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THE ALL INDIA REPORTER

1933

MADRAS SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE MADRAS HIGH COURT

REPORTED IN

- (1) I. L. R. 56 MADRAS (2) 64 & 65 MADRAS LAW JOURNAL
(3) 1933 MADRAS WEEKLY NOTES (4) 1933 CRIMINAL CASES
(5) 19 & 20 ALL-INDIA CRIMINAL REPORTS
(6) 34 CRIMINAL LAW JOURNAL (7) 1933 MADRAS CRIMINAL CASES
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1933

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77	" " 838	170	" " 68	312	" M 185	505	" " 701	646	" " 694
79	" " 852	174	" " 85	315	" " 322	508	" " 549	649	" " 126
81	1932 PC 168	178	" " 61	324	" " 503	510	" " 925	652	" " 457
88b	1933 M 434	185	" M 342	330	" " 321	514	" " 624	657	" " 393
90	" " 372	187	" " 362	331	1934 " 227	517	" " 646	660	" " 342
94	" " 841	189	" " 456	335	1933 " 540	522	" PC 122	663	" " 117
95	" " 251	190	" PC 63	341	" " 856	527	" M 435	667	" " 438
98	" " 367	199	" M 153	344	" " 481	543	1934 " 176	669	" " 328
100	" " 125	206	" " 527	347	" " 876	546	1933 " 337	672	" " 451
102	" " 148	208	" " 346	352	" " 675	549	" " 502	677	" " 366
109	" " 842	210	" " 306	357	" PC 87	553	" PC 145	678	" " 252
110	" " 840	213	" " 305	363	" M 689	557	" " 141	685	" PC 176
112	" PC 52	215	" " 178	365	" " 686	559	" " 169	689	" M 353
117	" " 33	216	" " 258	368	" " 524	566	" M 418	696	" " 821
121	" M 710	217	" " 413	370	" " 424	575	" PC 148	701	" " 659
125	" " 299	225	" " 231	374	" PC 134	579	" M 519	705	" PC 150
126	" " 344	227	1932 PC 186	379	" " 118	582	" " 649	713	" M 765
127	" " 844	235	1933 M 393	384	" M 583	587	" " 868	716	" " 728
133	" PC 43	237	" " 417	402	" " 439	589	" " 626	716	" " 728

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MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.	MWN	A. I. R.
718	1933 M 943	882	1933 PC 193	989	1933 M 748	1182	1934 M 825	1310	1933 M 16
720	" " 688	889	" " 198	996	" " 703	1191	" PC 202	1322	" " 183
730	" " 326	895	1934 M 103	998	" " 721	1201	" M 300	1324	1933 " 890
737	" " 506	902	1933 " 767	1000	" " 699	1209	" " 664	1355	" " 797
739	" PC 167	905	1934 " 95	1003	" " 768	1215	" " 533	1357	" " 879
743	" M 710	920	1933 " 851	1005	" " 722	1222	" " 885	1362	1934 " 59
744	1934 " 82	925	" " 780	1010	" " 860	1226	" " 495	1368	" " 24
745	1933 " 798	927	" " 870	1012	1932 " 436	1228	" " 510	1370	" " 8
755	" PC 178	929	" " 872	1013	1933 " 715	1230	" " 521	1371	1933 " 569
758	" " 183	931	" " 874	1023	1934 " 45	1233	" " 568	1373	1934 " 113
769	" " 155	934	1934 " 143	1025	1933 PC 208	1235	1934 " 126	1377	1933 " 795
782	1934 M 49	937	1933 " 764	1029	" M 688	1243	" " 25	1380	1934 " 15
785	1933 PC 180	939	1934 " 73	1033	" " 736	1251	1933 " 613	1382	" " 12
789	" M 627	941	1933 " 913	1046	" " 713	1276	" " 794	1384	1933 PC 117
792	1934 " 231	947	" " 173	1061	" " 550	1281	1934 " 85	1385	1934 M 103
816	1933 PC 198	949	" " 678	1081	" " 598	1286	1933 " 854	1398	" " 40
819	" M 696	950	" " 87	1095	" " 756	1288	1934 " 81	1404	" " 138
821	" " 690	952	" " 610	1106	" " 503	1289	" " 68	1408	" " 230
823	" " 871	955	" " 708	1110	" " 774	1292	" " 99	1409	" " 88
825	" " 701	957	" " 920	1116	" " 787	1293	" " 44	1433	" " 115
831	" " 697	967	" " 679	1124	" " 762	1298	1933 " 657	1449	" PC 3
834	" " 523	968	" " 680	1128	" " 367	1301	" " 637	1452	1933 " 233
842	" " 293	970	" " 745	1129	1934 " 248	1303	" " 565	1469	1934 M 65
850	" " 570	975	" " 695	1145	1933 " 804	1304	" " 429	1473	" " 173
869	1934 " 97	977	" " 682	1173	" " 824	1304	" " 658	1476	" " 52
873	" " 175	982	" " 681	1175	" " 855	1308	" " 31	1481	" " 55
879	" " 82	985	" " 691	1177	" " 847	1309	1934 " 31	1481	" " 55

1933 Madras Criminal Cases=All India Reporter

NOTE.—The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.

MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.	MCrC	A. I. R.
1	1933 M 123	61	" " 434	178	1933 M 337	223	1934 M 176	276	1934 M 95
12	" " 99	73	" " 251	185	" " 230	228	1933 " 502	308	" " 175
16	" " 338	75	" " 842	186	" " 416	230	" " 758	335	1933 " 688
25	" " 125	85	" " 372	187	" " 434	248	" " 843	337	" " 794
28	" " 147	90	1934 " 202	200	" " 413	251	" " 765	358	1934 " 248
29	" " 148	129	1933 " 129	215	" " 888	257	" " 688	370	" " 88
53	" " 367	134	" " 503	217	" " 326	258	" " 728	384	1933 PC 208
61	" " 840	149	" PC 124	219	" " 372	270	" " 767	390	1934 M 52
63	" " 841	149	" PC 124	219	" " 372	270	" " 767	390	1934 M 52

19 & 20 All India Criminal Reports=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Allahabad.

34 Criminal Law Journal and 141 to 146 Indian Cases=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Lahore.

1933 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Nagpur.

TABLE No. II

Showing Seriatim the pages of the ALL INDIA REPORTER, 1933 MADRAS with corresponding references of OTHER REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1933 MADRAS.
Column No. 2 denotes corresponding references of OTHER JOURNALS.

A I R 1933 Madras=Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	63 M L J 805	5	140 I C 226	10	36 M L W 688	16	5 M Cr C 351
SB	36 M L W 868		1932 M W N 1262		140 I C 311		1933 Cr C 64
	1932 M W N 1298	7	139 I C 623	14	63 M L J 796		56 Mad 26
	140 I C 850		63 M L J 736	SB	36 M L W 873	22	36 M L W 659
	56 Mad 329		1932 M W N 1233		1932 M W N 1282		140 I C 273
3	63 M L J 446		37 M L W 27		141 I C 330		1932 M W N 1248
	139 I C 475	9	1932 M W N 1201	16	1932 M W N 904	24	1932 M W N 946
	36 M L W 465		36 M L W 699		63 M L J 554		63 M L J 565
	1932 M W N 955		63 M L J 778		139 I C 644		36 M L W 588
	56 Mad 163		140 I C 461		36 M L W 610		139 I C 847
5	36 M L W 586		56 Mad 395		33 Cr L J 792		56 Mad 354

A. I. R. 1933 Madras=Other Journals—(Contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
25	1932M W N 1102	65 (2)5	M Cr C 346	99	34 Cr L J 16	145	145 I C 412
	63 M L J 727		1933Cr C 109		1933Cr C 127	147	140 I C 773
	37 M L W 75	67(1) 63	M L J 670		1933M Cr C 12		34 Cr L J 96
	141 I C 822	36	M L W 636	101	36 M L W 795		1933M Cr C 28
28	1932M W N 840		1932M W N 1081		63 M L J 884		1933Cr C 257
	63 M L J 598		140 I C 323		141 I C 29	148	140 I C 524
	36 M L W 558	5	M Cr C 363	102	33 M L W 718		34 Cr L J 26
	141 I C 429	33	Cr L J 930	FB	140 I C 530		1933M Cr C 29
	56 Mad 198		1933Cr C 80		63 M L J 867		1933M W N 102
33(1)	1932M W N 1200	56	Mad 157		55 Mad 1049		1933Cr C 263
	36 M L W 714	67 (2)	1932M W N 1154		5 M Cr C 408		37 M L W 264
	140 I C 408	36	M L W 651		34 Cr L J 32	152	37 M L W 114
	63 M L J 843		140 I C 281		1933Cr C 130		64 M L J 119
	56 Mad 343	5	M Cr C 337	103	140 I C 441		141 I C 817
33(2)	63 M L J 383	33	Cr L J 956	104	63 M L J 785		1933M W N 43
	1932M W N 1044		1933Cr C 111		36 M L W 865		56 Mad 453
	139 I C 348	70	36 M L W 633		1932M W N 1330	153	143 I C 504
	36 M L W 504		63 M L J 703		140 I C 774	157	1932M W N 1338
	55 Mad 1025		140 I C 197	105	36 M L W 694		140 I C 872
39	36 M L W 490		1932M W N 1340		1932M W N 1240		37 M L W 79
	139 I C 562	71	140 I C 193		140 I C 458		64 M L J 22
	63 M L J 615		1932M W N 1260	108	36 M L W 828		56 Mad 316
	1932M W N 969		37 M L W 723		1932M W N 1324	158	37 M L W 19
	55 Mad 949	73	36 M L W 581		63 M L J 822		64 M L J 66
42	1932M W N 1197		139 I C 838		141 I C 324		141 I C 122
	63 M L J 759		1932M W N 1189	110	63 M L J 788		1933M W N 199
	36 M L W 701	74	1932M W N 959		36 M L W 750		56 Mad 534
	140 I C 462		36 M L W 703		140 I C 591	162	145 I C 529
	56 Mad 314		63 M L J 810	112	63 M L J 761	163	145 I C 407
43	63 M L J 319		56 Mad 273		36 M L W 756	164	142 I C 386
	139 I C 465		143 I C 265		1932M W N 1314		145 I C 690
	37 M L W 199	80	139 I C 867		140 I C 588	165	36 M L W 844
48	63 M L J 707		36 M L W 733	114	1932M W N 1252	166	1932M W N 1335
	36 M L W 817		63 M L J 911		63 M L J 899		63 M L J 941
	141 I C 456		1932M W N 1277		36 M L W 922		141 I C 54
54	1932M W N 1147	83	1932M W N 1198		141 I C 287		56 Mad 447
	36 M L W 754		63 M L J 792		56 Mad 346	168	145 I C 764
	140 I C 582		36 M L W 738	117	140 I C 833		145 I C 758
55	63 M L J 719		140 I C 498		64 M L J 79	169	145 I C 762
	36 M L W 638		56 Mad 320		37 M L W 157	171	141 I C 538
	1932M W N 1191	85	1932M W N 1116		1933M W N 663	173	37 M L W 71
	140 I C 324		63 M L J 725	120	140 I C 826		1933M W N 947
	56 Mad 310		36 M L W 716	123	63 M L J 906		65 M L J 143
57	1932M W N 1120		140 I C 500		140 I C 767		145 I C 694
	63 M L J 780	86	1932M W N 1178		1932M W N 1357	175	64 M L J 199
	36 M L W 883		63 M L J 887		34 Cr L J 90	176	37 M L W 210
	140 I C 769		36 M L W 931		1933Cr C 155		141 I C 632
59	36 M L W 664		141 I C 843		1933M Cr C 1		56 Mad 304
	140 I C 326	92	1932M W N 652	125	140 I C 756		1933M W N 39
	1932M W N 1274		36 M L W 120		34 Cr L J 92		141 I C 533
61	1932M W N 1149		138 I C 607		1933Cr C 157	178	37 M L W 74
	36 M L W 777		55 Mad 853		1933M Cr C 25		1933M W N 215
	63 M L J 880		63 M L J 741		1933M W N 100		65 M L J 252
	141 I C 70	93	36 M L W 793	126	140 I C 805		145 I C 394
63	36 M L W 644		1932M W N 1322		64 M L J 336	179	142 I C 730
	1932M W N 1187		140 I C 585		37 M L W 497	181	142 I C 548
	63 M L J 722	94	140 I C 325		1933M W N 649	184	141 I C 101
	140 I C 378		1932M W N 1338	129	63 M L J 917	184	37 M L W 130
	56 Mad 339	95	140 I C 329		36 M L W 942		64 M L J 382
65(1)	1932M W N 1074	96	36 M L W 781		141 I C 177		1933M W N 312
	63 M L J 794		140 I C 600		1933M Cr C 129		145 I C 599
	5 M Cr C 349		63 M L J 945	130	140 I C 779	187	145 I C 604
	36 M L W 759		1933M W N 54	133(1)	35 M L W 755	190	145 I C 588
	141 I C 276		36 M L W 641		1932M W N 653	194	140 I C 270
	1933Cr C 81	98	1932M W N 1230		138 I C 262	197	1932M W N 1317
	34 Cr L J 137		140 I C 322	133(2)	140 I C 540		142 I C 708
	56 Mad 154		5 M Cr C 386		63 M L J 932	200	142 I C 719
	19 A I Cr R 248		34 Cr L J 12		37 M L W 162	203	142 I C 721
65(2)	36 M L W 623		1933 Cr C 129	137	56 Mad 7	204	37 M L W 32
	139 I C 852		19 A I Cr R 93		64 M L J 208	207	64 M L J 320
	33 Cr L J 825	99	140 I C 260		37 M L W 233		56 Mad 177
	1932M W N 1218		1932M W N 1350		144 I C 629		

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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
207	143 I C 641	257	141 I C 148	300	1933M W N 1201	342 (2)	144 I C 252
215	145 I C 767		37 M L W 154	305	37 M L W 207		65 M L J 347
217	145 I C 766	258	37 M L W 48		141 I C 799	344	1933M W N 126
218	145 I C 765		1933M W N 216		1933M W N 213		37 M L W 313
219	1932M W N 1296		143 I C 246		65 M L J 364		142 I C 683
	37 M L W 127		65 M L J 193		56 Mad 712	345	1933M W N 75
	142 I C 368	259	36 M L W 914	306	64 M L J 204		37 M L W 720
221	142 I C 711		64 M L J 63		37 M L W 260		143 I C 613
224(1)	142 I C 656		141 I C 181		1933M W N 210	346	1933M W N 208
224(2)	142 I C 658		1933M W N 146		142 I C 121		142 I C 613
225	1933M W N 65		56 Mad 443	309	37 M L W 170	347	64 M L J 260
	37 M L W 188	260	1932M W N 1068		141 I C 852	FB	1933M W N 296
	56 Mad 356		141 I C 293		64 M L J 386		37 M L W 379
	144 I C 414	263	37 M L W 685		56 Mad 625		143 I C 894
	64 M L J 439		36 M L W 917		1933M W N 45		56 Mad 415
230	1933Cr C 288		141 I C 167	315	1933M W N 23	352	142 I C 152
	1333M Cr C 185	264	1933M W N 148		37 M L W 180		1933M W N 622
	34 Cr L J 948		1932M W N 1090		64 M L J 251	353 (1)	...
	145 I C 371		143 I C 104		56 Mad 453	353 (2)	37 M L W 288
231(1)	145 I C 380	265	1932M W N 1203	319	142 I C 187		1933M W N 689
231(2)	64 M L J 127		142 I C 735	320	141 I C 120		144 I C 573
	37 M L W 146		37 M L W 354		64 M L J 130	358	144 I C 608
	142 I C 29	268	1932M W N 1225		1933M W N 157	360	145 I C 531
	1933M W N 225		5 M Cr C 397		56 Mad 391	362	1933M W N 187
	56 Mad 401		1933Cr C 371		37 M L W 808		142 I C 643
233	1932M W N 801		143 I C 115	321	37 M L W 300		37 M L W 358
	5 M Cr C 289		34 Cr L J 528		142 I C 25	364	...
	64 M L J 88	270	1932M W N 1075		1933M W N 330	366	142 I C 201
	37 M L W 220		5 M Cr C 361	322	37 M L W 340		1933M W N 677
	1933Cr C 389		1933 Cr C 373	FB	64 M L J 354		65 M L J 334
	56 Mad 231		143 I C 102		142 I C 315	367(1)	142 I C 195
	143 I C 46		34 Cr L J 526		1933M W N 315		1933M W N 1128
	34 Cr L J 481	271	1932M W N 821		56 Mad 433	367(2)	37 M L W 101
	20 A I Cr R 64		143 I C 372	325	142 I C 534	FB	64 M L J 150
241	1933M W N 21	276	36 M L W 919		38 M L W 268		1933M W N 98
	64 M L J 86		64 M L J 75	326	1933Cr C 303		141 I C 539
	37 M L W 151		141 I C 175		1933M W N 730		56 Mad 159
	142 I C 96		1933M W N 155		144 I C 215		1933M Cr C 53
	56 Mad 560	277	1932M W N 722		1933M Cr C 217		34 Cr L J 175
242	142 I C 108		138 I C 385		34 Cr L J 677		19 A I Cr R 345
	64 M L J 235		5 M Cr C 230	328	37 M L W 437		1933Cr C 550
	37 M W N 137		33 Cr L J 596		142 I C 395	369	1932M W N 1265
	1933M W N 60		1933Cr C 378		1933M W N 669		5 M Cr C 390
	56 Mad 508	278	1932M W N 1222	330	37 M L W 106		1933Cr C 552
245	1932M W N 1079		5 M Cr C 402		64 M L J 122		144 I C 765
	5 M Cr C 382		142 I C 242		141 I C 602		34 Cr L J 823
	140 I C 900		1933Cr C 346		1933M W N 36	372(1)	142 I C 202
	34 Cr L J 88		34 Cr L J 284		56 Mad 705		34 Cr L J 291
	37 M L W 143	279(1)	1932M W N 1153	332	37 M L W 429		1933Cr C 555
	1933Cr C 344		5 M Cr C 365		144 I C 784		1933M Cr C 219
247	1932M W N 1162		1933Cr C 346	337	64 M L J 351		1933M W N 90
	5 M Cr C 373		143 I C 107		142 I C 21	372(2)	64 M L J 519
	142 I C 138		34 Cr L J 524		37 M L W 476		37 M L W 441
	34 Cr L J 278	279(2)	36 M L W 847		34 Cr L J 277		1933Cr C 555
	1933Cr C 374		141 I C 307		1933M W N 546		1933M Cr C 85
	65 M L J 6		64 M L J 361		1933Cr C 439		143 I C 424
	38 M L W 668		56 Mad 366		1933M Cr C 178		56 Mad 475
251(1)	36 M L W 881	290	141 I C 381	338	1933M Cr C 16		34 Cr L J 582
	141 I C 174	293	141 I C 372		37 M L W 250		1932M W N 1114
	1933M W N 95		64 M L J 682		1933M W N 254	374	37 M L W 466
	34 Cr L J 117		37 M L W 788		64 M L J 314		143 I C 245
	19 A I Cr R 243		1933M W N 842		142 I C 31		64 M L J 172
	1933Cr C 365		56 Mad 546		34 Cr L J 273	376	37 M L W 302
	1933M Cr C 73	298	142 I C 17		1933Cr C 441		142 I C 286
251(2)	36 M L W 918	299	37 M L W 104		56 Mad 481		1932M W N 1111
	141 I C 169		64 M L J 117	340	1933M W N 152	382	144 I C 726
252	140 I C 838		1933M W N 125		37 M L W 346		1932M W N 1093
	37 M L W 93		141 I C 809		147 I C 526	384	144 I C 733
	65 M L J 29		56 Mad 398	342(1)	1933M W N 185		37 M L W 417
	1933M W N 678	300	141 I C 136		142 I C 581	386	1933M W N 265
257	1932M W N 1328		37 M L W 117	342(2)	37 M L W 366		64 M L J 586
	64 M N J 18		64 M L J 241		1933M W N 660		

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A I R	Other Journals	A I R	Other Journals	A I R	Other Journals	A I R	Other Journals				
386	144 I C	621	424 56 Mad	724	457 37 M L W	645	503 (2) 144 I C	602			
	58 Mad	796	427 1933M W N	258		64 M L J	719	38 M L W	194		
390	37 M L W	272		64 M L J	503	1933M W N	652	1933M W N	1100		
	143 I C	880		37 M L W	495	56 Mad	646	506 65 M L J	25		
398	37 M L W	410		143 I C	608	145 I C	308	1933M W N	737		
	64 M L J	531		56 Mad	486	460 142 I C	592	144 I C	516		
	1933M W N	657	428	37 M L W	465	461 (1) 1932M W N	1229	38 M L W	80		
	144 I C	557		143 I C	90	5 M Cr C	389	56 Mad	744		
395	64 M L J	317	429	37 M L W	623	143 I C	190	508 144 I C	30		
	142 I C	193		143 I C	825	34 Cr L J	545	510 144 I C	503		
	1933M W N	595		56 Mad	641	1933Cr C	707	38 M L W	218		
	37 M L W	370		65 M L J	146	461 (2) 1932M W N	1272	1933M W N	1228		
397	64 M L J	500		1933M W N	1304	5 M Cr C	405	511 1933M W N	453		
	37 M L W	462	430	64 M L J	24	142 I C	191	38 M L W	85		
	142 I C	597		141 I C	80	34 Cr L J	285	144 I C	853		
	1933M W N	632		1933M W N	144	1933Cr C	707	65 M L J	572		
398	1933M W N	235		37 M L W	806	462 142 I C	744	56 Mad	951		
	64 M L J	523	431	64 M L J	576	465 144 I C	16	516 144 I C	95		
	37 M L W	501		37 M L W	748	38 M L W	263	519 37 M L W	425		
	143 I C	780		1933M W N	631	37 M L W	662	64 M L J	433		
	56 Mad	517		143 I C	755	1933M W N	478	56 Mad	323		
399	37 M L W	484	432	1933M W N	141	64 M L J	629	1933M W N	579		
	64 M L J	586		37 M L W	677	471 146 I C	204	144 I C	940		
	143 I C	454		147 I C	464	38 M L J	896	521 144 I C	963		
	1933M W N	634	434 (1)	1933Cr C	662	475 147 I C	494	38 M L W	214		
401	1933M W N	260		1933M Cr C	187	481 1933M W N	344	1933M W N	1230		
	64 M L J	496		146 I C	195	64 M L J	577	523 64 M L J	732		
	37 M L W	491		34 Cr L J	1183	37 M L W	628	144 I C	237		
	143 I C	139	434 (2)	1933M W N	88	146 I C	52	1933M W N	834		
	56 Mad	886		37 M L W	415	482 145 I C	174	38 M L W	221		
403	64 M L J	345		1933M Cr C	64	485 144 I C	103	524 64 M L J	574		
	142 I C	197		64 M L J	431	489 64 M L J	640	37 M L W	631		
	37 M L W	455		143 I C	510	SB 37 M L W	758	1933M W N	368		
406	1933M W N	257		1933Cr C	662		1933M W N	617	143 I C	496	
	37 M L W	487		34 Cr L J	586		144 I C	422	525		
	64 M L J	637		56 Mad	654		56 Mad	837	527	1933M W N	206
	142 I C	765	435	37 M L W	582	492	1933M W N	471		64 M L J	397
407	64 M L J	449		1933M W N	527		64 M L J	650		37 M L W	503
	37 M L W	471		143 I C	476		37 M L W	716		146 I C	530
	142 I C	646	436	143 I C	759		146 I C	46	529	37 M L W	793
	1933M W N	636	438	64 M L J	692	495	37 M L W	633		65 M L J	15
410	1932M W N	1118		1933M W N	667		143 I C	741		145 I C	289
	142 I C	903		144 I C	58		1933M W N	1226	533	37 M L W	737
411	64 M L J	489		38 M L W	766	496	144 I C	486		64 M L J	706
	37 M L W	452	439	37 M L W	552		38 M L W	226		144 I C	541
	1933M W N	591		1933M W N	402	498	1933M W N	468		1933M W N	1215
	143 I C	578		64 M L J	568		37 M L W	725	537	144 I C	115
	56 Mad	469		144 I C	243		64 M L J	728		38 M L W	240
413	1933M W N	217		56 Mad	716		147 I C	710	540 (1)	64 M L J	401
	37 M L W	547	442	37 M L W	557	500 (1)	1933M W N	460		37 M L W	469
	1933M Cr C	566		64 M L J	695		37 M L W	749		144 I C	167
	1933M Cr C	200		143 I C	412		64 M L J	735	540 (2)	1933M W N	335
	144 I C	519		1933M W N	623		144 I C	929		37 M L W	729
	34 Cr L J	800		56 Mad	520	500 (2)	1933M W N	18		146 I C	346
416	1933Cr C	531	447	1933M W N	29		37 M L W	110	544	144 I C	22
	1933M Cr C	186		143 I C	650		64 M L J	112		38 M L W	232
	146 I C	77	451	37 M L W	672		141 I C	607	549	1933M W N	508
	34 Cr L J	1158		64 M L J	676		56 Mad	563		144 I C	606
417	1933M W N	237		1933M W N	672	502	1933M W N	549		65 M L J	54
	64 M L J	493		144 I C	27		37 M L W	736		38 M L W	94
	37 M L W	460	454	37 M L W	489		1933Cr C	779		56 Mad	731
	142 I C	679		143 I C	596		65 M L J	24	550	38 M L W	45
	56 Mad	689		1933M W N	644		144 I C	154	FB	65 M L J	58
418	37 M L W	607	455	37 M L W	581		34 Cr L J	676		145 I C	534
FB	1933M W N	566		64 M L J	605		1933M Cr C	228		1933M W N	1061
	64 M L J	664		1933M W N	594	503 (1)	1933M W N	324		56 Mad	759
	143 I C	1		143 I C	432		1933M Cr C	134	563	143 I C	903
	56 Mad	490	456	1933M W N	189		37 M L W	735		38 M L W	201
424	64 M L J	526	FB	37 M L W	414		1933Cr C	799		65 M L J	538
	37 M L W	503		64 M L J	437		65 M L J	56	565 (1)	143 I C	681
	1933M W N	370		142 I C	622		144 I C	896		38 M L W	204
	144 I C	550		56 Mad	430		34 Cr L J	883			

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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals				
565 (1)	1933M W N 1303	637	145 I C	862	688 (1)38 M L W	392	710 (2)56 Mad	879			
565 (2)	144 I C	513	1933M W N 1301		1933M W N	1029	713	65 M L J	380		
568	143 I C	844	639	144 I C	584	1933Cr C	1178	38 M L W	439		
	38 M L W	224	516	1933M W N	517	34 Cr L J	950	1933M W N	1046		
	1933M W N	1233		65 M L J	179	145 I C	378	145 I C	654		
569	144 I C	472		38 M L W	208	56 Mad	913	715	65 M L J	390	
	38 M L W	199		56 Mad	696	1933M Cr C	335	38 M L W	463		
	1933M W N	1371		145 I C	594	688 (2)1933M W N	720	1933M W N	1013		
570	38 M L W	96	619	1933M W N	582	38 M L W	393	721	38 M L W	447	
FB	1933M W N	850		38 M L W	125	1933Cr C	1244	1933M W N	998		
	65 M L J	222		144 I C	525	34 Cr L J	951	65 M L J	420		
	145 I C	449		65 M L J	317	65 M L J	478	147 I C	707		
	56 Mad	915	653	65 M L J	298	1933M Cr C	257	722	38 M L W	450	
583	1933M W N	384		38 M L W	494	145 I C	379	1933M W N	1005		
FB	65 M L J	108		145 I C	876	56 Mad	987	65 M L J	507		
	38 M L W	169	655	38 M L W	278	689	1933M W N	363	145 I C	1004	
	144 I C	833		146 I C	26	65 M L J	315	725	38 M L W	344	
	56 Mad	846	657	38 M L W	244	38 M L W	399	145 I C	1008		
595	144 I C	365		65 M L J	302	145 I C	335	726	38 M L W	333	
	38 M L W	190		1933M W N	1298	690	1933M W N	821	145 I C	1014	
597	144 I C	66		146 I C	1026		38 M L W	436	728	1933M W N	716
	38 M L W	205	658	38 M L W	270		65 M L J	417	65 M L J	405	
598	143 I C	854		65 M L J	362	691	38 M L W	385	38 M L W	428	
	38 M L W	133		1933M W N	1308		65 M L J	342	145 I C	659	
	65 M L J	253		145 I C	831		1933M W N	985	34 Cr L J	1045	
	1933M W N	1081	659	1933M W N	701		145 I C	1011	193Cr C	1312	
	56 Mad	808		38 M L W	272		56 Mad	939	1933M Cr C	253	
603	144 I C	44		145 I C	300	694	1933M W N	646	729	1933M W N	498
609	143 I C	833	662	65 M L J	387		65 M L J	359	38 M L W	420	
610	144 I C	20		38 M L W	604		38 M L W	382	145 I C	721	
	38 M L W	83		145 I C	993		145 I C	855	65 M L J	620	
	1933M W N	952	664	65 M L J	290	695	1933M W N	975	734	38 M L W	341
612	144 I C	89		38 M L W	247		38 M L W	397	146 I C	219	
613	38 M L W	161		1933M W N	1209		65 M L J	383	736	1933M W N	1033
	65 M L J	194		146 I C	72		145 I C	941	38 M L W	507	
	1933M W N	1251	668	147 I C	501		56 Mad	984	65 M L J	491	
	56 Mad	892	672	38 M L W	599	696	1933M W N	819	145 I C	1023	
618	1933M W N	611		145 I C	744		38 M L W	435	745	1933M W N	970
	144 I C	400	674	147 I C	586		65 M L J	374	38 M L W	347	
	38 M L W	155	675	193M W N	352		145 I C	714	65 M L J	305	
	65 M L J	186		38 M L W	301	697	1433M W N	831	145 I C	397	
	56 Mad	749		65 M L J	271		38 M L W	330	748	38 M L W	455
622	37 M L W	681		145 I C	933		65 M L J	376	1933M W N	989	
	144 I C	202	678	38 M L W	315		147 I C	476	145 I C	917	
624	1933M W N	514	FB	1933M W N	949	699	65 M L J	410	65 M L J	518	
	38 M L W	135		56 Mad	687		38 M L W	394	753	38 M L W	337
	65 M L J	279		65 M L J	142		1933M W N	1000	755	38 M L W	316
	56 Mad	904		146 I C	459		145 I C	961	145 I C	858	
	147 I C	479	679	1933M W N	967	701	1933M W N	505	756	38 M L W	481
626	1933M W N	589		38 M L W	319	SB	56 Mad	679	1933M W N	1095	
	38 M L W	131		65 M L J	277		65 M L J	327	65 M L J	458	
	56 Mad	734		145 I C	852		38 M L W	474	146 I C	608	
	145 I C	388	680	1933M W N	968		145 I C	989	762	1933M W N	1124
	65 M L J	139		38 M L W	327	703	38 M L W	389	38 M L W	575	
627	38 M L W	133		65 M L J	324		65 M L J	402	145 I C	927	
	1933M W N	789		147 I C	453		1933M W N	996	65 M L J	592	
	144 I C	923		56 Mad	980		145 I C	999	764	1933M W N	937
	56 Mad	692	681	1933M W N	982	704	1933M W N	825	38 M L W	504	
	65 M L J	137		65 M L J	414		38 M L W	533	65 M L J	455	
628	144 I C	479		38 M L W	607		145 I C	476	145 I C	998	
	38 M L W	119		146 I C	116	708	1933M W N	955	765	1933M W N	713
	65 M L J	471	682	1933M W N	977		38 M L W	325	FB	1933M Cr C	251
631	1932M W N	153		34 M L W	401		65 M L J	311	56 Mad	996	
FB	38 M L W	257		65 M L J	367		145 I C	404	65 M L J	529	
	65 M L J	173		145 I C	438		56 Mad	833	38 M L W	562	
	145 I C	346		56 Mad	970	710 (1)	1933M W N	743	145 I C	878	
635	1933M W N	642	686	1933M W N	365		38 M L W	408	1933Cr C	1372	
	38 M L W	266		38 M L W	321		145 I C	228	34 Cr L J	1080	
	145 I C	230		65 M L J	355	710 (2)	1933M W N	121	767	1933M W N	902
636	145 I C	888		116 I C	49		65 M L J	350	1933M Cr C	270	
637	65 M L J	282		56 Mad	964		38 M L W	430	65 M L J	534	
	38 M L W	230	688 (1)	65 M L J	386		145 I C	716			

Comparative Tables

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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
767	38 M L W 564 1933Cr C 1373 147 I C 794	797	65 M L J 682 1933M W N 1355	841	35 Cr L J 79 38 M L W 995	865	146 I C 600
768	1933M W N 1003 65 M L J 532 38 M L W 585 145 I C 972	798	1933M W N 745 1933M Cr C 230 38 M L W 522 145 I C 953	842	1933M W N 109 1933M Cr C 75 65 M L J 797	867	1933M W N 950 147 I C 694
770	38 M L W 614		65 M L J 597		39 M L W 63	868	1933M W N 587 38 M L W 830
774	1933M W N 1110 38 M L W 495 146 I C 64 65 M L J 696	804	34 Cr L J 1109 1933M W N 1145 38 M L W 579 65 M L J 569	843	1933Cr C 1519 146 I C 478 1933M W N 718 1933M Cr C 248	870	1933M W N 927 38 M L W 933
778	38 M L W 595 146 I C 361	806	145 I C 975 65 M L J 548 38 M L W 539		35 Cr L J 75 1933Cr C 1519	871	1933M W N 823 147 I C 680
780	1933M W N 925 65 M L J 407 38 M L W 651 145 I C 871	817	147 I C 83 38 M L W 653 65 M L J 609	844	146 I C 475 1933M W N 127 146 I C 317	872	38 M L W 952 65 M L J 769
781	56 Mad 909 38 M L W 582 65 M L J 673 147 I C 369	821	146 I C 634 1933M W N 696 38 M L W 868 65 M L J 734	847	1933Cr C 1520 146 I C 475 1933M W N 1177	874	1933M W N 931 1933M W N 847
782	38 M L W 642 65 M L J 678 146 I C 307	824	147 I C 83 38 M L W 653 65 M L J 609	851	146 I C 317 1933M W N 1177 38 M L W 736	876	38 M L W 921 65 M L J 826
785	38 M L W 557 145 I C 930 65 M L J 747		1933M W N 1182 38 M L W 714 38 M L W 588	852	65 M L J 741 146 I C 1057 1933M W N 920	879	1933M W N 1357 65 M L J 819
787	1933M W N 1116 65 M L J 526 38 M L W 572 145 I C 946	833	146 I C 372 1933M W N 159 38 M L W 734	854	146 I C 1057 1933M W N 920 38 M L W 745	883	146 I C 566 65 M L J 781
789	38 M L W 568 145 I C 968 65 M L J 582	836	146 I C 535 1933M W N 77 38 M L W 728	855	1933M W N 1286 65 M L J 690 146 I C 628	885	1933M W N 1222 38 M L W 860
791	38 M L W 660 146 I C 499 65 M L J 725	838	146 I C 528 1933M W N 139 38 M L W 803		1933M W N 1175 65 M L J 675 38 M L W 768	888(1)	147 I C 383 38 M L W 874
794	33 M L W 587 145 I C 970 1933Cr C 1399 65 M L J 629	839	146 I C 516 1933M W N 110 1933M Cr C 61	856	147 I C 195 1933M W N 341 65 M L J 772	888(2)	146 I C 564 1933M Cr C 215
	1933M W N 1276 1933M Cr C 337 34 Cr L J 1159	840	65 M L J 732 1933Cr C 1517 147 I C 738	858	146 I C 417 65 M L J 833 1933M W N 1010	913	65 M L J 837 38 M L W 979
795	145 I C 965 33 M L W 610 65 M L J 588		1933M W N 94 1933M Cr C 63 146 I C 523	860	146 I C 417 65 M L J 833 1933M W N 1010	917	147 I C 46 1934Cr C 9
797	1933M W N 1377 145 I C 974 38 M L W 582	841	65 M L J 791	862	38 M L W 773 146 I C 1093 65 M L J 755	920	1933M W N 957 38 M L W 792
				865	38 M L W 927 65 M L J 775	925	147 I C 417 65 M L J 798
							1933M W N 510 65 M L J 684 38 M L W 755

LIST OF CASES OVERRULED AND REVERSED IN A. I. R. 1933 MADRAS

Akkanna v. Srirangaraja Bhattar (1930), M. W. N. 32=A. I. R. 1930 Mad. 486=123 I. C. 806.	Overruled in A. I. R. 1933 Mad. 890 (F.B.)
Chelimi Chetty v. Subbamma (1918), 41 Mad. 442=34 M. L. J. 213=22 M. L. T. 432=1917 M. W. N. 792= A. I. R. 1918 Mad. 379=42 I. C. 860.	" " 1933 Mad. 890 (F.B.)
Krishnayya Rao v. Venkata Kumara Mahipathi Surya Rao (1928), 51 Mad. 893=28 M. L. W. 422=55 M. L. J. 894=A. I. R. 1928 Mad. 994=116 I. C. 673 (F.B.).	" " 1933 P. C. 202.
Official Peceiver, Secunderabad v. Lak- hminarayana (1931), 54 Mad. 727=33 M. L. W. 562=(1931) M. W. N. 444= 61 M. L. J. 774=A. I. R. 1931 Mad. 474=132 I. C. 297.	Reversed in A. I. R. 1933 P. C. 134.
Sonachalam Pillai v. Kumaravelu Che- ttiar (1928) 51 Mad. 128=54 M. L. J. 8=27 M. L. W. 216=A. I. R. 1928 Mad. 77=107 I. C. 625 (F.B.).	Overruled in A. I. R. 1933 P. C. 183.

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ALL INDIA REPORTER
1933

MADRAS HIGH COURT

*** A. I. R. 1933 Madras 1
Special Bench**

BEASLEY, C. J., SUNDARAM CHETTY
AND BURN, JJ.

Commissioner of Income-tax, Madras
v.

T. Namberumal Chetty & Sons —
Assessee.

Original Petn. No. 29 of 1932, Decided
on 31st August 1932.

*** Income-tax Act (11 of 1922), S. 32 (1)—
Assistant Commissioner not enhancing total
assessment but increasing it on some items
and reducing it on others—No appeal lies—
Income-tax Act (11 of 1922), S. 31 (3).**

When in an appeal the assistant commissioner does not enhance the total income assessable to income-tax but by means of a reduction under one head and an increase under another head allows the Income-tax officer's total assessment to remain the same or reduces it; then merely by reason of the fact that the assistant commissioner has increased the income under one head an appeal does not lie to the Income-tax commissioner. The enhancement referred to in Ss. 31(3) and 32 (1) is an enhancement of the assessment and it means an enhancement of the assessment as a whole and not an enhancement of a particular item of income in the assessment which does not result in the enhancement of the assessment as a whole. [P 2 C 2]

M. Patanjali Sastri—for the Commissioner of Income-tax, Madras.

G. T. Ramanujachariar — for the Assessee.

Beasley, C. J.—The question referred to us by the Commissioner of Income-tax is :

“When the assistant commissioner in an appeal to him from the order of assessment of the Income-tax Officer enhances the assessment under one head of income without causing an increase in the total income (by not including altogether income assessed under another head), does an appeal lie to the commissioner under S. 32 against that order.”

This is a novel point and the facts which give rise to the question are as follows : The petitioners were assessed

by the Income-tax Officer, Madras, 2nd Circle, on a total income of Rs. 41,154 made up as follows : (1) Property Rupees 46,092, and (2) other sources, dividends, interest on debentures and remittances of profits from Trichur, Rs. 2,206 less, (3) loss in business Rs. 7,144 making a total as before mentioned of Rs. 41,154. The tax levied was Rs. 4,068-12-0. The petitioners appealed to the assistant commissioner and claimed that the figure adopted by the Income-tax Officer under “other sources” should be reduced by Rs. 2,048. This point the assistant commissioner conceded. In the course of the appeal however the assistant commissioner whilst conceding that point which of course reduced pro tanto the total income assessable of the assessee was of the opinion that the Income-tax Officer had incorrectly allowed two deductions from the income arrived at under the first heading, namely, “property”. He went into the matter and computed the income of the assessee under the heading of property at Rupees 47,744 instead of Rs. 46,092 the computation of the Income-tax Officer. The result was that the total income assessed by the Income-tax Officer was reduced by this method by Rs. 396, as the total income was found to be Rs. 40,758 by the assistant commissioner. The petitioners here argue that they were entitled under S. 32, Income-tax Act, to prefer an appeal to the Commissioner, arguing that there had been an enhancement of the assessment. S. 32 (1) reads as follows :

“Any assessee objecting to an order passed by an assistant commissioner under S. 28 or to an order enhancing his assessment under sub-S. (3), S. 31, may appeal to the Commissioner within thirty days of the making of such order.”

The argument of the assessee is that the computation of the income of an assessee arising under any or all of the various heads of income set out in the Act is itself an assessment and that therefore what the assistant commissioner did by increasing the amount under "property" amounts to an enhancement of the assessment thereby giving the assessee the right of appeal to the Income-tax commissioner. On the other hand, the Income-tax commissioner contends that "assessment" in S. 32 means the assessment of the total income of the assessee. Unfortunately we gain no help by any definition of the word "assessment" in the Act because it is not therein defined. We have to see whether any other sections of the Act do give us any assistance. In my view, some assistance is to be gained from S. 23 (1) which provides that if the Income-tax officer is satisfied that a return made under S. 22 is correct and complete, he shall assess the "total income" of the assessee, and shall determine the sum payable by him on the basis of such return. Then again sub-S. (3) of the same section provides that where the assessee has not made a return the Income-tax officer shall by an order in writing assess the "total income" of the assessee. There are some other sections which may possibly throw some light upon this question. S. 30 speaks of "the assessment" which seems, in my view, to mean that there is only one assessment and not several. Then we have to see what the assessee is entitled to do by way of an appeal to the assistant commissioner.

Under S. 30, if he objects to the "amount" or "rate" at which he is assessed under S. 23 or S. 27, he may prefer an appeal to the assistant commissioner and again by the use of the word "amount" it seems to me to follow that what is meant is the total amount of the income and not the smaller amounts which go to make up the total. When he has got to the assistant commissioner, the assistant commissioner in disposing of the appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment or set it aside. Having done that it is only when he has enhanced the assessment that under S. 32 any appeal lies to the Income-tax commissioner. If, on an appeal to the assistant commissioner, the assistant commis-

sioner upholds in toto the assessment of the Income-tax officer there has been no enhancement of the assessment nor any reduction of it; clearly in such a case as that no appeal lies to the commissioner of Income-tax. A fortiori, if, on appeal to the assistant commissioner, he accedes to some of the contentions of the assessee and reduces the total amount of the assessment, no appeal lies to the Income-tax commissioner. The question here is, whether, when the assistant commissioner does not enhance the total income assessable to Income-tax but by means of a reduction under one head and an increase under another head allows the Income-tax officer's total assessment to remain the same or reduces it, merely by reason of the fact that the assistant commissioner has increased the income under one head, does an appeal lie to the Income-tax commissioner?

The Income-tax commissioner in his order of reference is of the opinion that the enhancement referred to in Ss. 31 (3) and 32 (1) is an enhancement of the assessment and that it means an enhancement of the assessment as a whole and not an enhancement of a particular item of income in the assessment which does not result in the enhancement of the assessment as a whole. Income-tax, in his view, is one tax and not a collection of taxes on different items of income—that is obviously correct—and assessment to income-tax is one whole and not a group of assessments of different items of income. With that view I entirely agree. It cannot be correct that the computation of an income under each head set out in the Income-tax Act is itself an assessment. It is merely a computation of an item of income or class or classes of income which go to make the whole and, when the whole has been arrived at, there is an assessment. In my opinion, the view taken by the Income-tax commissioner upon this point is the correct one and the answer to the question referred must be that an appeal in such a case does not lie. Costs to the Commissioner of income-tax Rs. 250.

Sundaram Chetty, J.—I agree.

Burn, J.—I agree.

P.R.S./M.N.

Reference answered.

* A. I. R. 1933 Madras 3

BEASLEY, C. J. AND CORNISH, J.

B. Chenchuram Naidu — Plaintiff—Appellant.

v.

Muhammed Bahavuddin Sahib—Defendant—Respondent.

Court of City Civil Appeal No. 14 of 1929, Decided on 26th April 1932, against decree of City Civil Judge, Madras, in Original Suit No. 376 of 1928.

* Civil P. C. (1908), O. 23, R. 1—Subject-matter is cause of action—Withdrawal of suit for ejectment for want of notice is no bar to subsequent suit even in absence of leave.

Subject-matter means the series of acts or transactions alleged to exist giving rise to the relief claimed. In a suit for ejectment there were two defendants. Defendant 1 was a tenant paying rent to the plaintiff and defendant 2 was also made a party to the suit. He put in a written statement in which he put the plaintiff to proof of his title and alleged that he had not been given a written notice to quit which was a fact. The plaintiff withdrew his suit without obtaining liberty to file fresh suit against defendant as there was no notice to quit, thus exonerating him and proceeded with his suit against defendant 1. Subsequently the plaintiff sued defendant 2 for ejectment.

Held: that the withdrawal of the previous suit was no bar as the subject-matter was not the same: 42 Bom 155, *Foll.* [P 4 C 2]

K. Krishnaswamy Ayyar and *T. V. Venugopala Iyyar*—for Appellant.

Rafiuddin Ahmad—for Respondent.

Beasley, C. J.—This was a suit in ejectment. The plaintiff, the appellant here, claimed to be the owner of the suit land and entitled to eject the defendant from the superstructure on it. The learned City Civil Judge dismissed the appellant's suit. A suit had been filed in 1924 in the same Court, O. S. No. 422 of 1924, by the appellant against another person as defendant 1 and the respondent here as defendant 2 to eject them. The suit was withdrawn as against the respondent here by the appellant but at the time when he withdrew the suit he did not ask for liberty to file a fresh suit against the respondent. The learned City Civil Judge held that that was a statutory bar to the filing of the suit under appeal against the respondent. Upon that ground he dismissed the suit. He also went into the merits of the case and held that the appellant failed to prove his title and upon that ground also he dismissed the suit.

The first thing we have got to consider here is whether the appellant was

prevented from filing the suit under appeal against the respondent by reason of the fact that he withdrew his claim against the respondent in the previous suit without reserving his right to file this suit. That was a suit in which there were two defendants. Defendant 1 was a tenant paying rent to the plaintiff and the respondent was also made a party to the suit. The respondent put in a written statement in which he put the plaintiff to proof of his title and alleged that he had not been given a written notice to quit which was a fact. During the hearing of the case, the appellant withdrew his suit against the respondent thus exonerating him and proceeded with his suit against defendant 1. The learned City Civil Judge who tried that suit gives an account of what took place in his judgment as follows:

"Plaintiff has now exonerated defendant 2. The suit against him is accordingly withdrawn but liberty to litigate his right, if any, in respect of the suit house is reserved to him."

A separate order was passed subsequently some days afterwards and it runs as follows:

"Plaintiff exonerates defendant 2. Suit against defendant 2 is withdrawn. No costs, defendant 2's right to litigate his claim in this house, if any is reserved to him."

The learned trial Judge has construed those orders as reserving liberty to defendant 2 to litigate his claim, and indeed that is what the latter of the two orders distinctly says. We have had the advantage also of the statement of Mr. Rafiuddin, who appeared on behalf of defendant 2 in that suit and represents the respondent here: who has told us that he asked that this reservation of defendant 2's right should be made and it is quite obvious that it was as a result of that request that the order to which reference has already been made, was made. We accept what Mr. Rafiuddin had told us and although it does not appear to us to have been quite unnecessary to make any reservation of defendant 2's right, however we are satisfied that that right was reserved at the express request of Mr. Rafiuddin so that the learned trial Judge's interpretation of those orders is perfectly correct and therefore there was no reservation of liberty to the appellant, the plaintiff in the suit, to file another suit against the respondent. But was such leave neces-

sary? The question here is whether the suit under appeal was a suit for the same subject-matter as the previous suit. That of course was a suit to eject the respondent and this suit also claims the same relief against the respondent. But it does not necessarily follow that because in an ejectment suit the claim is the same the statutory bar under O. 23, R. 1, is raised against the appellant. It is argued before us that the reason why defendant 2 was exonerated in the earlier suit was because no written notice to quit had been given to him. On the other side it is argued that it was because of the point raised with regard to the appellant's title.

It is argued that it was because he was unable to prove his title that he exonerated the respondent. One answer to that is that he proceeded with his suit against defendant 1 and it was equally important to him to prove his title against defendant 1. If he had no title he could not succeed against defendant 1 any more than he could against defendant 2. It seems to us to be much more probable that the appellant did not proceed against the respondent here, defendant 2, because he had not given him notice to quit. It was no good going on with the suit against the respondent and succeeding in proving his title if the claim was bound to fail by reason of the defect that he had not given him written notice. What has to be considered here is what is the meaning of a "subject-matter" and we derive great assistance upon this point from *Rukma Bi v. Mahadeo Narayan* (1), which seems to us to be directly in point. That was a suit brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under O. 23, R. 1, Civil P. C., 1908. It was held that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject-matter as the second suit within the meaning of O. 23, R. 1, Civil P. C., 1908, and that "subject-matter" means

"the series of acts or transactions alleged to exist giving rise to the relief claimed."

Scott, C. J., at p. 158 says:

"The question is whether the previous suit was a suit for the same subject-matter within the meaning of O. 23, R. 1. We are of opinion that 'subject-matter' means, to use the words of O. 1, R. 1 'the series of acts or transactions alleged to exist giving rise to the relief claimed.' Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore the two suits are not in respect of the same subject-matter. . . . In the first suit between the present parties there was no cause of action because notice had not been given. In the present suit there is a cause of action because notice has been given. Therefore the causes of action are not the same."

With those observations we entirely agree. To hold otherwise would be to place a defendant, against whom an ejectment suit is launched without previously giving him the required written notice and against whom the suit is withdrawn for that reason, in an impregnable position. Never thereafter would the owner of the property be able to eject him from his premises. In fact the tenant would become the owner of the property. That never could have been the intention of O. 23, R. 1. We therefore hold that, although the learned trial Judge was right in his interpretation of his own orders, he was wrong in holding that the suit was barred by reason of the provisions of O. 33, R. 1. We now go on to examine his other findings. The respondent's case was that the appellant was not the owner of the property, i. e., the land upon which the superstructure stands. The appellant claimed to have purchased the land from one Sundaram Naidu. (His Lordship then considered the evidence on the fact of ownership and concluded.) We are quite satisfied that the suit property was Sundaram Naidu's and it follows that by reason of his sale the appellant became the owner of the property and was therefore entitled to sue in ejectment. Under these circumstances this appeal must be allowed with costs throughout. The further question with regard to valuation will be dealt with in the trial Court.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 5

RAMESAM, J.

T. S. Subbaraya Devai—Defendant—Petitioner.

v.

R. Sundaresa Devai—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 230 of 1931, Decided on 3rd May 1932, against order of Sub-Judge, Trichinopoly, D/- 4th September 1930.

(a) **Civil P. C. (1908), O. 9, R. 9—Pauper application dismissed in default as no steps taken for prosecution can be restored on finding that some steps were taken — Civil P. C. (1908), S. 141 and O. 47, R. 1.**

A pauper application was dismissed for default, after refusing a prayer for adjournment, on the ground that no steps were taken to prosecute the application. Later on an application for restoration was made which was granted on the Court being satisfied that some steps had been taken.

Held: that the Court had jurisdiction to do so both under O. 9, R. 9 read with S. 141 and O. 47, R. 1: 41 *Mad* 286; *A I R* 1926 *Mad* 875; *A I R* 1927 *Mad* 355; *A I R* 1929 *Mad* 757 and *A I R* 1931 *Mad* 656 (F B), *Dist*; *A I R* 1922 *P C* 112, *Ref*. [P 6 C 1, 2]

(b) **Civil P. C. (1908), S. 115—No grave injustice—Court is not bound to interfere.**

The Court is not bound to exercise jurisdiction under S. 115 except in cases where not doing so will cause grave injustice even if there is an irregularity. [P 6 C 2]

M. S. Vaidyanatha Ayyar—for Petitioner.

P. J. Kuppanna Rao — for Opposite Party.

Judgment.—This is a revision petition filed under S. 115, Civil P. C., against an order of the Subordinate Judge of Trichinopoly dated 4th September 1930 by which he restored to file a pauper petition, O. P. No. 7 of 1930, which had been previously rejected on 26th July 1930. The facts of the case may be thus briefly stated. The respondent filed an application for permission to sue in forma pauperis. This application was numbered as O. P. No. 7 of 1930 and it came on for orders on 26th July 1930. The Subordinate Judge passed the following order on that day:

"Petitioner had not taken steps even to summon witnesses to prove the incumbrances on his property. There is no satisfactory explanation for not doing so. Petition dismissed."

Then there was an application for restoring O. P. 7. On that the Subordinate Judge passed the following order:

"I am unable to construe the order of this Court dismissing the petition as one on the merits. No witnesses had been summoned to

prove the incumbrances. His pleader was absent and he was unable to say what really happened in the case. It is brought to my notice that his sister was expected by a later train with the mortgage deeds in question. Mr. Balakrishna Ayyar who appears for the petitioner says that she did turn up that day. Under these circumstances I feel I ought to give him an opportunity to prove his pauperism. The petition will be restored on petitioner paying Rs. 25 to the other side for their costs in one week."

The revision petition is against this latter order. The second petition was filed under O. 9, R. 9 taken with S. 141 and also under O. 47, R. 1. Mr. Vaidyanatha Ayyar who appears for the petitioner contends that neither provision of law applies to this case and that the petition is not maintainable. Now it seems to me what happened on 26th July was this. The pauper petition stood posted for that day. The vakil for the petitioner was absent. This appears from the later order. The party himself appearing must have asked for adjournment. The Subordinate Judge observed that steps were not taken even to summon witnesses to prove the incumbrances on the property. He was therefore of opinion that there were no grounds for granting adjournment. The application for adjournment was therefore refused. The pauper petition then was dismissed because it was not prosecuted. The petitioner might at least have gone into the witness-box but he did not. So that it seems to me that there were two applications on that day, one, for permission to sue as a pauper and secondly an application to have that matter adjourned. The adjournment application was refused. The other petition merely followed by a consequential order. Now it seems to me that O. 9, R. 9 taken with S. 141 is applicable in so far as the pauper petition was dismissed for default on the first occasion. In the course of his argument Mr. Vaidyanatha Ayyar referred to the following cases: *Pichamma v. Sreeramulu* (1), which refers to the distinction between an order passed under O. 17, R. 2 and an order passed under O. 17, R. 3. If a suit is disposed of on the merits and not for default the remedy is by way of appeal. But it seems to me that in this case the pauper application was dismissed for default. The Subordinate Judge did not say that he finds that the plaintiff was not a pauper.

1. (1919) 41 *Mad* 286=43 *I C* 566 (F B).

The next decision referred to, *Krishnamurthy v. Ramayya* (2), where it was held that if a pauper petition was dismissed it does not bar a second application to sue as a pauper. This may be; but it does not touch the present question whether the first pauper petition which was dismissed for default may not be restored. Two other cases are referred to: *V. Ramaraghava Reddi v. Rajah of Venkatagiri* (3) and *Alagasundaram Pillai v. Pichuvier* (4). In the first of these cases it was held that default of appearance was not a reason contemplated by O. 47, R. 1 and that O. 9, R. 9 was not applicable to execution proceedings. In the second of the cases it was held that O. 9, R. 9 was not applicable to execution proceedings. The same view was taken in *Arunachalam v. Veerappa Chettiar* (5). In this case we are not concerned with an execution application but with an application for permission to sue in forma pauperis. It may be that even to such an application O. 9, R. 9 by itself is not applicable but O. 9, R. 9 taken with S. 141 may be applicable. A similar reasoning will not avail to execution applications according to the three cases abovementioned because execution proceedings are proceedings in suits, and there is no need to refer to S. 141 and O. 9, R. 9 by itself is not applicable to execution proceedings. I do not think it follows from those three cases that O. 9, R. 9 does not apply to cases where an application to sue in forma pauperis was dismissed for default. I therefore think that so far as the pauper application was concerned it was dismissed for default and O. 9, R. 9 taken with S. 141 is applicable to it and that the Subordinate Judge exercised jurisdiction.

The other point argued is that O. 47, R. 1 is not applicable to an order of this kind, i. e., remedy by way of review. It is true that the cases mentioned show that a dismissal for default is not a ground for review under O. 47, R. 1. But I think the said application may be regarded as one for review of the order dismissing the application for adjournment. When the application for an adjournment was dismissed, he could find no

ground for granting an adjournment because all the proper facts were not represented to him. But later on it was mentioned to him that the plaintiff's sister had actually started with the mortgage deeds and had arrived later on in the day. This was a fact not known on 26th July but known to the Subordinate Judge only later on. Now, a review is permissible only on the ground of discovery by the party of other evidence which could not be known to him with due diligence or other sufficient cause. The Privy Council has held in *Chhajju Ram v. Neki* (6), that the sufficient cause must be at least ejusdem generis with the earlier reason. Now the discovery of a ground by the party is one of the grounds mentioned earlier in the section. The discovery of a reasonable ground for adjournment by the Court later on, I think is a ground ejusdem generis with the earlier reason and the Court had found later on that the party did take some steps, though he had not taken out summons, to get his sister down to the place with all the mortgage documents. This fact being discovered by the Court as a good reason for review within the meaning of the Privy Council decision, I think the Subordinate Judge had good ground for reviewing his order dismissing the application for adjournment. And if that order is set aside, automatically the pauper application becomes restored. So even from the point of view of O. 47, R. 1 I do not think the order of the Subordinate Judge is irregular.

Finally I must consider on the facts of this case even if I am not strictly correct in either of the grounds mentioned by me above, I am not bound to exercise jurisdiction under S. 115 except in cases where not doing so will cause grave injustice. I am not satisfied that this is a case where I should interfere under S. 115 even if there was an irregularity. For all these reasons I decline to interfere with the order passed by the learned Subordinate Judge and dismiss the revision petition with costs.

P.R.S./M.N. *Application dismissed.*

2. A I R 1926 Mad 875=96 I C 962=50 Mad 63.

3. A I R 1927 Mad 355=99 I C 951.

4. A I R 1929 Mad 757=120 I C 567=52 Mad 899 (F B).

5. A I R 1931 Mad 656=134 I C 806 (F B).

6. A I R 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).

A. I. R. 1933 Madras 7

ANANTAKRISHNA AYYAR, J.

(Devessery) Pathraj Kathavala —
Plaintiff—Petitioner.

v.

New Bombay Steamships Ltd.—Defendant—Opposite Party.

Civil Revn. Petn. No. 938 of 1929, Decided on 6th April 1932, against decree of Sub-Judge, Cochin, in S. C. S. No. 80 of 1927.

Shipping—Bills of lading containing in margin description of goods as given by merchant and also clause stating contents unknown—Burden is on merchant to show that specification is correct—Shippers have to deliver goods tendered—Evidence Act (1872), S. 101.

The effect of the specification in the margin of a bill of lading of the description of the goods, which according to the merchant, truly represented the quality and quantity of the goods that were shipped, when considered along with the clause in the bill of lading, namely "the contents, weights and value unknown" etc., is not that there is a prima facie case, that the specification in the margin is correct. The merchant has to prove that the goods were according to specification. And the shipping company is only responsible for delivering the same bags or cases that were shipped: *A I R 1921 Mad 691, held Reversed. Lebeau v. General Navigation Co., (1873) 8 C P 88, Rel on.*

N. R. Sessa Ayyar—for Petitioner.*V. K. John*—for Opposite Party.

Judgment.—The plaintiff is the petitioner in this civil revision petition. He was the plaintiff in S. C. S. No. 80 of 1927 on the file of the Subordinate Judge of Cochin, the defendant being the firm of B. N. V. Kini Brothers, agents of the Bombay Steamships Ltd. The plaintiff sued the defendant to recover the price of five bags of certain grains, which he alleged formed part of a consignment which he shipped from Bombay to Cochin in the defendants' steamer "S. S. Indira." The allegation is that the plaintiff sent 157 bags of grains of different kinds by the said steamer from Bombay to Cochin and that when delivery was made at Cochin there was shortage of two bags of oorid and three bags of long dhal. In the place of the above, the defendant offered five bags of onions. The plaintiffs declined to accept the case, and accordingly filed a suit to recover the price of two bags of oorid and three bags of long dhal. The plea of the defendant was that though in the bill of lading, in the margin the names of the particular grains said to be the contents of the bags delivered by the plaintiff to the defendant

are mentioned, yet the bill of lading contains the statement:

"weight, contents and value, when shipped are unknown, and that delivery by the company of packages externally in good condition as received shall be conclusive evidence of the delivery of the full weight and contents and that the defendant was not liable."

The learned Judge who tried the suit came to the conclusion that the five bags in question contained the marks of the plaintiff. In the mate's receipt—which was granted to the plaintiff when the goods were taken into the ship along with the boat-note and after the same were accepted by the person who took charge of the same—mention was made that the consignment is "said to be" of particular grains. In exchange for the mate's receipt, a bill of lading was given to the plaintiff in the usual course, and as already remarked, in the margin of the bill of lading there is a description of the number of bags and of the particular grain which the bags were said to contain. Being of opinion that the company was not conclusively bound by the mention in the margin of the bill of lading of the particular kinds of grains the bags were said to contain, and that the company was discharged of its obligations by delivery to the plaintiff of the total number of bags containing the initials (marks) of the plaintiff the learned Subordinate Judge dismissed the plaintiff's suit. The plaintiff has preferred the present civil revision petition.

On plaintiff's behalf his learned advocate drew my attention to the Import Manifest and the Outturn Report which have been exhibited as Exs. C and D in this case and he emphasized upon the duty that the Master of the ship was under to give to the harbour authorities a correct description of the goods landed in any particular harbour. It was argued that having regard to the description of the goods in Exs. C and D it must be taken that the goods that were actually carried from Bombay to Cochin were goods of the description mentioned in the margin of the bill of lading. He also contended that there must be a specific finding on the question whether the five bags in dispute were the identical bags that were shipped by the plaintiff at Bombay. On behalf of the respondent the learned counsel, who appeared for the company, drew my attention to the mate's receipt as well as to

the contents of the bill of lading. The mate's receipt only stated that so many bags were received which were "said to contain" particular grains, and there were the conditions in the bill of lading already mentioned by me, namely "the nature of the contents unknown," and "delivery by company of packages externally in good condition shall be conclusive evidence of the delivery of the full contents."

The learned counsel also strongly relied on the circumstance that the learned Judge has found that those five bags contained the plaintiff's marks under which the consignment was shipped by the plaintiff. It seems to me that one thing is clear, that the company was bound to deliver the exact bags that were shipped at Bombay, subject of course to the conditions and exceptions contained in the bill of lading and that the company was not entitled to take advantage of any misdescription of the goods with a view to withhold from the plaintiff the exact bags that were actually shipped by the plaintiff. If for example, the description of the bags was that they contained grains of an inferior quality but it was proved that the grains contained in the bags were of a superior quality, it is not open to the company to say that they would deliver to the plaintiff only grains of an inferior quality. In fact subject to the exceptions and conditions mentioned in the bill of lading relating to loss by perils of the sea etc., the company is bound to deliver the identical bags that were shipped at Bombay by the plaintiff to be carried to Cochin.

The argument that was advanced on behalf of the petitioner is, that both in the boat-note, (which however has not been produced in this case) and in the bill of lading itself, there is a specification in the margin of the number of bags shipped and of the contents of the same, (the names of the particular grains which the bags contained being specified there) and therefore the onus is upon the defendant company to prove that those descriptions were wrong. It is clear that the marginal notes to the bill of lading did not mention "onions" and the five bags in question offered to the plaintiff at Cochin were bags which contained "onions." What then is the effect of the specification in the margin of a bill of lading of the description of the goods, which, according to the merchant, truly

represented the quality and quantity of the goods that were shipped, when considered along with the clause in the bill of lading, namely "the contents, weights and value unknown," etc. This question came up for consideration before this Court in the case reported in *The British Steam Navigation Co., Ltd. v. Krishna-swami Ayyar* (1). There the receipt that was granted to the shipper contained the words "said to contain" such and such goods. There was also the other usual clause, namely "contents and weight unknown." On those facts the learned Judge who tried the suit on the original side of this Court came to the conclusion that the company was bound to deliver the goods specified in the circumstances. That decision however was reversed by a Bench of this Court consisting of Sir John Wallis, C. J., and Krishnan, J. The learned Judges held that such questions had been decided in England and that the real meaning to be attached to such shipping documents was that the shipping company was not prepared to accept the description given by the merchant, and that for their purpose of determining the freight due to them they were prepared to accept the classification and the weight mentioned by the merchant. After referring to the course of business in such matters, namely, that the shipper takes a boat-note, delivers the goods to some person in charge of the ship and gets a mate's receipt for the goods, and then in exchange for the same gets a bill of lading from the agent or the master of the ship in the usual course, the learned Judges made the following observation :

"Reliance was placed upon the mate's receipts and the bill of lading as shifting the burden on to the defendant company. The mate's receipts expressly say "said to be" so many bags. When the shipping company takes care to give a receipt of that sort, so that it may not be used as an admission against them as to the number of bags received by them, it seems to me that there is no justification for using it as making out a prima facie case as to the number of bags actually put on board."

There the question was as regards the weight and the number of bags, not, as in the present case before me, as regards the contents. But the same remark as regards the words "weight not known" occurring in such bills of lading would also apply, in my opinion to the other portion of the bill of lading, namely,

"contents not known." A similar question arose for decision in *New Chinese Antimony Co. Ltd. v. Ocean Steamship Co. Ltd.* (2). The action was there tried by Sankey, J., as he then was, and he held that the shipowner was liable. On appeal, the Court of appeal reversed that decision and took occasion to remark as what would be the exact significance in law of such a condition occurring in a bill of lading. Viscount Reading, Chief Justice, at p. 669 observed as follows :

"I think that the true effect of this bill of lading is that the words 'weight unknown' have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers' representative says, weighed 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only."

Then the remarks of Brett, J., in *Lebeau v. General Navigation Co.* (3), at p. 96 are quoted, which seem to be apposite for the present case. This is what that learned Judge said in the case in *Lebeau v. General Navigation Co.* (3) at p. 96 :

"When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading, he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business, and it seems from the American cases, to be the law, that he thereby declines to accept the declaration of the shipper. He says in effect: 'I accept this case as it appears on the outside; I know nothing about the inside and will be bound by no statement in reference to it'. It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package."

Scrutton, L. J. put the following illustration at p. 673 :

"Suppose a box described as a 'box of jewels' were deposited for safe custody at a Bank, and a receipt were given for it in the words 'received, contents unknown', there would be no evidence of the receipt of any jewellery."

Having regard to the well-recognised interpretation which these and similar words occurring ordinarily in bills of lading have received, I think that the description in the bill of lading in question in the margin that the bags con-

tained grains of particular description is not conclusively binding on the defendant. No doubt the defendant is bound (subject to the exceptions and conditions mentioned in the bill of lading) to deliver at Cochin the bags that were handed to him by the plaintiff at Bombay. As regards the identity of the bags, one of the defendant's witnesses gave evidence to the effect that the five bags in question contained the marks of the plaintiff. He was not cross-examined with reference to that point, and the learned Judge states that the bags in question had plaintiff's marks on them and that in the absence of any other suggestion the bags in question should be taken to be among the bags that were tendered to the defendant at Bombay. For the foregoing reasons I think that the judgment of the learned Judge is not shown to be incorrect, and the civil revision petition is dismissed with costs.

P.R.S./M.N. *Petition dismissed.*

A. I. R. 1933 Madras 9

JACKSON AND MOCKETT, JJ.

Chella Rangappa—Appellant.

v.

Yerravenkatagiri Rangappa and others—Respondents.

Appeal No. 480 of 1929, Decided on 16th September 1932, against order of Dist. Judge, Anantapur, D/- 7th March 1929 in O. P. No. 19 of 1928.

(a) Civil P. C. (1908), S. 11—S. 11 is not exhaustive.

Section 11 is not exhaustive and the binding force of a previous judgment depends not upon S. 11 but upon general principles of law: 6 All 269 (P C), *Foll*; A I R 1921 P C 11 and A I R 1922 P C 80, *Ref.* [P 10 C 1,2]

(b) Civil P. C. (1908), S. 11—*Res judicata* applies to Insolvency proceedings—Receiver's application for setting aside alienation dismissed—Creditor cannot again apply—Provincial Insolvency Act (1920), S. 54.

The doctrine of *res judicata* is applicable to proceedings in insolvency and hence when an application by the receiver under S. 54, is dismissed on merits once, one of the creditors cannot again apply for setting aside the transfer: 6 All 269 (P C), *Rel on.* [P 10 C 2]

T. R. Ramachandra Iyer and *R. Srinivasa Ayyangar*—for Appellant.

S. Ranganatha Ayyar and *T. R. Arunachalam*—for Respondents.

Judgment.—In this O. P. No. 19 of 1928 the petitioner, a creditor of the estate of respondent 2 (insolvent), seeks to set aside a sale to respondent 1 of certain properties. Respondent 3 is the Official

2. (1917) 2 K B 664=86 L J K B 1417=117 L T 297=23 Com Cas 1=14 Asp M L C 131.

3. (1873) 8 C P 88=42 L J C P 1=27 L T 447=21 W R 146=1 Asp M C 435.

Receiver of Anantapur. The petition is stated to be under S. 4, Provincial Insolvency Act, and para. 4, alleges that the sale was "in fraud of other creditors." This same sale was the subject of O. P. No. 13 of 1924 filed by the Official Receiver now respondent 3. That petition was stated to be under Ss. 4, 54 and 56, Provincial Insolvency Act, and prayed that:

"the execution sale in favour of the 1st counter-petitioner (now respondent 1) be set aside as fraudulent and preferred."

Issue 3 in that O. P. was "whether the sale amounts to a fraudulent preference"

and issue 4,

"whether in any event the sale can be set aside under S. 4, Insolvency Act."

The learned Subordinate Judge held that on the facts there was no fraudulent preference and that the provisions of S. 4 could not be invoked. It was, of course, obvious that S. 56 did not apply. The matter came before the High Court in C. M. S. A. No. 115 of 1927 on a question as to whether a second appeal lay from the District Judge, and Ramesam and Devadoss, JJ., gave judgment as follows (Ex. A):

"We think that the order of the Subordinate Judge was passed under Ss. 51 and 54, Provincial Insolvency Act. He especially refuses to apply S. 4 of the Act. The order is therefore not an order under S. 4"

Mr. T. R. Ramachandra Ayyar now argues that the appellant (petitioner) is free to proceed with his present petition as (1) it is "res judicata" that there has been no decision under S. 4 which is the basis of this petition, and (2) that the respondent cannot plead res judicata to the decision under S. 54 as S. 11, Civil P. C., does not refer to insolvency proceedings which are not "suits." We agree with his contention as to (1) as Ex. A is clear and in insolvency proceedings the Official Receiver represents the general body of creditors of whom the present appellant is one.

As to the second point it is true that no authority has been cited before us to the effect that insolvency proceedings can be the subject of res judicata, but there is ample authority for the proposition that S. 11, Civil P. C., is not exhaustive and that as stated by the Privy Council in *Ram Kripal Sukul v. Mt. Rup Kuari* (1):

"the binding force of such a judgment (i. e. a previous judgment) depends not upon S. 18 of

1. (1884) 6 All 269=11 I A 37 (P C).

Act 10 of 1877, but upon general principles of law."

The section referred to corresponds to S. 11, Civil P. C.:

"If, say their Lordships, it were not binding there would be no end to litigation."

This is manifestly so and is especially applicable to insolvency proceedings. Were it otherwise it would be impossible for anyone, whose possession of property received from an insolvent had been unsuccessfully impeached as a fraudulent transfer of preference, to be able to sell that property or even to enjoy its proceeds with any sense of security. This is a position which is clearly opposed to the principle "*nemo debet bis vexari*." The above *Ram Kripal v. Mt. Rup Kuari* (1) case was decided in 1883. Since then the Privy Council have reaffirmed their statement of the law bearing on the point in *Hook v. Administrator-General of Bengal* (2) and *Ramachandra Rao v. Ramachandra Rao* (3), the latter a case under the Land Acquisition Act.

On the authorities above cited we are of opinion that the doctrine of "res judicata" is applicable to proceedings in insolvency and that the present petition is therefore unsustainable. We therefore agree with the learned District Judge and dismiss this appeal with customary costs throughout including pleader's fees. This disposes of the memorandum of objections.

P. R. S. / M. N.

Appeal dismissed.

2. A I R 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (P C).

3. A I R 1922 P C 80=67 I C 408=19 I A 129 45 Mad 320 (P C).

A. I. R. 1933 Madras 10

SUNDARAM CHETTY, J.

(Allam) Narasimhulu and others—Defendants—Appellants.

v.

(Gutta) Bhadrappa and others—Plaintiffs—Respondents.

Second Appeals Nos. 334 and 470 of 1930, Decided on 23rd August 1932, against decrees of Sub-Judge, Ellore, in A. S. Nos. 184 and 211 of 1928.

(a) **Riparian Rights—Artificial stream is one which is artificial at source or flows through artificial channel—Proprietors of adjoining lands of artificial streams cannot enjoy their water without grant or prescription—Easements Act (1882), S. 7.**

An artificial stream is a stream which flows at its source by the operation of man, or if it flows at its source by the operation of nature, flows in

a channel made by man. Where water is made to flow in an artificial channel from a natural stream, such a channel is an artificial stream. Where a stream is artificial and flows in a channel made by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not *prima facie* the same as those of proprietors on the banks of natural streams. The right to the enjoyment of a natural stream or water belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself. He has a right to have it come to him in its natural state, in flow, quantity and quality and to go from him without obstruction. Such a right in no way depends on prescription or any presumed grant. But in the case of artificial water courses the acquisition of rights in them must be by grant or prescription : 43 I C 235 ; A I R 1927 Bom 251 ; A I R 1925 P C 236 : *Nuttal v Bracewell*, 2 Ex 1 and *Sutcliffe v. Booth*, 32 L J Q B 136, Dist. [P 12 C 1]

(b) Civil P. C. (1908), S. 100—**Misconstruction of important document in deciding question of fact—Interference is possible in second appeal.**

If by reason of a misconstruction of an important document the Courts below come to an erroneous finding on a question of fact, the High Court can interfere in second appeal. [P 13 C 2]

T. M. Krishnaswami Ayyar, Ch. Raghava Rao and M. Appa Rao—for Appellants.

P. Venkataramana Rao and K. Subba Rao—for Respondents.

Judgment.—These are connected appeals and arise out of a suit brought by plaintiff (respondents) for a declaration that only the raiyats of the lands within the ayacut of Solavani and Karicherlavari tanks are entitled to use the water flowing through the suit Solavani channel and that the defendants have no right to use that water for cultivating as wet their lands on either side of the channel and for an injunction restraining them from taking the water of the channel to their lands for wet cultivation by putting up cross bunds or palmyrah spouts and also for directing the defendants to restore the channel to its original condition. Both the lower Courts have found the plaintiffs' contention to be substantially true and passed a decree in their favour, granting the reliefs asked for by them subject to a slight qualification, S. A. No. 470 of 1930 has been filed by defendant 12 and S. A. No. 334 of 1930 by some of other defendants. Plaintiffs and others own about 400 acres of mamool wet land under the ayacut of Solavani and Karicherlavari tanks. The source of supply for those tanks is Tammileru, which is doubtless a natural stream. From that stream the suit

channel called Solavani channel was cut in order to serve as a feeder to the aforesaid tanks. After these tanks became full, the water flowing through the suit channel used to be taken to two other tanks mentioned in the plaint. There is another tank called Kotta Cheruvu to which water is supplied from Tammileru by means of a branch from Dondulur channel.

It is found by both the Courts below that the defendants' contention that the water from Tammileru flows through the suit channel into Kotta Cheruvu is false. Most of the defendants' lands lying on either side of the suit channel have been found to be dry, and it is only since 1917 or 1918 that the defendants have been trying to convert those lands into wet. Defendant 12's land alone is found to be mamool wet, but the finding of both the lower Courts is, that that land is fed by Kotta Cheruvu and that no right to take the water of the suit channel for irrigating that land has been established. There is no doubt that the plaintiffs and others who own wet lands under the ayacut of Solavani and Karicherlavari tanks, have permanent rights of occupancy therein, and the suit channel is a feeder for those two tanks. After a full consideration of the evidence and circumstances of this case, it is found by both the Courts below that the raiyats holding wet lands within the ayacut of Solavani and Karicherlavari tanks are entitled to the exclusive user of the water flowing through the suit channel and to the unobstructed flow of water through the same, in order to fill up the aforesaid tanks for the purpose of irrigating their wet lands, within the ayacut. As observed by the learned District Munsif, the rights so acquired can be traced to an implied grant by the zamindar and by reason of the long enjoyment of the entire quantity of water flowing from the suit channel in the aforesaid manner, as of right, an easement by prescription or a customary right has been acquired even as against the zamindar. These findings are amply borne out by the evidence and must be accepted in these second appeals.

It is however contended that the suit channel should be deemed to be a natural stream and therefore the defendants who own lands on either side of it, are entitled to riparian rights which could not

be lost by mere non-user. The Courts below have held that the suit channel is not a natural stream but only an artificial water course. That finding is challenged by setting up the contention that as the suit channel flows out of Tammileru which is a natural stream, it must also be taken to be a natural stream.

But the opinion expressed by text-writers is against this contention. An artificial stream is a stream which flows at its source by the operation of man, or, if it flows at its source by the operation of nature, flows in a channel made by man. In the present case, water is made to flow in an artificial channel from a natural stream and such a channel is an artificial stream (vide p. 327 of the Law of Riparian Rights by L. M. Doss). Where a stream is artificial and flows in a channel made by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not prima facie the same as those of proprietors on the banks of natural streams. The right to the enjoyment of a natural stream of water belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself. He has a right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction. Such a right in no way depends on prescription or any presumed grant. But in the case of artificial water courses the acquisition of rights in them must be by grant or prescription: vide pp. 106 and 107 of the Law of Waters by Coulson and Forbes, 4th Edn. The same view is expressed in Gale on Easements (10th Edn.) at pp. 274 and 275. The learned author says that in the case of an artificial water-course, any right to the flow of water must rest on some grant or arrangement either proved or presumed, from or with the owners of the lands from which water is artificially brought or on some other legal origin. The contention of Mr. Raghava Rao for the appellants seems to be that by reason of the artificial channel having been cut from a natural stream, the owners of lands on either side of the channel must be deemed to have the same riparian rights as in the case of natural streams. But I think it is too broad a proposition which practically obliterates the distinc-

tion between a natural stream and an artificial water course; and even the decisions relied on by him do not support such an unqualified proposition.

What those decisions appear to lay down is, that even in the case of an artificial water course, special circumstances may be shown to exist so as to confer all such rights as a riparian owner would have had in the case of a natural stream. In *Nuttall v. Bracewell* (1), there were special circumstances for finding in favour of the acquisition of riparian rights in respect of an artificial stream. As a result of an agreement between two riparian owners of lands abutting a natural stream, there was a diversion of the water of the natural stream through an artificial channel, ultimately returning the water to the natural stream without doing any injury to any one. It was considered that it was within the competence of a riparian proprietor to grant a portion of his rights to another provided the latter did not make an unreasonable use of the water so as to cause sensible injury to the higher or lower down proprietor. In this case reference was made to *Sutcliffe v. Booth* (2), as an authority for the position that an artificial stream may be on the same footing as a natural one as regards rights of riparian proprietors. But it is clear from the decision in *Sutcliffe v. Booth* (2) that in order to acquire all the rights of riparian proprietors, it must be shown that a water course, though artificial, was originally made under such circumstances and so used as to give all the rights owned by the riparian proprietors in respect of a natural stream. There is nothing in the decision of the Patna High Court reported in *Krishna Dayal Giri v. Bhawani Koer* (3), which goes beyond the limitations prescribed in the aforesaid English decisions. The facts established in that case led to the inference that even in respect of the artificial water-course rights incidental to a natural stream have been acquired. Even in the decision in *Yesu Sakharam v. Ladu Nana* (4), the same principle has been adopted. The ordinary rule that in the case of an artificial water course

1. (1867) 2 Ex 1=4 H & C 714=36 L J Ex 1 =12 Jur N S 989=15 L T 313.

2. (1863) 32 L J Q B 136=9 Jur N S 1037.

3. (1918) 3 Pat L J 51=43 I C 295.

4. A I R 1927 Bom 251=101 I C 330=51 Bom 243.

any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought was held to be subject to a qualification which as laid down by the Privy Council in *Maung Bya v. Maung Kyi Nyo* (5), is as follows:

"There is however a well established principle of law, namely, that a water course originally artificial may have been made under such circumstances and have been used in such a way that an owner of land situate on its banks will have all the rights over it, that a riparian owner would have if it had been a natural stream."

It is clear from the above mentioned authorities, that unless the defendants establish circumstances under which the suit channel was made and the manner in which it was used so as to give rise to an inference that those who own lands on either side of this channel have all the rights of riparian owners as such, the contention put forward by Mr. Raghava Rao must be held to be untenable. As both the lower Courts have found, the water of the suit channel was never used for irrigating the lands on either side of it till 1917 or 1918 and it is only since then, attempts have been made to make use of the water in violation of the rights owned by the ryots having lands under the ayacut of Solavani and Kari-cherlavari tanks.

I have therefore no hesitation to find that the defendants can claim no riparian rights in respect of the suit channel. It is also perfectly clear, that even assuming that they have such natural rights, they were lost by reason of the acquisition of a right of easement to the exclusive user of the water of the suit channel and of the uninterrupted flow of the same to the said two tanks, acquired by the ayacutdars who own wet lands under those tanks. S. A. No. 334 of 1930 is therefore dismissed with costs.

In the other appeal, a special contention is raised on behalf of defendant 12 by reason of his land being a mamool wet land. It follows from what I have stated above, that he can claim no riparian right by reason of his land abutting the suit channel. If so, he must prove that by grant or prescription or any other arrangement he has acquired the right to take the water of the suit channel for irrigating that land. Both

the Courts below have fully considered the evidence regarding defendant 12's claim and given an adverse finding. The learned District Munsif finds that there is no sufficient reliable evidence to establish that defendant 12 and his predecessors have been taking water as of right from the suit channel for over the statutory period for irrigating the land purchased by him under Ex. 8. The learned Subordinate Judge has taken the same view of the evidence and come to the same conclusion. The concurrent finding of both the Courts below on a pure question of fact is to be accepted in second appeal, unless there are adequate grounds for interfering with it. Mr. T. M. Krishnaswami Ayyar pressed an argument in order to show that that finding is vitiated by a misconstruction of the sale deed, Ex. 8, obtained by defendant 12 in 1920, which may be deemed to be his title deed for the land. I need hardly observe that if by reason of a misconstruction of an important document the Courts below came to an erroneous finding on a question of fact, this Court can interfere in second appeal. It has therefore to be seen whether Ex. 8 was really misconstrued or not. (The judgment after considering the document held.) I am of opinion that the appreciation of the oral evidence by both the Courts below is not in any way vitiated by a misconstruction of this document. The finding of the learned District Munsif is also supported by what he observed in the locality at the time of his personal inspection. It is conceded by the plaintiffs that the water of Kotta Cheruvu was taken to defendant 12's land through a side channel and a small sluice and by means of a palmyrah spout placed over the suit channel. There is, in my opinion, no adequate ground for interference with the finding of the lower Courts. In the result, S. A. No. 470 of 1930 is also dismissed with costs.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 14

Special Bench

BEASLEY, C. J., SUNDARAM CHETTY
AND BURN, JJ.

*In the matter of the Indian Income-tax
Act 11 of 1922.*

*M. S. M. M. Meyappa Chettiar—As-
sessee—Petitioner.*

v.

Commr. of Income-tax, Madras.

Original Petn. No. 54 of 1931, Decided
on 30th August 1932.

**(a) Income-tax Act S. 4 (2)—Money received
in British India is presumed to be profits.**

The ordinary presumption is that when money
is received in British India from another coun-
try, the remittance is out of profits. [P 15 C 1]

**(b) Income-tax Act (1922), S. 4 (2)—Person
having two funds one of which was taxed—
There is no irrebuttable presumption that
all remittances are made out of taxed fund—
Foreign untaxed fund sending remittance
less than its profits is profit received in Bri-
tish India.**

It is not correct to say that where a person has
two funds in his possession, one of them being a
fund which has been subjected to income-tax
and the other being a fund which remains to be
taxed, the presumption that any remittance he
makes is out of the one already subjected to tax
can never be rebutted, or that it is an irrebutt-
able presumption.

An assessee had a fund in British India which
was taxed and another fund outside British
India. Certain sums were sent out from the former
and invested through the latter fund out of
British India. The tax on the fund in British
India was paid from a remittance received from
the latter fund. The profits of the foreign fund
were more than the remittance.

Held : that the remittance was not out of the
sums sent from the former fund which was taxed
but was a remittance of foreign profit received in
British India and that it could be taxed : *Sug-
den v. Leeds Corporation*, (1914) A. C. 483 and
A I R 1930 Mad 457, Dist. [P 16 C 1, 2]

*K. S. Krishnaswamy Ayyangar for
R. Kesava Ayyangar—for Assessee.*

*M. Patanjali Sastri—for Commr. of
Income-tax.*

Beasley, C J.—The question referred
to us is :

“Whether on the facts of this case any pre-
sumption as to the receipt of profits can be raised
and if it can, whether the presumption has not
been rebutted.”

The facts of the case which can be
stated quite shortly are as follows : The
assessee carries on a business in Rangoon;
and in Ipoh he is the sole proprietor of a
business, which at the material times it
is alleged by the assessee earned no profit
at all, and he is also a partner in another
money lending business with other per-
sons which did result in a profit at the
material times. In 1926 sums of money

amounting to Rs. 4,10,000 were sent from
Ipoh to Rangoon to the petitioner there,
the last sum being a sum received in
December 1926. In the Rangoon books
there is a ledger account for Ipoh and in
Ipoh there is a ledger account for Ran-
goon, and money passing from one place
to the other is set out in the respective
ledger accounts. The income-tax author-
ities assessed that sum of Rs. 4,10,000
received from Ipoh by the petitioner in
Rangoon to income-tax as being a remit-
tance of foreign profits to British India
levied an income-tax of Rs. 91,262
and odd upon it. The matter came before
the High Court on a reference and the
reference was answered against the peti-
tioner (the same petitioner here) ap-
parently not upon the merits but for
some other reason ; so that that assess-
ment remains and a sum of Rs. 91,262
odd has been paid by the petitioner to
the income-tax authorities ; and the
question before us is, where did that sum
of money come from ?

Now it appears and it is quite plainly
proved from the assessee's own books
that in February and March 1927 a large
sum of money, very nearly equivalent
to the sum sent by Ipoh to Rangoon the
previous year, was sent by Rangoon to
Ipoh, the total amount being Rupees
4,08,662. In order to pay the income-
tax levied by the income-tax authorities
the assessee sent from Ipoh Rupees
91,262-14-0 by telegram from the Char-
tered Bank on 27th April 1928 and the
receipt of that sum was duly entered in
the Rangoon books as a credit on 28th
April 1928 and as a debit to the suspense
account on 9th May 1928. The peti-
tioner's case here is that tax having been
paid on the Rs. 4,10,000 sent from Ipoh
to Rangoon in 1926 that was a tax-free
fund and that that tax-free fund or
amount was sent back to Ipoh where
there was that tax-free fund or tax-paid
fund in the hands of the assessee and in
addition to that there was another fund
which was a profit fund which of course
would be liable to income-tax. We are
not deciding here whether the money
sent from Rangoon to Ipoh was in fact
the money sent from Ipoh to Rangoon
the previous year. We are dealing with
this reference merely on the assumption
that it was. The assessee's endeavour
here and before the Income-tax Commis-
sioner was to show that the Rupees

91,262 odd sent from Ipoh to Rangoon with which to pay the income-tax levied came out of the tax paid or tax-free fund in his hands at Ipoh. Had he been able to prove any such thing as that, then, in our opinion, he would have been entitled to maintain that, as the fund had already been taxed, this sum of Rupees 91,262 odd could not be taxed again because that sum has been assessed to income-tax by the Income-tax Commissioner as a remittance received in British India out of profits of the foreign firm at Ipoh.

We are asked here to say that the presumption that a remittance is out of profits has been rebutted here, the ordinary presumption being that, when money is received in British India from another country, the remittance is out of profits. The assessee however contends that an overriding presumption in their favour has been raised and that is that where there are two funds at the disposal of a person, one, a fund upon which income-tax has been levied and another fund which is still liable to income-tax the presumption is that the former will be drawn upon to make payments and not the latter and that this presumption has not been rebutted in this case. What do the entries in the assessee's account books at Ipoh show? The Income-tax Commissioner has found that the whole of the money sent from Rangoon to Ipoh, namely, Rs. 4,08,662 was, when it was received in Ipoh, re-invested with constituents and that, that being so, the assessee cannot be heard to say that the Rs. 91,262 odd remitted by him from Ipoh to Rangoon for the purpose of paying income-tax came out of that fund. The following are the entries to be found in the books of the assessee: on 17th February 1927 a sum of Rs. 77,250 equivalent to \$50,000 was remitted by the Rangoon business to the Ipoh business; on 26th February 1927 a sum of Rupees 1,00,912 equivalent to \$65,000 was remitted; on 4th March 1927 a sum of Rs. 93,000 equivalent to \$60,000 was remitted; on 11th March 1927 a sum of Rs. 77,500 equivalent to \$50,000 was remitted; and finally on 28th March 1927 a sum of Rs. 60,000 equivalent to \$38,799 was remitted making a total of Rs. 4,08,662. Let us see how these sums of money were dealt with and the dates upon which they were. On 17th Febru-

ary 1927, the same date on which the sum of \$50,000 was received, an identical sum was advanced to a constituent; on 26th February 1927 the date on which the sum of \$65,000 was received, similarly an identical sum was lent out to somebody in Penang; on 4th March 1927 the same date on which the sum of \$60,000 was received, a sum of \$59,000 was advanced to a constituent and a sum of \$1,000 was advanced to another making a total of \$60,000; on 11th March 1927, the same date on which the sum of \$50,000 was received, an identical amount was lent out to a constituent in Penang; and on 28th March 1927, the same date upon which the sum of \$38,799 was received, a sum of \$38,803 was advanced to another constituent; so that with the exception of a very small amount, the whole of the Rs. 4,08,662 was by 28th March 1927 re-invested with other constituents and was no longer in the hands of the assessee.

We have got to consider again the date upon which the remittance in order to pay income-tax took place. That was on 27th April 1928. At that time according to the books the whole of the money received from Rangoon was still invested with the constituents of the assessee's firm. Therefore upon the assessee's own showing and by reason of the entries made in his own books presumably made upon instructions by the agent who was carrying on the business there none of the Rs. 91,262 odd ever came out of the fund remitted from Rangoon to Ipoh. That being so, it is obvious that it did not come out of the fund upon which income-tax had already been paid. But in spite of these very clear entries which are admissions completely destructive of the assessee's case we are asked to say that they cannot be taken as evidence of the fact that this sum of money received from Rangoon was not intact in the hands of the assessee and that the Rs. 91,262 odd did not come out of it. In support of this contention a passage in the judgment of the Lord Chancellor, Lord Haldane, in *Sugden v. Leeds Corporation* (1) was relied upon. The passage referred to is at p. 253 and it is as follows:

1. (1914) A C 483=108 L T 578=83 L J K B 840=77 J P 225=11 L G R 662=6 Tax Cas 211=57 S J 425=29 T L R 402.

"If the annual payments would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of the tax he has deducted."

We are told that in that case the Leeds Corporation in their books of account had shown that sums of money had been paid out of certain sources of income that they had the right to make the payments out of another fund or another source of income and that in spite of their accounts showing that they had made these payments out of a certain source, they were entitled to say thereafter that the payments were made out of another fund. Whatever may be the facts of that case, I cannot for one moment think that that observation of the Lord Chancellor can have any application to the facts of this case. It is argued, of course, that here there is the certain presumption, that is to say, that where a person has a fund in his hands which has already been subjected to income-tax, and another fund in his hands which is liable to income-tax if he is called upon to make any payment in the course of his business or otherwise he is much more likely to make the payment out of the fund which has already been taxed rather than out of the fund which remains to be taxed. That may be a reasonable presumption to draw but, in my view, this is not a case at all of drawing any presumption. No presumption of the kind suggested by the assessee arises here, in view of the fact that we have got the book entries of the assessee himself which clearly show that the remittance of Rs. 91,262 odd was not made out of a fund which had already been subjected to income-tax. There were profits in the Ipoh business and the ordinary presumption arises therefore that there being profits more than sufficient or sufficient to cover the amount of the sum remitted, the remittance of Rs. 91,262 odd was a remittance from the profits of Ipoh business.

To allow the contention of the assessee here would be to say that where a person has two funds in his possession, one of them being a fund which has been subjected to income-tax and the other being a fund which remains to be taxed the presumption that any remittance he makes is out of the one already subjec-

ted to tax can never be rebutted, or it is an irrebuttable presumption. That of course cannot possibly be the law. In this case even if that presumption had arisen, it would be clearly rebutted by the book entries of the assessee himself. In what other way can the income-tax authorities rebut such a presumption? If they are not to be allowed to pray in aid the book entries made by the assessee himself or by his agent it is very difficult to see how they can possibly rebut the presumption which is sought to be raised in aid of the assessee here.

Another case, namely, the Quilon case *Subbiah Iyer v. The Commissioner of Income-tax, Madras* (2), was referred to. There the facts that book entries had been made by the assessee, that the payments made from Quilon to British India were out of current account, that the book entries made by the assessee in his British India books showed that the remittance was of capital and that the genuineness of those entries was not challenged were taken as circumstances rebutting the ordinary presumption which arose that the remittance from Quilon to British India was a remittance out of profits. It is an amazing contention that though an assessee can avail himself of book entries in order to rebut such a presumption, the income-tax authorities are not similarly entitled to rely upon book entries to rebut any other presumptions which may be raised in favour of an assessee. Under these circumstances, our answer to the question referred to us must be in favour of the Income-tax Commissioner. Costs Rupees 250 to the Commissioner.

Sundaram Chetty, J.—I agree.

Burn, J.—I agree.

P.R.S./M.N. *Answer accordingly.*

2. A I R 1930 Mad 457=127 I C 225 (S B).

A. I. R. 1933 Madras 16

BEASLEY, C. J. AND CORNISH, J.

Universal Mutual Aid & Poor Houses Association, Limited, Madras—Appellant.

v.

A. D. Thoppa Naidu and others—Respondents.

Original Side Appeal No. 8 of 1932, Decided on 9th March 1932, against decision of Stone, J., D/- 1st February 1932.

(a) Penal Code (1860), S. 294-A—Lottery is distribution dependent on chance only—It is different from wager—Contract Act (1872), S. 30.

What constitutes a lottery is that some gain, which need not be a money prize necessarily, is to come to the subscriber dependent upon pure chance, any element of skill being absent. It is distinct from a wager which is between two parties whereas a lottery is a multipartite agreement: *A I R 1927 Mad 583 (F B), Expl.*

[P 20 C 1]

(b) Penal Code (1860), S. 294-A—Company for conduct of lottery is illegal even if some objects are philanthropic—It should be wound up—Companies Act (1913), S. 162—Contract Act (1872), S. 30.

Where the main objects of a company is the conduct of a lottery, the mere fact that some of its objects were philanthropic will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose. The purpose would still be illegal even where the illegal business is merely annexed to the real one which is philanthropic: *English cases referred.*

[P 20 C 2]

T. R. Venkatarama Sastri and V. Viswanatha Sastri—for Appellants.

Ch. Raghava Rao, T. V. Ramanathan and K. R. Srinivasa Raghava Ayyangar—for Respondents.

Beasley, C. J. — This is an appeal from a judgment of Stone, J., ordering the winding-up of the appellant company. The learned trial Judge has found that the company was formed for an illegal purpose, the purpose being an offence under S. 294-A, I. P. C., that is to say, conducting a lottery or keeping an office for the purpose of drawing a lottery or publishing proposals relating to the drawing in such lottery. No exception can be taken to the Memorandum of Association of the Company where the objects of the company are quite unobjectionable. Had the affairs of the appellant company been conducted strictly in accordance with those objects, no complaint whatever could have been made against it. It is argued on behalf of the respondents that the Articles of Association disclose purposes far beyond those appearing in the Memorandum of Association. It is contended that the Articles disclose that the object of the company was to conduct a lottery. The appellants, on the other hand, contend that the object of the company was to benefit charity and that there was nothing illegal in the conduct of the company. Reference must be made at this stage to the Memorandum of Association. There we find that, amongst other objects, one object is to raise general donation funds

to carry out charitable objects. Of the special donation fund raised, not less than 30 per cent is to be invested entirely and permanently in Government securities and not more than 70 per cent on the security of immovable property. Of the interest from the before-mentioned investments, not less than 75 per cent is to be utilised in granting personal loans to the donors and in paying relief bonuses to their heirs. At the extraordinary general meeting of the company held on 25th November and 17th December 1930 in lieu of certain existing articles certain new articles were incorporated after sanction by the share-holders. The important articles are Arts. 16, 17, 18, 19, 20 and 21. Under these articles a donation certificate is to be granted to a person for each sum of Rs. 100 he pays either in a lump payment or by instalments as a contribution to the Poor Houses Special Donation Fund of the Association; and one lakh of such certificates is to form one series. Out of the interest accruing on the 70 per cent of the fund invested on security of immovable property, not less than 75 per cent is to be utilised every year in granting loans ranging from Rs. 1,000 to Rupees 10,000 to 200 donation certificate-holders on their personal security without interest and relief bonuses to the heirs of 200 donation certificate-holders who die before getting the loan of Rs. 1,000 or more for every complete series.

The names of the donors that are to get such loans are to be determined only by means of drawings. A donation certificate is to cease to exist when once it is drawn; or, if an advance of Rs. 500 is made to any heir of a donation certificate-holder, all rights to claim any benefits in respect of the same certificate are extinguished. The scheme is one under which anybody who takes a donation certificate of Rs. 100 becomes entitled to a loan of Rs. 1,000 free of interest and anyone who takes certificates for Rs. 1,000 becomes entitled to a loan of Rs. 10,000 free of interest—if he is lucky enough to get his certificate drawn in any of the annual drawings. A person can take a certificate in each and all of the series. But only 200 donation certificates are to be drawn each year. Similarly Rs. 500 is to be paid to the heirs of a deceased donation certificate-holder, but there are only to be 200 of

such payments in each year; and the heirs of those deceased donation certificate holders who have got loans are not to be paid the relief bonus. Subsequently, the articles were still further altered and, in lieu of interest free loans, cash bonuses were substituted. Instead of a donation certificate holder getting loans of from Rs. 1,000 to Rupees 10,000 according to the number of certificates held, he was to get a cash bonus ranging from Rs. 500 to Rs. 5,000, that is to say, a half of the loan amounts.

The question to be considered is whether this scheme is a lottery or not. A lottery is not defined in the Penal Code and we must therefore look elsewhere for a definition. One definition of lottery is found in Webster's Dictionary—viz., a distribution of prizes by lot or chance. In the present case is there anything which is determined by lot or chance? It is contended by the respondents that there is in the case of the loans because the loan is dependent upon whether a certificate is drawn or not and the benefit is therefore dependent upon chance. It clearly is dependent upon chance. Here the drawing is the chance and it cannot seriously be contended that the certificate-holder is dependent for his benefit upon anything else than chance. Suppose a certificate-holder has only one certificate. If he is lucky, he may get his benefit during the first year itself; if he is not lucky, he may not get it, we are told, for at least sixty years. He may hold 12 certificates in which case he has 12 chances in every yearly drawing and under the cash bonus scheme he may be entitled to a cash bonus from Rs. 6,000 to 1,20,000 if all of them are drawn. The question is whether this necessarily leads to the conclusion that the scheme is a lottery and, in considering the question, English decisions upon the point may be more usefully considered since there is no definition of a lottery in the Penal Code. One of these is *Sykes v. Beadon* (1). In that case there was a Government securities trust or combination of more than twenty persons formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual

drawings by lot into preference dividend bonds bearing interest with a bonus. In the opinion of Jessel, M. R., this was a lottery and therefore illegal under the Lottery Act. On p. 190, Jessel, M. R. says:

"The holders of certificates are persons who subscribe money to be invested in funds which are to be divided amongst them by lot, and divided unequally. That is, the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose certificates are not drawn, and it depends upon chance which gets the greater or the lesser advantage. It is therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund by chance and unequally."

Another case is *Taylor v. Smetten* (2). In that case Taylor sold packets each containing a lb. of tea at 2 sh. 6d. a packet. In each packet a coupon was inserted entitling the purchaser to a prize and the prizes varied in character and value. It was held that this constituted a lottery. It was conceded that the tea was worth the money paid for it, but what the purchaser did was, he bought the tea coupled with the chance of getting something of value by way of a prize but without the least idea what that prize might be. In making his purchase he exercised no choice. What he bought he bought without any option or action of his own will, but as the result of mere chance or accident. Another case is the *Premium Bonds case Re. International Securities Corporation Limited* (3). It is a case very similar to this. The learned trial Judge in the course of his judgment refers to an Australian case. According to the head-note—there is unfortunately no report available in Madras—the facts were very similar to those in the present case. The head-note is set out in the judgment of the trial Court and it is therefore not necessary to repeat it here. In that case on the facts it was held that that was a distribution of prizes by lot or chance and therefore a lottery. It was argued that there was no difference between a lottery and a wager. This argument was necessary because the appellants at first relied very strongly upon the decision of a Full Bench of this Court of which I was a member, viz., *Narayana Ayyangar v. Vellachami*

1. (1879) 11 Ch D 170=18 L J Ch 522=40 L T 243=27 W R 464.

2. (1883) 11 Q B 207=52 L J M C 101=48 J P 26.

3. (1909) 99 L T 581=24 T L R 837.

Ambalam (4), a chit fund case. It was there held that the promotion of a chit fund, wherein the number of subscribers is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him either before or at the closing of the fund at a fixed time, is not a wagering contract within S. 30, Contract Act, even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. The head-note also states that this was not an offence within S. 294-A, I. P. C., and it is this no doubt that has caused this case to be thought to support the appellants. The facts are set out at p. 697 (of 50 *Mad.*) as follows:

"In this case the defendants were the promoters of the chit fund in question. According to the rules framed by them for the fund they proposed to work the chit as soon as 500 people became subscribers, each agreeing to subscribe one rupee a month. The rules further provided that the chit was to run for 50 months and at the end of each month Rs. 50 was to be given by the defendants to the person who was determined by the casting of lots out of the 500. Any person whose name was so drawn by lot either in the first month or in any of the succeeding 49 months got Rs. 50 and he was thenceforward relieved from paying the further monthly instalments. After the 50th lot was cast the chit fund was to be closed and all the remaining 450 people were to be given by the defendants each Rs. 50. Under such rules the plaintiffs who subscribed for two chits subscribed Rs. 36 for 18 months at the rate of Rs. 2 a month. As the defendants refused to run the chit fund after the 18th month the plaintiffs brought this suit for Rs. 36 and interest. The defendants pleaded that the chit fund was a lottery, that the transaction between the parties amounted to a wagering contract and that it was therefore unenforceable. Upholding the defendant's plea the Munsif dismissed the suit. Hence this revision petition."

In his order of reference to the Full Bench, Waller, J., stated that the two questions which arose were: (1) whether the fund was a lottery and (2) if it was, whether the subscriptions were recoverable. When the case came before the Full Bench, as it then constituted, a finding was called for as to whether an offence as defined by S. 294-A, I. P. C., was committed when the transaction was formed. The District Munsif found as follows:

"The plea was raised by the defendants. The onus is on them. Nothing is placed before me by them wherefrom I could determine how the

chit fund was organized and advertised and whether any one who liked could join by merely paying subscriptions, points considered to be essential for a satisfactory solution of the question whether the chit fund was a lottery. As observed in the order of remand, the rules of the fund as given in the printed book filed with plaint are not sufficient to make this clear. In spite of facilities having been afforded to defendants, they have not chosen to appear before me and let in evidence though I waited till this day. I must therefore answer the question in the negative."

When the case was further considered as there was the finding that no offence under S. 294-A, I. P. C., had been committed, we proceeded to consider the only other point, viz., whether this amounted to a wagering contract. Throughout the judgment of the Full Bench there is a discussion of that aspect of the case and that only. It is quite clear that there was no decision by the Full Bench that the chit fund in question was not a lottery. Thus it was that at a late stage in the argument when the real effect of the Full Bench decision became apparent it was contended on behalf of the appellants that wagering was the same thing as keeping a lottery. In my view the two are not the same. In *Carill v. Carbolic Smoke Ball Co.* (5), at p. 490, Hawkins, J., defines a wager thus:

"A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties If either of the parties may win but cannot lose, or may lose but cannot win it is not a wagering contract."

In *Hampton v. Walsh* (6), at 192, a wager was described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening. In *Thacker v. Hardy* (7), Cotton, L. J. says:

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature; that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win."

5. (1892) 2 Q B 484.

6. (1876) 1 Q B D 189.

7. (1878) 4 Q B D 685=48 L J Q B 289=39 L T 595=27 W R 158.

In *Earl of Ellesmere v. Wallace* (8), Russell, J., held that there cannot be more than two parties or two sides to a bet and that there may be a multiparty agreement to contribute to a sweepstakes, which may be illegal as a lottery if the winner is determined by chance, but not if the winner is determined by skill. In the present case none of the parties are betting against each other. There are no two sides unless the subscribers on the one hand and the company on the other can be said to be sides. The scheme under consideration seems to me to have none of the elements of a wager but to possess all of those of a lottery as defined. It was also argued for the appellants that it was essential to a lottery that there should be a money prize. This is clearly not necessary as the case of *Taylor v. Smetten* (2) shows. Nor can it affect the question that the subscriber receives the whole of the amount subscribed by him on some future date. What constitutes a lottery is that some gain is to come to the subscriber dependent upon pure chance, any element of skill being absent. In my view the learned trial Judge was right in holding that the conduct of the appellant company was illegal under S. 294-A, I. P. C. It was further contended that, as the company was formed for the purpose of benefiting charities and the lottery was merely an annexe to the original business no offence can be held to have been committed. This in my view is clearly wrong. S. 294-A, I. P. C., is sufficiently wide in its terms to negative any such contention as this and moreover there is an English case which shows the contrary, namely, *Leng (Sir W. C.) & Co. (Sheffield Telegraph v. Sillitoe)* (9), the *Football Coupon* case. There, a newspaper company was convicted of carrying on a ready money football betting business contrary to the Ready Money Football Betting Act of 1920. It was found as a fact by the Justices that on the date specified in the charge some persons bought the newspaper solely, and that other persons bought it partly, to obtain the coupon, and so to acquire the chance or possibility of winning a prize. Lord Hewart, C. J., says at 373:

8. (1929) 2 Ch. 1=98 L J Ch 177=140 L T 628
=73 S J 142=45 T L R 238.

9. (1929) 1 K B 366=98 L J K B 262=140 L T
500=93 J P 26=26 L G R 695=72 S J
810=45 T L R 94.

"What is necessary for a conviction under the Act is that the defendant should be shown to be carrying on a ready money foot-ball betting business within the definition in S. 2 of the Act. In my opinion, it is quite immaterial that a person who is charged with carrying on such a business can show that he is also carrying on another business however well established and well known it may be. If he annexes to an existing business a business which comes within the statute he is liable to the penalties provided by S. 1. And to appreciate the relation between the printer or publisher and his clients, it is not necessary to make a guess or to strike an average. What has to be examined is the nature of the transaction which takes place between the printer or publisher and the individual purchaser of the thing published."

In the present case from the handbook published by the company it is quite clear that the public are invited to purchase the certificates because of the chance there is of securing valuable prizes. Although some of the objects of the company may be philanthropic, it seems clear that the main object of the company was to conduct a lottery. No argument upon the facts that the illegal business was merely annexed to the real business can prevail nor could it, even if those facts were proved, in law prevail. It is further contended that no order for the compulsory winding up of the company ought to be made because it is still possible for the company to conduct itself so as only to carry out the original purposes for which it was formed and that the objectionable features of it can be removed. It seems to me however that by the removal of its obnoxious features the substratum of the company goes. Under these circumstances, the learned trial Judge was quite right in ordering it to be compulsorily wound up. This appeal must therefore be dismissed with costs.

Cornish, J.—I am of the same opinion. I think it is impossible to regard the scheme of interest-free loans or cash bonus scheme which supplanted it as anything but a lottery. According to the scheme as adumbrated in the Articles of Association and in the prospectus issued by the company a donation of Rs. 100 to a fund called the Poor Houses Special Donation Fund gives the donor a certificate and the chance of that certificate winning one of the 200 prizes ranging in amount from Rs. 500 to Rs. 10,000 at the annual drawing of certificates for these cash bonuses. The articles and the prospectus expressly provide that the

prize winners, as also the amount of the prize won by each, shall be determined only by means of drawings. The scheme purports to ensure a certificate holder receiving at least Rs. 500 in respect of his certificate, for the arrangement is that if the certificate is not drawn for a prize in the holder's lifetime his heirs will receive on his death a payment of Rs. 500, called a Death Relief Bonus. But the winning of the other cash bonuses is purely a matter of chance dependent on the luck of the draw. And this feature, in my judgment, entirely distinguishes the case from *Wallingford v. Mutual Society* (10), where the fact that the apportionment of the loans to members of a benefit society was regulated by lot, was held not to bring the arrangement within the Lottery Acts. The lot merely decided the order in which the loans were to be made to the members of the society, and the loans were not in the nature of prizes dependent on the chance of the draw.

There is no definition of "lottery" in the Penal Code; so that the word, as it occurs in S. 294-A, I. P. C., must bear its ordinary meaning, which is, a distribution of prizes by lot or chance without the use of skill: see *Re. International Securities Corporation Ltd.* (3) and *Earl of Ellesmere v. Wallace* (8) at p. 52. An absolutely gratuitous distribution on chances, none of which had been paid for by the participants would not, in the opinion of Darling, J., in *Willie v. Tounge and Stenbridge* (11), amount to a lottery. But that is not the case here. It is true that the prize money was provided from the interest received from investments made by the company of the money subscribed by the certificate holders. But the money was subscribed with the knowledge and with the object that it was to be invested and that a specified proportion of the interest derived from the investments was to be distributed amongst the subscribers in cash prizes according to the luck of the draw. That was the great inducement held out in the company's prospectus to subscribe and become a certificate holder. The prospectus at p. 34 in describing the advantages of taking certificates, says:

"The maximum amount of cash bonus one can get in respect of each certificate in the drawings is Rs. 10,000. That is to say, if a person holds

two certificates in each of the 12 series, he will be entitled to a cash bonus up to Rs. 2,40,000 at Rs. 10,000 for each certificate in case all of them come up first in the drawings."

In fact, the subscribers embarked their money in the company for the purpose of participating in chances of drawing these big money prizes. In my judgment the cash bonus scheme was clearly a lottery. The learned advocate for the appellant laid great stress on the Full Bench ruling in *Narayana Ayyangar v. Vallachami Ambalam* (4), in aid of his contention that there was no substantial difference between a chit fund scheme and the present scheme. The Full Bench however did not rule that a chit fund was not a lottery. There was no occasion for it so to decide in view of the finding, called for from the lower Court, that the necessary elements of an offence under S. 294-A, I. P. C., were absent. The decision was confined to the question whether the subscribers to the chit fund could enforce the contract against the promoter; and it was held that they could, because the contract was not a wagering, and consequently a void contract. But a lottery does not mean the same thing as a wagering contract, and Ramesam, J., who delivered the judgment of the Full Bench, was careful to point this out in criticising the use of the word "lottery" by Spencer, J., in *Veeranan Ambalam v. Iyyachi Ambalam* (12) to signify a wagering contract. The distinction between the two will be found further illustrated in *Stoddart v. Sagar* (13) and in Russel, L. J.'s judgment in *Earl of Ellesmere v. Wallace* (8).

It remains to be considered what should be done with the company. It is clear from the articles and the prospectus that the company is conducting this lottery as an important integral part of its business. According to the prospectus the sum to be annually expendible in providing cash bonuses does not fall far short of the amount to be allocated to the charitable undertakings of the company. But a lottery per se is not illegal in British India. An Act, 5 of 1844, instituted an Act for suppressing all lotteries not authorized by Government, declared unauthorized lotteries to be common nuisances. But it was repealed by

12. A I R 1926 Mad 168=92 I C 968.

13. (1895) 2 Q B 474=64 L J M C 234=15 R 579=18 Cox C C 165=73 L T 215=44 W R 287=59 J P 598.

10. (1881) 5 A C 635=50 L J Q B 49=43 L T 258=29 W R 81.

11. (1907) 1 K B 448.

Act 27 of 1870 which amended the Penal Code by introducing S. 291-A. The illegal aspects of a lottery therefore have to be found in S. 294-A, and consist in the keeping of any office or place for the purpose of drawing any lottery not authorized by Government or in publishing such lottery. There can, I think, be no doubt that the company in keeping an office, as it does, for the conduct of this lottery, and in publishing in its articles and prospectus the scheme of the lottery, is acting in contravention of S. 294-A. The business, at least a very substantial part of it which it is carrying on, is consequently an illegal business; and, such being the position, the case of *Re. International Securities Corporation Ltd.* (3) is good authority for ordering the compulsory winding up of the company.

P.R.S./M.N.

*Appeal dismissed.***A. I. R. 1933 Madras 22**

SUNDARAM CHETTY, J.

V. S. R. M. Chockalingam Chettiar
and another—Plaintiffs—Appellants.

v.

Taluk Board, Devakotta—Defendant
—Respondent.

Second Appeal No. 882 of 1928, Decided on 15th August 1932, against decree of Sub-Judge, Devakotta, in A. S. No. 16 of 1927.

(a) Civil P. C. (1908), S. 102—Suit for return of money less than Rs. 500 recovered as tax and injunction to prevent defendant from levying it again—Reliefs independent and necessary—Suit is not of Small Cause nature—Provincial Small Cause Courts Act (1887), Art. 17.

A suit was for the recovery of a sum (less than Rs. 500) collected as profession tax for a particular year, and also for an injunction against the defendant in respect of levying this tax for the succeeding two years. The relief by way of injunction as claimed in the plaint was not merely prefatory or ancillary to the return of the money nor could it be said that all the reliefs which the plaintiffs sought in respect of the plaint mentioned years could be obtained, without asking for an injunction.

Held: that as both the reliefs, which were independent ones, could not be granted by a Small Cause Court, the suit was not of a Small Cause nature and second appeal lay: *A I R 1932 Mad 226; 30 Mad 101 and A I R 1930 All 702, Dist.* [P 23 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 93—Actual receipt of income within area must be proved—Mere residence is not sufficient.

He who, within the area of the Taluk Board is in receipt of income from money lending, is liable to pay the profession tax. The actual receipt of the income within the limits of that area must be shown. It is not enough to show

his residence alone within that area: *A I R 1920 Mad 314 and A I R 1923 Mad 574, Rel. on.; A I R 1932 Mad 509 and A I R 1932 Mad 226, Foll.; 21 I C 847, Dist.* [P 23 C 2]

Watriap S. Subramania Ayyar—for Appellants.

K. Rajah Ayyar—for Respondents.

Judgment.—Plaintiffs are the appellants. They filed a suit against the Taluk Board of Devakotta for a refund of Rs. 254-9-9 being the profession-tax illegally collected for the year 1923-24, by the defendant, and for an injunction restraining the defendant from assessing them to profession-tax on similar grounds for the succeeding years, 1924-25 and 1925-26. A decree for the refund of the money was passed by the first Court in plaintiff's favour, but the lower appellate Court set aside that decree, and dismissed the plaintiff's suit. Hence this second appeal.

A preliminary objection is raised by Mr. Rajah Ayyar for the respondent, that no second appeal lies in this case. If this is a suit cognizable by a Small Cause Court, no second appeal will lie, as the amount or value of the subject-matter of the suit does not exceed Rs. 500 (S. 102, Civil P. C.). It is also clear that a suit to obtain an injunction is exempted from the jurisdiction of a Small Cause Court. The present suit is for the recovery of a sum (less than Rs. 500) alleged to have been collected as profession-tax for a particular year, and also for an injunction against the Taluk Board in respect of levying this tax for the succeeding two years. The relief by way of injunction as claimed in the plaint is not merely prefatory or ancillary to the return of the money, as in the case reported in *Raman Chetty v. Taluk Board of Sivaganga* (1), nor can it be said that all the reliefs which the plaintiffs seek in respect of the plaint mentioned years could be obtained, without asking for an injunction as in the case reported in *Ramachandra Ayyar v. Noorulla Sahib* (2). In the present suit the plaintiffs want to get a refund of the sum paid for one year, and seek to prevent the defendant from levying this tax for the next two years, by getting an injunction. The latter relief claimed is an independent one, and not subservient to the refund of the money asked for.

1. *A I R 1932 Mad 226=189 I C 620.*

2. (1907) 30 Mad 101=16 M L J 477 (F B).

The aforesaid decisions relied on by Mr. Rajah Ayyar, have no application.

It is however contended that though this prayer is treated as an additional prayer it comes within the purview of the decision of the Allahabad High Court reported in *Harbans Deo v. Raja Kunwar*, A. I. R. 1930 All. 702. The case dealt with in that decision has no analogy to the present. In a suit for money the plaintiff asked for an injunction restraining the defendant from transferring his immovables, and it was found that the addition of this absurd prayer was only a dodge, to oust the jurisdiction of the Small Cause Court. In such an extreme case, the learned Judges thought fit to discard that prayer as a fictitious one. There is no reason to brand the prayer for injunction in this suit, in that manner. It seems to be a bona fide prayer, without which the plaintiffs could not avert the levy of this tax for those years. As the plaint stands, it cannot be said, that all the reliefs asked for can be given by a Small Cause Court. I think this suit is not cognizable by a Small Cause Court. The preliminary objection is overruled.

On the merits the question has to be decided on a proper construction of S. 93, Madras Local Boards Act 14 of 1920. It is common ground that the plaintiffs are residents of Poolankurichi (which is within the limits of the Taluk Board area), but do not carry on any money lending business there. The money lending business in respect of which the profession-tax in question was levied, is actually carried on in Rangoon. It is not contended that this tax is leviable under the first category mentioned in the section. The second category of cases is covered by the following provision, viz.:

"Every person who within such area and for the period laid down in S. 96 is in receipt of any income from money lending."

We have to see whether the plaintiffs were assessable to profession-tax for the year 1923-24, in respect of the income of the money lending business at Rangoon, viz., Rs. 25,000. The contention of the appellants is, that as no portion of that income was actually received by them at Poolankurichi, the place of their residence within the area of their Taluk Board, Devakotta, no profession-tax was payable to that Board. Whereas the respondent's contention seems to be,

that by reason of their residence within the area of the Taluk Board, they are liable to pay this tax to the Board, though the income accrued to them at Rangoon and was not actually received at Poolankurichi. The words in the section seem to me to be plain and unambiguous. He who within the area of the Taluk Board is in receipt of income from money lending is liable to pay the tax. The actual receipt of the income within the limits of that area must be shown. It is not enough to show his residence alone within that area. The authorities are clear on this point. With reference to a similar provision in S. 8 (1), Income-tax Act 7 of 1918, it was held that though a person is a resident in British India, owning a money lending business carried on for him by his agents outside British India, he is not liable to be taxed, where the income derived from that business is not remitted to British India: *Board of Revenue, Madras v. Ramanathan Chetty* (3).

The aforesaid section relates to all income from whatever source it is derived, if it accrues or arises or is received in British India. In construing that section, proof of actual receipt of the income within British India was held to be necessary for levying the income-tax under the Act. The same view was upheld in a later Full Bench decision of this Court in *Board of Revenue v. Ripon Press* (4) and the decision in *Aurangabad Mills, Ltd., In re* (5) was also followed. These rulings are applicable to the present case by way of analogy. But there is a recent decision by a Division Bench of our High Court reported in *Perianan v. Devakotta Taluk Board*, A. I. R. 1932 Mad. 509, which is exactly in point. In that case the person had a money lending business at Rangoon, but was a resident within the limits of the Taluk Board of Devakotta. In construing S. 93, Madras Local Boards Act 14 of 1920, Waller, J., says that the plain meaning of the section seems to be that that part of his income is chargeable which he actually receives within the area of the Taluk Board. Same is the view of Jackson, J., in the decision

3. A I R 1920 Mad 344=53 I C 976=43 Mad 75 (S B).

4. A I R 1923 Mad 574=77 I C 621=46 Mad 706 (F B).

5. A I R 1921 Bom 159=64 I C 9=45 Bom 1286.

reported in *Raman Chetty v. Taluk Board of Sivaganga* (1).

Some stress was placed by Mr. Rajah Ayyar on the decision in *Mahadeva Sastri v. Municipal Council, Kumbakonam* (6). That decision was with reference to S. 53, District Municipalities Act 4 of 1884, whose wording is different. Under that section, if the holder of any office or appointment (specified) resides within the Municipal area he is made liable to pay the profession-tax. A pensioner residing in that area, is the holder of an office. Though he drew his pension outside that area, he would still come within the purview of that section. This decision has no application to the present case. (The judgment then considered the evidence and finding that the income was not received within the area of the Board concluded.) I therefore hold that under S. 53, the plaintiffs were not assessable to profession-tax for 1923-24, as no portion of the income of the Rangoon money lending business was actually received by them within the aforesaid Taluk Board area. In the result the appeal is allowed, and the decree of the District Munsif is restored with costs here and in the lower appellate Court.

P.R.S./M.N.

Appeal allowed.

6. (1913) 21 I C 847.

A. I. R. 1933 Madras 24

BEASLEY, C. J. AND BURN, J.

(Adam Hajee) Peer Mahommed Essack—Appellant.

v.

Hajee Sukur Ganny—Respondent.

Original Side Appeal No. 83 of 1931, Decided on 29th July 1932, against decision of Stone, J., D/- 31st July 1931.

Tariff Act (1894), S. 10—Article duty paid means article for which duty is to be paid by seller—Sale of articles in bonded warehouse—Duty increased before delivery—Purchaser must tender full price including increased duty for getting delivery—Sea Customs Act (1878), S. 37—Contract Act (1872), S. 51.

The words "article duty paid" in S. 10 does not mean articles upon which the duty has been paid at the time of the making of the contract. What is meant is that it is to be a sale of an article in respect of which the liability to pay duty is upon the seller and he sells the article duty free.

[P 25 C 1]

The plaintiff contracted to purchase certain articles for home consumption from a bonded warehouse. Between the date of contract and demand for delivery the import duty was increased and the customs authorities refused de-

livery till that duty was paid. The plaintiff brought a suit for damages for nondelivery.

Held: that the seller was entitled to refuse delivery until the contract price and the additional duty was tendered to him. The fact that the duty had not been paid by seller made no difference.

[P 25 C 2]

G. Ramakrishna Ayyar and C. Srinivasa Chari—for Appellant.

T. N. Sambasivan—for Respondent.

Beasley, C. J.—This appeal raises an interesting point. The appellant was the plaintiff in the trial Court and in the suit he claimed damages from the defendant for nondelivery of some bags of sugar. The defendant, the respondent here, was the seller of those bags which had been imported from Java and at the time of the sale lay in a bonded warehouse. The sale was effected on 28th February 1930 and on the next day the import duty on sugar was increased by Rs. 3 per bag. On that day the plaintiff demanded delivery of the sugar from the defendant and delivery was refused because the Customs House authorities refused to allow delivery to be given unless the increased duty in respect of the bags was paid. The sale was a sale of ready goods for ready delivery. Stone, J., has found as a fact that the sale was of goods in a bonded warehouse and there is ample evidence to support that finding—indeed, there is no evidence on the appellant's side to the contrary. Evidence was necessary upon the point because it was argued that a sale of goods of this description meant a sale of goods in a warehouse which was not a bonded warehouse, not requiring the payment of any extra customs duty. It should be mentioned that the appellant possesses another warehouse in Madras but the limit of its accommodation is 1,000 bags of sugar and that the suit claiming damages was in respect of bags which lay in the bonded warehouse. I see no reason whatever to find fault with the findings of fact of the learned trial Judge on this point.

What we have now got to consider is whether the appellant was entitled to demand delivery of the bags of sugar without paying the increased duty. It is argued that by reason of S. 10, Tariff Act, 1894, the liability to pay the increased duty does not fall upon the appellant at all, but upon the respondent, because the respondent has not brought himself within the provisions of that

section. That section obviously was enacted for the purpose of making it plain, in the absence of any agreement, upon whom the liability to pay duty upon articles which had been agreed to be sold was where the duty had increased between the time the contract of sale was made and the delivery of the goods. It was in order to make quite clear what the position both of the seller and the purchaser of the goods would be under such circumstances. Here, in between the time of entering into the contract of sale of these bags of sugar and their delivery, the import duty was increased by Rs. 3 per bag. Upon whom was the liability to pay that increase? The section in question, S. 10, reads as follows:

"In the event of any duty of customs or excise of any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article without stipulation as to the payment of the duty where duty was not chargeable at the time of the making of the contract, or for the sale of such article duty-paid where duty was chargeable at that time. . ."

It is the latter part of the section which has application here. This was a case of the sale of an article in respect of which there was a duty chargeable and that duty chargeable was subsequently increased. Here sub-Cl. (a), S. 10 comes into play. It is as follows:

"If such imposition or increase so takes effect that the duty or increased duty, as the case may be, (or any part thereof) is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition."

Sub-Cl. (b) has no application here. The point taken before us, although it does not appear to have been taken at all before the learned trial Judge, was that the words "article duty paid" in the section mean articles upon which the duty has been paid at the time of the making of the contract.

In my view, that is not the meaning of those words. What in my view, is meant is that it is to be a sale of an article in respect of which the liability to pay duty is upon the seller and he sells the article duty free. If it had been intended that in order to comply with the provisions of that section or to bring himself within the provisions of that section a seller must already have paid the duty, then I should expect the section to read "for the sale of such article upon which the duty has been paid." That is

not what the section says. Stone, J., says that it was the duty of the purchaser who is under that section liable to pay the increased duty to tender the proper amount to the seller before he was entitled to demand delivery. That of course is one alternative. It is also pointed out by the learned trial Judge that the seller himself might have paid the duty and recovered the increase from the purchaser; but this is a suit by the appellant to recover damages for non-delivery of the goods and, in my view, the respondent was perfectly entitled to refuse to give delivery until the proper price, that is to say, the agreed purchase price plus the increased duty, had been tendered to him. The fact that the duty had not been paid in this case makes no difference at all. It is found as a fact that the sale was of goods in a bonded warehouse and by reason of S. 37, Sea Customs Act, it does not matter at all whether the old duty had been paid. Under that section if the old duty had been paid and the goods had been allowed to remain in the bonded warehouse and subsequent to the payment of the old duty a new duty, the increased duty, had been put upon the goods, then that duty would have to be paid if and when goods were removed from the warehouse if the purpose for which the goods was removed, was home consumption; and that is this case. So that it did not make any difference at all whether the old duty had been paid or not. The new duty would still have to be paid under S. 37, Sea Customs Act, the goods not having been removed from the warehouse before the date of its imposition. It being found that this was a sale of goods in a bonded warehouse, the question as to whether or not old duty has been paid is immaterial. In my view, S. 10, Tariff Act, means a sale of goods duty-free. For these reasons, this appeal must be dismissed with costs.

Burn, J.—I agree with my Lord the Chief Justice.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 25

PANDALAI, J.

S. A. S. Subbiah Iyer—Appellant.

v.

Official Receiver, Tinnevely—Respondent.

Appeal No. 434 of 1930, Decided on 31st August 1932.

(a) Provincial Insolvency Act (1920). S. 17—Continuation of proceedings after death of debtor—Alienation by debtor can be set aside under Provincial Insolvency Act (1920), Ss. 53 and 54.

When a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17 the Official Receiver or creditors can invoke the power of the Court to set aside settlements and alienations voidable under Ss. 53 and 54. The order passed is not against the estate of the deceased but against the deceased himself and transfers by him can be set aside: *A I R 1928 Mad 476 and 480, Rel. on.* [P 27 C 1]

(b) Practice—Order—Interpretation—Right order of adjudication against deceased debtor intended to be passed but expressed as adjudging deceased's estate—Effect will be given to intention and not to form—Provincial Insolvency Act (1920). S. 17.

The language used by every Court is only the vehicle of its thought and every Court is entitled to full faith and credit for its orders being understood in the way it was intended. Advantage will not be allowed to be taken of slips or errors of language due to a bona fide belief that the Court is adopting the form appropriate for the occasion. Where the Judge who passed the order of adjudication against a debtor who died before it was passed against him on a creditor's application intended to pass the right order of adjudging the deceased debtor as insolvent but expressed himself as adjudging the estate because he thought that that was the proper way to word the order against a dead man, effect must be given to the order in the way in which it was intended. [P 27 C 2]

T. R. Venkatarama Sastriar and P. R. Srinivasan—for Appellant.

B. Sitarama Row for *R. Krishna-swami*—for Respondent.

Judgment.—The two lower Courts have arrived at opposite conclusions on the question whether when a debtor against whom a petition in insolvency has been presented dies before adjudication and the proceedings are continued under S. 17, Provincial Insolvency Act, the Official Receiver or creditors can invoke the power of the Court to set aside settlements and alienations voidable under Ss. 53 and 54. The first Court gave a negative answer and the lower appellate Court an affirmative answer to this question. I venture to think that the difficulty felt by the lower Courts is due rather to the form of the order of adjudication which the insolvency Court passed in the case rather than to anything obscure in the provisions or language of the Act. The facts are simple and undisputed. A creditor's petition (I. P. No. 58 for 1927) was filed against one S. K. Krishna Iyer. He died some 15 months afterwards before any order of adjudica-

tion was passed. Notice of the petition was sent to his minor son (respondent 2) and on 4th February 1929 the Court passed an order that the estate of respondent 1 (Krishna Iyer) be and the same hereby is adjudged as insolvent and that the Official Receiver, Tinnevely, is appointed Receiver to administer it. Respondent 2 (son of Krishniah) was ordered to produce the accounts and documents of title before the Official Receiver in one month and to perform all the other duties imposed by the said Act and also to apply for discharge of the estate within one year from the date of the order. In the course of the subsequent proceedings the Official Receiver applied to set aside certain alienations under Ss. 53 and 54. The appellant, the alienee, took inter alia the objection that the application was incompetent as his transferor had not been declared insolvent but only his estate.

This objection was literally correct but only literally so. For it assumed firstly, that when proceedings are continued against the debtor after his death before the order for adjudication, the order passed under S. 17 must be not of the debtor himself but of his estate only and secondly, that when an order is passed as in the present case expressed to be adjudging the estate insolvent, it means in the circumstances something different, from an order against the debtor. Both these assumptions are wrong. As to the first point, it is concluded by the authority of *Venkatarama Ayyar v. Official Receiver, Tinnerelly* (1) and *Ramathi Anni v. Kanniappa Mudaliar* (2). In those cases on facts similar to the present, the Court had passed orders adjudging the deceased debtor insolvent. The objection raised was that on the language of S. 17 as amended by the Act of 1920 there could be no order of adjudication against a dead man and it was argued that that was the effect of altering the words "as if he were alive" which occurred in the old section to "as far as may be necessary for the realization and distribution of the property of the debtor."

This contention was fully dealt with in the latter case and rejected in both cases by this Court, the result being that the proper order to pass in a case like the pro-

1. *A I R 1928 Mad 476 = 51 Mad 344 = 109 I C 94.*

2. *A I R 1928 Mad 480 = 51 Mad 495 = 110 I C 107.*

sent is to adjudge the deceased debtor and not his estate. I asked learned counsel on both sides for any rule or precedent by which an order adjudging the estate insolvent is contemplated by the Provincial Insolvency Act. They did not refer to and I am not aware of any such. It is to be noted that the Provincial Insolvency Act, does not contain any provision similar to Ss. 108 and 109, Presidency Towns Insolvency Act, corresponding to S. 130, English Bankruptcy Act, empowering the insolvency Court to administer insolvent estates. Therefore considerations and decisions applicable to that power must not be confused with cases falling within S. 17, Provincial Insolvency Act, which corresponds to S. 93, Presidency Towns Insolvency Act, and S. 112, English Bankruptcy Act. The form of the order of adjudication in this case is probably due to this distinction not being borne in mind. However that maybe, the contention that when a debtor dies after the petition but before adjudication the powers of the Court under Ss. 53 and 54 are automatically withdrawn because the transferor being dead cannot be adjudged insolvent is clearly untenable in view of the decisions above-mentioned by which I am bound. It follows that if the order of adjudication in the present case had been in terms one adjudging the debtor, and not his estate insolvent, the ground of the appellant's objection to the proceedings under Ss. 53 and 54 would disappear. Learned counsel for appellant seemed to suggest that he could still maintain his objection and base it on the changed language of S. 17 of the Act. With respect, I fail to see how he can do so except by showing that the two decisions are wrong.

Not only am I bound by them but I respectfully agree with them that the change of language in S. 17 was not intended to limit by a side wind the powers of the Court in insolvency when the debtor dies after petition but before adjudication to the power of administration of insolvent estates of persons who die before the petition—a power which is not conferred on Provincial Courts of insolvency at all. Learned counsel had to admit that the language of the section cannot have the effect of so limiting the Courts' power where the debtor dies after adjudication. If so, the words which are perfectly general cannot have

a different effect merely because the debtor dies at an earlier stage—before adjudication. I am therefore of opinion that the substantial ground of the objection fails. But the second part of the objection which is based on the form of the order remains. I have stated that the proper form of order of adjudication in the case was to adjudge the debtor himself and not his estate. I was at first inclined to give some effect to this objection. But on consideration I think I ought not to do so. The phraseology of an order is certainly important as is shown by this very case. But after all, the language used by every Court is only the vehicle of its thought and every Court is entitled to full faith and credit for its orders being understood in the way it was intended. Advantage will not be allowed to be taken of slips or errors of language due to a bona fide belief that the Court is adopting the form appropriate for the occasion. I have no doubt that the Judge who passed the order of adjudication intended to pass the right order but expressed himself as adjudging the estate because he thought that that was the proper way to word the order against a dead man.

Either the decision in *Ramathi Anni v. Kanniappa Mudaliar* (2) was not then reported or was not brought to his notice. In those circumstances I must give effect to the order in the way in which it was intended. After all if full effect is given to the appellants' objection all that follows is that the insolvency Court has not yet passed any order of adjudication. Not only will it then be open to the Court to make a fresh order if necessary but the only effect it will have will be to throw into confusion all that may have happened in the insolvency within the last three years to which no one has taken any objection and in which the appellant has no interest whatever. The appellant's objection has really no merits and no decree or order will be interfered with on account of any irregularity or error not affecting the merits or the jurisdiction of the Court. I am therefore of opinion that the order of adjudication should be read, understood and given effect to as if the debtor himself had been adjudicated. The appeal fails and is dismissed. There will be no order as to costs.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 28REILLY AND ANANTAKRISHNA
AYYAR, JJ.

(Mara) Ramanarasu—Appellant.

v.

Matta Venkata Reddi and others—Res-
pondents.

Appeal No. 13 of 1928, Decided on 24th March 1932, against appellate order of Dist. Judge, Kistna, in Appeal No. 60 of 1927.

Civil P. C. (1908). O. 21. R. 2—Transaction extinguishing decree partially or wholly is adjustment—Fresh contract otherwise legal though involving promise by judgment-debtor to do something in future is adjustment.

Any transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree is an adjustment of the decree. So if a decree-holder enters into a fresh contract with the judgment-debtor with reference to the satisfaction of the decree then unless there be anything illegal with reference to the new contract the new contract, even if it stipulates that the judgment-debtor is to do something in future, would be a ground for the judgment-debtor applying to the Court to enter up satisfaction of the decree : 28 I C 376, *Rel on.*; A I R 1922 All 13, *Expl.*; A I R 1930 Mad 410, *not Foll.*; A I R 1928 Cal 527, *Ref.*

[P 31 C 2]

G. Lakshmanan—for Appellant.

P. Venkataramana Rao—for Respon-
dents.

Reilly, J.—In O. S. No. 24 of 1922 on the file of the Subordinate Judge of Bezvada, the appellant before us obtained a decree for sale on a mortgage against one Venkata Reddi for something over Rs. 3,500. In O. S. No. 25 of 1922 he obtained a decree on another mortgage deed executed in his favour by Venkata Reddi's brother, Rami Reddi. In O. S. No. 25 of 1922 he brought the property to sale and himself purchased it for Rs. 1,750 less than what was due on Rami Reddi's mortgage, and for the Rs. 1,750 he obtained a personal decree against Rami Reddi. After that he brought the property covered by Venkata Reddi's mortgage to sale in execution. That sale was held on 25th October 1926. A man called Saiyed Murtuza Sahib was the successful bidder at that auction and he deposited in Court on that occasion Rs. 952-8-0 as 25 per cent of the amount of his bid. A few days after that sale it is admitted that the decree-holder, Venkata Reddi and Saiyed Murtuza entered into an agreement, which is embodied in Ex. A, dated 3rd November 1926. Ac-

ording to Ex. A the land put up for sale in execution of the decree against Venkata Reddi, for which Saiyed Murtuza had been the successful bidder was to be transferred to the decree-holder with the crops on it except the crops on two fields, and the amount paid by Saiyed Murtuza into Court, Rs. 952-8-0 was to be got back from the Court and paid to the decree-holder; to part of the land which the decree-holder had bought in execution of his decree against Rami Reddi, Venkata Reddi was to give up a claim which it appears he had put forward; four other items of land were to be transferred to Venkata Reddi or, if he chose, in respect of one of them Rs. 1,000 was to be paid by the decree-holder; the other consideration on his side was the amount of his decree against Venkata Reddi and the balance of his decree against Rami Reddi.

It will be seen that the agreement embodied in Ex. A covers several matters beyond the scope of the decree against Venkata Reddi in O. S. No. 24 of 1922. On 9th November 1926 Venkata Reddi presented a petition to the Subordinate Judge in which he alleged that the decree against him in O. S. No. 24 of 1922 had been adjusted in this way to the satisfaction of the decree-holder and prayed that satisfaction of the decree might be recorded. The petition it appears was posted to 4th December 1926, and on that day it was dismissed for default because as Venkata Reddi explains though he was in the Court-house, he was not in the Court room when he was called. On that very day he put in another petition, E. A. No. 2198 of 1926, to the same effect, and that is the petition with which we are concerned. The decree-holder when he got notice of that petition, alleged that he had been induced by fraud to execute Ex. A, Venkata Reddi's object being to keep possession of the land concerned in O. S. No. 24 of 1922 and to reap the crops upon it. He denied that there had been any satisfaction of his decree, and he contended that at any rate Ex. A was not admissible in evidence because it was unregistered.

The Subordinate Judge after taking evidence found that there had been no adjustment of the decree in O. S. No. 24 of 1922 and also found that Ex. A was inadmissible in evidence because it was unregistered. Venkata Reddi preferred

an appeal to the District Judge, who found that Ex. A was admissible in evidence in consequence of the amendment of the law by Act 2 of 1927 and also found as a fact that there had been adjustment of the decree to the satisfaction of the decree-holder and therefore he ordered satisfaction to be recorded. Against that decision the decree-holder has brought the present second appeal.

It is not denied, and it has not been denied at any stage that the decree-holder executed Ex. A on the date it bears. The allegation that he was induced to do so by fraud has not been pressed before us nor apparently before the District Judge. It is not denied that it was intended by the decree-holder, when he executed Ex. A, that the terms of Ex. A should supersede the decree which he had obtained against Venkata Reddi. It is contended however that on the date of Ex. A there was no actual adjustment in satisfaction of the decree, but that Ex. A was only an agreement that the decree-holder would be satisfied, if certain things were done in accordance with Ex. A, which have not been done. And it is contended for the decree-holder before us that there can be no adjustment of a decree within the meaning of R. 2, O. 21, of the Code by a mere promise to do something when that promise has not yet been carried out. In this case it is admitted that the promises contained in Ex. A have not been carried out. It has been found that the land has not been put into the possession of the decree-holder as was intended. It has been found, and it is admitted, that the documents of transfer which were to be executed by the parties, have not been executed. Therefore it is represented that all we have in this case on the side of Venkata Reddi is a promise to do things, which he has not done, and that it is contended could not be accepted by the decree-holder as an adjustment within the rule. The words of R. 2, O. 21 are:

"where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder."

Mr. Lakshmana for the decree-holder contends in effect that a decree can be adjusted to the satisfaction of the decree-holder by something being paid by the judgment-debtor to the decree-holder or by some property being transferred by

the judgment-debtor to the decree-holder or, as I understand him by something being given up by the judgment-debtor to the decree-holder, but that an adjustment cannot be made to the satisfaction of the decree-holder within the meaning of the rule by a mere promise that the judgment-debtor will do something at some future date, though that promise may be a legally enforceable contract. That seems to me to be an exceedingly difficult proposition to establish.

It is admitted that a decree-holder who has a decree for the payment of Rupees 1,000 in his favour may accept in adjustment of that decree to his satisfaction an immediate payment of Rs. 100; but it is contended that a decree-holder in whose favour there is a decree for the payment of Rs. 100 cannot legally accept in adjustment of that decree to his satisfaction, a promise that the judgment-debtor will pay to him at some future date Rs. 1,000. The argument must go so far as that he cannot accept such a promise in whatever form it is either in a bond with sureties or in a mortgage deed. I cannot see any basis for such a contention; but it is alleged that there is authority to be found in *Lachman Das v. Ramnath Kalikamlivala* (1). The head-note of that case in the report perhaps seems to suggest something of that sort. There it is stated:

"the judgment-debtor filed a petition alleging that the question of the execution of the decree had been settled out of Court by means of an agreement between the parties under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immovable property. The decree-holder denied that any such adjustment as alleged had taken place and the judgment-debtor was unable to show that any part of the alleged agreement, which according to his own account of it, was to be performed by him had been so performed. Held that such an agreement as alleged could not be set up by the judgment-debtor under R. 2, O. 21, Civil P. C., as a bar to execution."

But I think when we examine that case with care, we shall find that it is no authority for any proposition so wide. In Piggot, J's., judgment at p. 252 will be found a statement

"that agreement was to the effect that the decree-holder would accept satisfaction of his decree in a modified form and would abandon the execution proceedings which were being taken, as soon as four specified conditions had been fulfilled by the judgment-debtor,"

1. A I R 1922 All 13=64 IC 990=14 All 258.

and it was found that none of them had been fulfilled. That was not a case therefore where it was found that the decree-holder had agreed to accept as immediate satisfaction a promise that something would be done in future by the judgment-debtor but a case where the decree-holder had agreed that, if at some future date the judgment-debtor did something, then he at that future date would accept satisfaction. The case so examined is no authority for the proposition that a promise to do something at a future date cannot be accepted by a decree-holder as a legal and immediate adjustment in satisfaction of his decree. Walsh, J., in that case made a quotation with approval which appears to come from *Ramakrishna v. Eastern Development Corporation Ltd., London* (2), a decision of Seshagiri Ayyar and Bakewell, JJ., in this Court. The words of that judgment on which Walsh, J. relied—I quote them as they actually appear in *Ramakrishna v. Eastern Development Corporation Ltd.* (2), not with the slight variation with which Walsh, J., quoted them—are :

“An inchoate contract would not give the judgment-debtor a right to plead against execution that this contract should be completed and that he should then be permitted to plead that the transferee was only his alias and has no locus standi.”

That an inchoate agreement cannot be pleaded as an adjustment within the meaning of R. 2, O. 21 I should have thought need hardly be stated, as it certainly cannot be disputed. I understand an inchoate agreement to be an agreement not yet concluded by the parties, an agreement which is still in the stage of negotiation; and it is perfectly obvious that a judgment-debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation. However Mr. Lakshmana also relies upon a decision of Cargenven, J., in *Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar* (3). There the learned Judge understands *Ramakrishna v. Eastern Development Corporation Ltd.* (2), to mean that :

“so long as an agreement remains executory and has not been fully executed, it cannot amount to an adjustment under O. 21, R. 2.”

I think that is not what was laid down in *Ramakrishna v. Eastern Development Corporation Ltd.* (2), and, although the

learned Judge adopted that as a proposition of law, with great respect I cannot agree with it. In *Lodd Govindoss v. Ramdoss* (4), Sadasiva Ayyar, J., said that :

“an adjustment referred to in O. 21, R. 2, Civil P. C., is a transaction which extinguishes the decree as such in whole or part.”

Why should not a decree be extinguished by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a contract instead of the decree which he has in his hands. A promise to do something in future is legal consideration, and, if a decree-holder thinks it is to his advantage instead of using his decree, the weapon which he has in his hand, to accept in its stead a promise that the judgment-debtor will do something in future, or if quite apart from any question of advantage, he chooses to accept such a promise, what is there in law to prevent him from doing so? And why should not that be a legal adjustment? It may well be said that, if a judgment-debtor comes into Court and alleges that the decree-holder has given up the weapon available in his hand, the decree which he can execute, and in its place has accepted a promise that the judgment-debtor will do something at a future date and if that is disputed, then the evidence that the decree-holder has done such a thing should be carefully scrutinised. It may very well be a foolish thing for a decree-holder to do; it may be unreasonably generous; it may be likely to give him a great deal of trouble in future. But, if it is proved that he has done so, that he has accepted a new contract in place of his decree as immediate satisfaction of that decree at the time of his acceptance, there is no legal impediment in the way of his doing so and there is no justification for the Court refusing to find on proper evidence that he has done so.

In the present case the learned District Judge has differed from the Subordinate Judge and has found as a fact that the decree-holder on 3rd November 1926, when he executed Ex. A, did accept as an immediate adjustment and satisfaction of his decree a new contract between the parties. Unfortunately the learned District Judge has not discussed the evidence on this subject. The part of his

2. (1918) 43 I C 537.

3. A I R 1930 Mad 410=123 I C 604.

4. (1915) 28 I 76.

judgment which deals with this matter is far briefer than it should have been; but he has arrived at a finding of fact, and, if we examine the evidence in this case, I do not think we can say that there is no evidence to support that finding of fact. In the circumstances it appears that there were some reasons for the decree-holder entering into a new arrangement with Venkata Reddi instead of pressing on with the execution of his decree. (The judgment after giving reasons and holding that the filing of the petition was hurried so as to save the deposit of one-fourth amount from lapsing and discussing the evidence concluded.) It appears to me therefore that, although the learned District Judge has not discussed the evidence in this case, there is clear evidence to support his finding that there was an actual adjustment to the satisfaction of the decree-holder on the date of Ex. A. Whether that was an adjustment into which the decree-holder was wise or unwise to enter is not a matter with which we are concerned. There is a finding of fact, with evidence to support it, that he did accept an immediate adjustment in satisfaction of his decree on that date. With that finding there is no sufficient reason for us to interfere, and, that being so, in my opinion this appeal fails and should be dismissed with costs.

Anantakrishna Ayyar, J.—(After stating facts, his Lordship proceeded.) I may state at once that I must accept in this second appeal the finding of the learned District Judge that there was a completed contract between the parties. The wording of the agreement entered into by the parties lends support to the finding, as also the evidence of the decree-holder given in these proceedings. The main argument advanced by the learned advocate for the decree-holder, appellant before us, was that the defendant, mortgagor, had not really carried out what he had to perform under the terms of this agreement, and that the agreement only evidenced a promise on his part to do something in future and that such a promise would not be a ground for the Court recording satisfaction of the decree. I find myself unable to accept that contention. On the analogy of S. 62, Contract Act :

“if the parties to a contract agree to substitute a new contract for the old, the contract origi-

nally entered into between the parties need not be performed.”

If the decree-holder entered into a fresh contract with the judgment-debtor with reference to the satisfaction of the decree, then, unless there be anything illegal with reference to the new contract, the new contract would surely be a ground for the judgment-debtor applying to the Court to enter up satisfaction of the decree. No doubt if the substance of the new contract be to vary the terms of the decree, or to allow execution in a manner different from that directed by the decree, then, having regard to the provisions of S. 47, Civil P. C., and the scheme of the Code as pointed out by the Privy Council in *Kotaghiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao* (5), the Court would not accept that new contract as a satisfaction of the decree when in essence it purports to vary the terms of the decree with a view to enable the parties to carry out in execution something contrary to the provisions of the decree. But when the new contract is not open to any such objection and is otherwise legal, I fail to understand why the same should not be a ground for the defendant asking the Court to enter up satisfaction of the decree. No doubt if the contract between the parties was that it is only the actual carrying out of the terms of the contract that should be the consideration for entering satisfaction of the decree, then no doubt unless those terms be carried out, it may not be open to the judgment-debtor to apply to the Court successfully to have the adjustment recorded. But the contention that even though there was a completed contract between the parties, yet if the contract be to do something in future and was really of an executory nature, then the defendant could not apply to record the adjustment is, I think, not supported by any provision of law to which our attention was drawn in this case. What the exact meaning of the expression “adjustment of a decree” as used in O. 21, R. 2, is, has been explained by Sadasiva Ayyar, J., in *Lodd Govindoss v. Ramdoss* (4). The learned Judge there stated that

“any transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the

decree in respect of the particular relief or reliefs granted by the decree"

is an adjustment of the decree. That opinion of the learned Judge was followed in *Azizur Rahman v. Aliraja Choudhary* (6). The learned advocate for the appellant however argued that the decision in *Lachman Das v. Ramnath Kalikamlirala* (1) is against this view. As my learned brother has pointed out in his judgment just now delivered, the head-note to the report of that case would seem to go beyond the terms of the adjustment. That would seem to be a case where the decree-holder agreed to accept particular acts if actually done by the judgment-debtor as satisfaction of the decree which he was entitled to execute. It is the actual performance of particular acts mentioned by the judgment-debtor that was considered to be the real gist of the contract between the parties, which would enable the judgment-debtor to apply for recording satisfaction of the decree. Having regard to the terms of the judgment of Piggot, J., I am not obsessed by that decision. On the other hand, as I have already remarked, it is open to the parties to provide for particular acts being done, or particular terms being actually carried out, as the consideration for the decree-holder agreeing to enter satisfaction of the decree. The decision in *Ramakrishna v. Eastern Development Corporation Ltd.* (2) only lays down, as far as I am able to understand it, that inchoate agreements could not be taken to be the basis for recording satisfaction of the decree. Unless there be a completed contract between the parties, an inchoate agreement would only be a step, or steps, in the negotiations between the parties which may ultimately end or not end in a completed contract. No doubt there are certain observations in the judgment reported in *Muthu Vaithilinga Mudaliar v. Subbaraya Chettiar* (3), where the learned Judge, Cargenven, J., observes that a mere promise may not be enough to enable judgment-debtor to apply under O. 21, R. 2; but the learned Judge in his judgment also uses the words "inchoate agreement"; and, as I already remarked, there is nothing in law which would enable the judgment-debtor to rely upon an inchoate agreement for recording satisfaction.

If on the other hand, the learned Judge really meant to lay down that a promise, though supported by consideration and otherwise legal, would never be the basis for an application under O. 21, R. 2, unless the same be actually carried out, then, with all respect, I find myself unable to agree. In the case before me, the terms of the agreement, coupled with the evidence given by the decree-holder himself, make it reasonably clear that the intention of the parties as evidenced by the agreement was that the same should be taken as an adjustment of the decree, since certain things contemplated by the parties could not be carried out except on this view of the agreement. If there is any doubt upon this point as to the meaning of the agreement, the decree-holder's evidence makes the matter reasonably clear. No doubt the agreement entered into by the decree-holder in this case seems to be rather of a complicated nature; and whether he was well-advised in having entered into this contract in this particular case, is not for me to say. There is no finding that there was any fraud practised upon him, or that he was induced to sign the document without knowing the contents of the same. His deposition given in these proceedings makes it clear that he knew what the arrangement was. Being therefore of opinion that in this case there was a legal contract supported by consideration—a completed contract entered into between all the parties interested—by which the decree in question should be taken as satisfied and that the rights of the parties should be worked out on the basis of the new agreement, (which further contains a default clause, by which the parties are, in case of any default, allowed recourse to civil or criminal proceedings as may be deemed proper), I think that the defendant was entitled to have the relief prayed for by him in his application under R. 2, O. 21, granted to him. I agree with my learned brother that this appeal should be dismissed with costs.

P.R.S., M.N.

Appeal dismissed.

A. I. R. 1933 Madras 33 (1)

VENKATASUBBA RAO AND REILLY, JJ.

S. Srinivasa Ayyar and another—Appellants.

v.

Lakshmi Ammal—Respondent.

Appeal No. 89 of 1929, Decided on 18th August 1932, against order of Sub-Judge, Tinnevely, D/- 6th August 1928.

Decree—Execution — Maintenance decree creating charge on some items and making whole property liable—Security need not be proceeded against in first instance unless not doing so is mala fide—Analogy of mortgage decree does not apply—Civil P. C. (1908), O. 34, R. 6.

In the case of maintenance decrees providing concurrent remedies of a decree against the family properties and a charge on specific items thereof, it is not incumbent on the plaintiff to proceed against the security in the first instance unless the defendant satisfies the Court that the plaintiff's action in not doing so is mala fide, oppressive and not taken for a legitimate purpose. Considerations applicable to mortgage decrees do not apply in such cases. [P 33 C 1, 2]

N. A. Krishna Ayyar—for Appellants.*C. A. Seshagiri Sastri and S. Panchapagesa Sastri*—for Respondent.

Venkatasubba Rao, J.—The lower Court has made an order allowing execution and the defendants contend that that order is wrong, on the ground that the plaintiff is bound to proceed in the first instance against the properties charged under the decree. The decree sought to be executed is one for maintenance obtained by the plaintiff against her husband's co-parceners. Para. 2 directs the defendants to pay the plaintiff maintenance at a certain rate out of the assets of their joint family; and under para. 4 some specific items of property are charged with the maintenance awarded. The plaintiff applied in the lower Court by way of execution, for attachment of the defendant's family house—an asset of their joint family but not an item over which the charge was created. The appellants' contention is, that the plaintiff should not be permitted before exhausting her remedies against the security, to attach their other properties. The appeal raises the question whether in the case of maintenance decrees providing concurrent remedies, there is a rule of law which makes it incumbent on the plaintiff to proceed against the security in the first instance.

The analogy of mortgage decrees which has been pressed on us is, in our opinion inapplicable and no useful purpose will

be served by our referring to the cases cited at the Bar. Considerations that apply to decrees obtained by widows for maintenance are different from those that apply to mortgage decrees. The object of charging specific properties with the maintenance awarded to a widow is to safeguard her right and to make it prevail against persons claiming under subsequent transfers; while the decree confers on her this special right, there is no reason to hold that her ordinary right is curtailed while that very decree in terms provides concurrent remedies. If the defendant succeeds in showing that the plaintiff's application is made mala fide and oppressive and not made for a legitimate purpose, the Court may, in the exercise of its discretion, refuse the plaintiff's application and compel her to pursue her remedy against the security. But, in the present case, the facts show that far from the plaintiff's action being mala fide, the defendants who own extensive property, are withholding maintenance with the object of spiting the plaintiff. We confirm the lower Court's order and dismiss the appeal with costs.

Reilly, J.—I agree. If I may say so with respect, the decree made by the Subordinate Judge and amended by this Court on appeal does not appear to me to have been very happily worded. But I think there is no doubt that the plaintiff (respondent before us) is within her rights as given by that decree in applying for execution in respect of the particular arrears in question in this case against the assets of the joint family other than the charged property.

P.R.S./M.N.

*Appeal dismissed.**** A. I. R. 1933 Madras 33 (2)**REILLY AND ANANTAKRISHNA
AYYAR, JJ.*Shanmugasundara Mudaliar and others*—Plaintiffs—Appellants.

v.

S. Ratnavelu Mudaliar—Defendants—Respondents.

Appeal No. 464 of 1928, Decided on 23rd March 1932, against Sub-Judge, Chingleput, D/- 13th November 1928.

*** Civil P.C. (1908), S. 144—Test is restoration to injured party—Benefit to opposite party immaterial—Money ordered to be deposited for obtaining stay—On success of**

appeal money though not withdrawn by other party was refunded with interest.

It is the injury which has been caused to a party who has been ultimately successful as the final result of the litigation, that the Court seeks to remedy by virtue of proceedings taken in restitution. Such a party is to be placed, so far as it may be done, in the same position which he would have occupied had not the injury been done to him. The fact that the other party has gained no advantage does not affect the question. [P 37 C 1]

Hence a party against whom a decree was passed was ordered to deposit half the amount in Court as a condition for obtaining stay of execution and was successful in appeal was held entitled to the return of the deposit made with interest though the other party had not withdrawn the deposit which he was authorized to do on furnishing security: *A I R 1929 Pat 593*; *A I R 1925 Bom 313*; *24 C L J 467* and *A I R 1922 P C 269, Rel. on.*; *A I R 1925 Bom 313, Ref.* [P 28 C 2]

N. S. Srinivasa Ayyar and G. Jagadisa Ayyar—for Appellants.

Reilly, J.—In O. S. No. 5 of 1922, on the file of the Subordinate Judge of Chingleput, the appellants as trustees of a certain temple obtained a decree for money against defendant 1 and others. Defendant 1 among others appealed to this Court against that decree in Appeal No. 218 of 1925. Pending that appeal, defendant 1 applied for stay of execution of the Subordinate Judge's decree, the amount of which we are told by the date of his appeal with interest had come to about Rs. 7,000. The appellants opposed that stay application, and eventually an order was made by Jackson, J., on the stay petition that execution would be stayed if defendant 1 paid into Court Rs. 3,500 and gave security for the remainder of the decree and that if the Rs. 3,500 was paid into Court in accordance with the order, then the present appellants should be allowed to draw it only on giving security for that amount. Defendant 1 paid that Rupees 3,500 into Court and gave security for the remainder of the decree, and thereupon execution of the decree against him and the other defendants was stayed pending the appeal against that decree to this Court. But although defendant 1 paid that Rs. 3,500 into Court, it appears that the present appellants never gave security for the amount, and so they never withdrew it from Court. The appeal of defendant 1 and others against the Subordinate Judge's decree for money was successful so far as defendant 1 and some of the other defendants were

concerned; and after his success defendant 1 applied to the Subordinate Judge, in whose Court the Rs. 3,500 had been deposited by him for restitution. He claimed the Rs. 3,500 with interest upon it. The Subordinate Judge made an order that the Rs. 3,500 should be paid back to him and that the present appellants should pay interest at 6 per cent on that amount as part of the restitution to be made to defendant 1. The present appeal is against that order so far as it directs the present appellants to pay interest on the Rs. 3,500 to defendant 1.

It is urged for the appellants, first, that they never compelled defendant 1 to pay that amount into Court, and secondly, that they never got any benefit out of it, as they never withdrew the amount from Court; and for both those reasons it is contended that although defendant 1 is entitled to get back the Rs. 3,500, he is not entitled to any interest as part of the restitution now due to him. I cannot agree with the suggestion that the payment of the Rs. 3,500 into the Subordinate Judge's Court by defendant 1 was a voluntary payment. It is true that the appellants by the time defendant 1 came to this Court for an order for stay of execution had not taken any proceedings to execute their decree. But there was a decree for money standing against defendant 1, which he knew might be executed at any moment against him, and he was quite within his rights in coming to this Court and asking that, pending his appeal against that decree, execution might be stayed. When the present appellants got notice of that application, they did not consent to the decree being stayed on security under R. 5, O. 41, and they were quite within their rights in not consenting. Nor did they disclaim any intention of executing their decree.

On the contrary they asserted their right and intention to execute it. Jackson, J., stayed execution of that decree on certain terms; he made an order that, if there was to be any stay at all, Rs. 3,500 must be paid into the Subordinate Judge's Court. That order was obviously intended for the benefit of the present appellants and must have been made at their instance. It certainly would never have been made, if they had disclaimed a desire for any such order. In the circumstances I think it is im-

possible to say that defendant 1 made the deposit of Rs. 3,500 in the Subordinate Judge's Court as a voluntary payment. Defendant 1 had to pay that amount because a decree, which the appellants were prepared to execute and declared that they intended to execute, had been wrongly made against him, as events have turned out, and for the time from the date he made that payment until the disposal of the appeal against the decree he was deprived of that money. Having been deprived of his money as the result of a decree, which the appellants insisted on executing, but which turns out to be wrong he is clearly entitled to restitution.

Mr. Srinivasa Ayyar, who appears for the appellants here, does not deny that restitution in such cases, if it is to be complete, must often include not only the actual money which has been deposited but interest thereon, and that is provided by S. 144, Civil P. C. But he contends that, when we are trying to ascertain what is the exact restitution which should be made in such a case, whether it should be the money deposited alone or the money with the addition of interest upon it, the test to be applied is, not the injury which has been done to the judgment-debtor who has had to pay the amount under a mistaken decree, but the benefit which has been obtained by the other party, or at least that no interest should be ordered where, although the judgment-debtor has suffered an injury in consequence of such compulsory payment, the decree-holder has not derived any benefit from it. It appears to me that that is not the way to apply the principle of restitution, which is recognized in the Code. The provision in the Code is to be found in S. 144, which lays down that :

" in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

Now, reading that provision in its ordinary plain meaning, the restitution mentioned appears to me to be on its face the restoration to the injured party of what he has lost, not primarily the deprivation of the other party of what he has wrongfully gained. It is the

party entitled to restitution who can apply to the Court and claim the help of the Court in the matter : it is for his benefit that the provision is introduced. The restitution must be such as will put the parties in the position which they would have occupied but for the wrong decree. The party who is to be assisted by Court must be put into the position which he would have occupied but for the wrong decree. Is it an answer to that provision to say that it cannot be given effect to because the other party happened to gain no benefit by the wrong decree or order which had been made ? I can see nothing in the section to lead us to suppose that it can be defeated in that way. And, if we go further into the section, we find the words :

" For this purpose the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal."

Take damages : Can it be suggested that the measure of damages in such cases is, not what the wronged party has suffered, but what the other party has gained ? Take compensation : Is the wronged party to be deprived of compensation merely because the other party has made no actual profit out of the mistaken decree or order, which is afterwards reversed ? I think, if we read the section in its natural way, it will be found to be directed to the benefit of the wronged party and its object to be, so far as possible, to put him back into the position in which he would have been but for the wrong decree or order, which is afterwards reversed. Surely that is how the matter should be treated. The Court unfortunately by a mistaken decree has done a wrong to the judgment-debtor. When the Court has done a wrong, it is the Court's duty, so far as possible, to put it right. The Court is not directly interested in depriving the other party of a benefit which he may have got from a mistaken order or decree. It is the wrong that has been done which the Court should wish to put right. The actual benefit which may have been gained by the other party may often be almost impossible to estimate ; but that is not the matter in which the Court is interested. If we look at *Rodger v. The Comptoir D'Escompte de Paris* (1), in

1. (1871) 3 P C 465=40 L J P C 1=24 L T 111=19 W R 449=7 Moo P C (n s) 314.

which this matter was discussed by Lord Cairns, I think it will be seen that it is the wrong which has been done by the mistaken order or decree with which the Court is primarily concerned and which the Court must always wish to rectify, not the incidental advantage which the other party may have been fortunate enough to get. That principle has been applied in a case somewhat like this, *Dalu Ram v. Ramanand*, A. I. R. 1929 Pat. 593. There the plaintiff was made to pay interest as part of the restitution of the money deposited by the defendant towards the decree, not only from the date when the plaintiff drew that money from Court, but from a much earlier date, when the defendant had deposited it in Court, although it was represented that between those two dates the plaintiff had got no benefit whatever from the money.

But it happens that in this case the present appellants are not at all in a strong position for urging that they got no benefit from defendant 1's deposit of Rs. 3,500. It is urged for them that they got no benefit from that because for some reason they found it inconvenient to give security and draw that money. Can we properly say that they got no benefit from the money simply because they did not choose, or were even unable, to give security? We know that they did not give it; but the moment they choose to give security or were able to give that security they could take the money out of Court. And, as part of the decree amount due to them was in Court ready for them to put their hands upon it the moment they succeeded in the appeal, if they did succeed in it, that was clearly a benefit to them, as was recognized in *Hira Bhai Dahya Bhai v. Maneklal Ranchhod* (2). In my opinion, if we had to decide this case on the basis whether the appellants had got any benefit by the deposit of the Rs. 3,500, I think we should have to find that they had derived at least some benefit from that deposit. But in my opinion that it is not the proper test. The proper test is whether defendant 1 has been injured or deprived of his legal right in respect of that Rs. 3,500, which he had to deposit in consequence of the wrong decree obtained against him by the appellants. In my opinion he was injured by having to

make that deposit, and he cannot be properly compensated for that injury by the mere return of the Rs. 3,500. If he is to be compensated, if he is to get restitution within the meaning of S. 144 of the Code he is entitled to get interest also. In my opinion the order of the learned Subordinate Judge is right, and this appeal should be dismissed.

Anantakrishna Ayyar, J.—I agree. (After stating facts, his Lordship proceeded). Before us it was contended by the learned advocate for the appellants that on a proper construction of S. 144, Civil P. C., all that the Court could direct the unsuccessful decree-holders to do was to restore any benefit that they might have derived by virtue of the decree that was subsequently reversed by the appellate Court. In support of that argument the learned advocate drew our attention to some reported decisions. In my view, that is not the proper standpoint from which this case is to be looked at, in order to arrive at a correct decision on the point before us. The principle of restitution is based upon the legal maxim that the act of the Court should injure none: *actus curiae neminem gravabit*. That this is the principle is made clear by the judgment of Lord Cairns in *Rodger v. The Comptoir Escompte De Paris* (1) where the principles that ought to govern Courts in directing restitution in such cases are discussed. I do not propose to read all the passages, though many of them would be relevant to the point before me. The following are among the relevant passages occurring in that judgment:

"It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far therefore as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at will not have been arrived at unless the persons who

2. A. I. R. 1925 Bom. 313 = 87 I. C. 713.

have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld" see pp. 475 and 476.

Now as I read those passages, it seems to me that it is the injury which has been caused to a party who has been ultimately successful as the final result of the litigation that the Courts seek to remedy by virtue of proceedings taken in restitution. Such a party is to be placed so far as it may be done in the same position which he would have occupied had not the injury been done to him. If that is the principle then I think the answer to the question before me is quite clear. Defendant 1 was, as a result of the proceedings, taken by the appellants in pursuance of a decree, which was ultimately reversed, directed to put into Court a certain sum of money. If that decision had not been passed, defendant 1 would not have been deprived of the use of the money, and the injury done to him therefore could be remedied only by paying him back not only the principal amount of that money but also some compensation for the deprivation of the use of the money from date of deposit to date of judgment of the High Court reversing the lower Court's decree. The wordings of S. 144 also make this point clear. The section is not drafted merely with a view of depriving the decree-holder in the prior litigation of any benefit which he has actually in fact derived from the decree, but the section is drafted with a view to benefit, by way of restitution or otherwise, the party who had been injured by an act of Court found to be ultimately erroneous. The section says:

"In so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

I therefore decline to accept the contention raised before us by the learned advocate for the appellants, that we should view the case from the standpoint of the benefit that the appellants actually derived from the decree they obtained in the first Court. The learned advocate emphasized on the words "so far as may be" occurring in the section. As I understand the section, those words have no relevancy so far as the point now be-

fore us is concerned. It may happen that in very many cases restitution as ordinarily understood, is impossible. Property may have been sold and purchased by bona fide strangers, and in some cases it might be impossible to restore in specie the property of which the defendant might have been deprived. In such and similar cases, justice requires that the injured party should be restored if not to the very thing of which he was deprived, at least to as much of its equivalent as can be given to him in the place of the thing the restoration of which has become impossible. The subsequent wordings of the section namely:

"the Court may make any order . . . for payment of interest, damages etc."

make it clear that it is the injury that defendant 1 suffered that has to be compensated for in a case like the present. The learned advocate for the appellants referred us to some cases which he stated were inconsistent with the view that I am inclined to adopt in this case. On a careful perusal of the cases to which our attention was drawn, it is clear that those cases do not establish the proposition he contends for. I must remark that in properly understanding the expressions used by learned Judges in particular cases we must not forget to inquire what exactly was the relief that a party was actually claiming before the Court in such proceedings. If as a matter of fact a person in the position of defendant 1 claimed only interest from the time when the decree-holder actually drew the money out of Court, and was content with claiming the same only, and did not claim compensation from the time when he parted with the money, then the remarks occurring in judgments dealing with such contentions should be understood only with reference to the prayer actually contained in the petition before the Court. As far as I am able to see, the passages in the judgments referred to us do not lay down that a person in the position of defendant would not be entitled to anything more than the benefit which the decree-holder actually got by virtue of the prior decree. On the other hand, our attention was drawn to two cases *Dalu Ram v. Ramnand*, A.I.R. 1929 Pat. 593 and *Hirabhai v. Manek Lal* (2), both of which support the position contended for by defendant. In *Hirabhai v. Manek Lal* (2) the money

was in Court for some time. The decree-holder had no benefit in the sense that he was able to make interest out of that money, as during the period in question the money was lying idle in Court: yet the learned Judges decided that the decree-holder was bound to pay interest for the period during which money was lying in Court. To use the words of the judgment :

"The decree-holder has had the advantage of the money lying in Court until the appeal was heard and that would be a sufficient advantage to enable defendant 1 to succeed."

In the other case *A. I. R. 1929 Pat. 593*, the decree-holder was directed to withdraw the money from Court after furnishing security, and in that respect, that case is very similar to the one before us. The learned Judges decided that even in such a case the decree-holder was bound to pay interest to the defendant on the amount for the period during which the money was lying idle without the decree-holder having furnished security. If the test is the injury done to the defendant, then the circumstance that the decree-holder considered it to his benefit in any particular case not to actually draw the money out of Court but to have it ready in Court, would not make any difference, and I am not at all satisfied that it will not be to the benefit of the decree-holder to have an order in his favour that the money is to lie in Court and that he can draw it at any time on furnishing security. In this particular case that it was a benefit to the decree-holders to have money ready in Court is clear to me from another circumstance. Evidently defendant 1 wanted to have stay of execution in respect of the whole decree. The learned Judge was inclined to grant stay on defendant 1 furnishing security in respect of a moiety of the decree amount. The order passed by the learned Judge with reference to the other moiety, is, in my view, entirely due to the request made by the decree-holders that money may be directed to be paid into Court and that they should be allowed to draw the same on furnishing security. If such a thing was not to their benefit, I am unable to understand why they wanted such orders to be made with reference to that moiety of the decree amount. Therefore the question of benefit to the decree-holder is, in my view, entirely immaterial and irrelevant for the purposes of the present

case; and even otherwise, in the present case I am clear that there was an order which was (as already stated) to the benefit of the decree-holders; and consequently, having got a benefit, it does not lie in their mouths to say that they are not liable or responsible for having deprived defendant 1 of the use of the money during the period. In addition to the case in *Rodger v. The Comptoir D'Escompte de Paris* (1), I wish to refer to the observations of Sir Barnes Peacock in *Hurro Chunder Roy Chowdhury v. Sooradhonee Debia* (3), at p. 992 :

"It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. . . . A Court of appeal does not necessarily enter into the question, whether a decree, which it is about to reverse, has been executed or not. The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorised the lower Court to cause restitution to be made of all that the party, against whom the erroneous decree had been enforced, had been deprived by reason of its having been enforced : see also the further observations at p. 993."

I wish also to refer to the observations of Sir Ashutosh Mookerjee, J., in *Ashutosh v. Upendra* (4), at 474 (of 24 (C. L. J.)) where the learned Judge after referring to the decision in *Rodger v. The Comptoir D'Escompte de Paris* (1), emphasises on the correct principle underlying the whole discussion, namely, that it is the legal injury that is done to the person in the position of the defendant that is sought to be remedied in such cases: see also a later Privy Council decision in *Jai Berhama v. Kedar Nath Marwari* (5). I think it is enough for our purpose to be guided strictly by the provisions of S. 144, Civil P. C., and having regard to its wordings, I think that defendant 1 is entitled to the benefit he claims in the present case, namely interest—as for the use of the money—of which he has been deprived, for the period during which that money was not available to him, he having been directed to part with that money, by a decree that has been ultimately reversed as erroneous. I agree that the appeal must be dismissed but without costs as nobody appears

3. (1868) Beng L R Sup Vol 985=9 W R 402.

4. (1916) 38 I C 17=24 C L J 467.

5. A I R 1921 P C 269=69 I C 278=49 351=2 Pat 10 (P C).

for the respondent. In order to make matters clear, I should add that defendant 1 claimed restitution with interest at 12% and the learned Subordinate Judge was—in my opinion—right in having allowed him only interest at 6%.

P.R.S./M.N.

Appeal dismissed.

* A. I. R. 1933 Madras 39

RAMESAM AND MADHAVAN NAIR, JJ.

R. M. M. S. T. Vyravan Chettiar — Appellant.

v.

Official Assignee of Madras — Respondent.

Original Side Appeal No. 98 of 1929, Decided on 8th March 1932, against decision of Waller, J., D/- 8th October 1929.

* Contract Act (1872), S. 141—One of joint promisors paying entire debt — He is not surety nor entitled to subrogation in place of creditor in respect of securities held by latter—Contract Act (1872), S. 126.

Persons who are jointly and severally liable on promissory notes are not sureties under S. 126 of the Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions of S. 141. Hence where one of such joint promisors pays the entire debt he is not entitled to the benefit of any securities which the creditors may have held against the person whose debts were discharged: *Duncan Fox & Co. v. North & South Wales Bank*, 6 A C 1, *Expl. and Rel. on.*; 15 Bom 48, *Dist.*; *English cases referred.* [P 42 C 1,2]

K. S. Krishnaswami Ayyangar—for Appellant.

O. T. G. Nambiar—for Respondent.

Ramesam, J.—The facts out of which this appeal arises may be stated as follows: Two Chetties *R. M. M. S. T. Vyravan Chettiar* who is the appellant before us and *M. A. R. N. Ramanadhan Chettiar* carrying on business under the vilasam of *M. A. R. N.* were in the habit of borrowing from the banks in Madras on joint promissory notes and utilizing the amounts in equal shares. There were two such promissory notes with which we are concerned. On each occasion the amount borrowed was Rs. 50,000. The total amount borrowed being one lakh, each debtor took Rs. 50,000 for his own purpose. The dates of the two notes are 8th July 1924 and 22nd April 1925. On 3rd August 1925 *M. A. R. N.* was declared insolvent. It is admitted that the insolvent paid interest on his share of the debt on 8th July 1924, 8th October 1924 and 8th January 1925. He had certain shares in the Indian Bank

from whom those debts were borrowed, and under Art. 19 of the Articles of Association of the Indian Bank, the bank had a lien on the shares. After the insolvency of *Ramanadhan Chetty*, the bank demanded payment from the appellant and he paid the whole debt. In respect of the moiety of the insolvent's debt he now claims to be subrogated to the benefit of the lien which the Indian Bank had over the shares, and this is claimed under S. 141, Contract Act. The Official Assignee representing the insolvent claims that the shares had vested in him free of any such lien. The matter came on before our brother Waller, J., and he found that no specific agreement as was alleged by the appellant to the effect that each debtor was to be surety for the other in respect of his moiety of the debt was made out. He therefore dismissed the application. This appeal is filed against his order.

We entirely agree with the learned Judge that the evidence does not make out any specific agreement between the parties to the effect that, though as between the Indian Bank and the debtors they were jointly and severally liable, as between themselves each should be regarded as a surety for the other in respect of his moiety of the debt. Under the Contract Act the contract of guarantee is confined to cases where the guarantor agrees with the creditor to discharge the liability of a third person in case of his default. Cases where, on the face of the contract two persons are both jointly and severally liable, do not fall within the definition. In other words, the contract of guarantee as defined in S. 126, Contract Act, is confined to cases of suretyship strictly so called. In *Duncan Fox & Co. v. North & South Wales Bank* (1), Lord Selbourne, L. C., distinguishes between three kinds of cases at p. 11. The first case there mentioned is the only case covered by the Contract Act. The second and third cases there enumerated are cases of suretyship loosely described as such. The second case is a case where there was an agreement between the principal and the surety only, the creditor being a stranger to it. The third case is a case where, without any contract of suretyship, there is a primary and secondary liability of

1. (1881) 6 A C 1=50 L J Ch 355=43 L T 706
=29 W R 763.

two persons for one and the same debt, the debt as between the two being of one of those persons only, and not equally of both. After eliminating the cases of suretyship strictly so called, the noble Lord discusses at p. 12 how far the person secondarily liable as surety is entitled to be subrogated to the rights of the creditor in the second and third cases. He refers to Lord Eldon's dictum in *Younge v. Reynell* (2) (at p. 689) and finally winds up by saying that even in the second and third cases the surety has some right to be placed in the shoes of the creditor where he paid the amount. The learned advocate for the appellant strongly relied upon this dictum and also the case in *William Rouse v. Bradford Banking Co. Ltd.* (3). But in this case there is an express agreement between the parties. He also referred to Rowlatt on Principal and Surety, p. 7. But the passage at p. 7 relies on the case in *Duncan Fox & Co. v. North & South Wales Bank* (1) and does not carry the statement of the law beyond it. To make this passage applicable, the case must be one where the debt must be wholly of one and not equally of both. The whole foundation for the equitable doctrine of the English Courts of Equity is the argument of Sir Samuel Romilly in *Craythorne v. Swinburne* (4). That was a case of contract of guarantee in the strictest sense of the term. So also the cases reported in *Younge v. Reynell* (2) and *Monypenny v. Monypenny* (5). Mr. Krishnaswami Ayyangar relied on Sheldon on Subrogation, S. 169. But that section does not very much help the appellant.

The opening sentence shows that even in some States in America (Georgia, Alabama and Vermont) right of subrogation among the parties jointly bound as principals is denied, though in other States such right of subrogation seems to have been recognized. There is no case in England where the Courts have gone to this length. On the other hand, the statement of the law in *Duncan Fox & Co. v. North & South Wales Bank* (1) makes it subject to the limitation that the debt should not be equally of both. The case in *Goverdhan Das Gokuldas*

Tejpal v. The Bank of Bengal (6), is also a case of contract of suretyship strictly so called. The only point held there was that unless the surety pays down the whole money he is not entitled to the transfer of the security. We are not prepared to extend the legal position as laid down in English cases on the mere authority of the cases cited in Sheldon. The appeal fails and is therefore dismissed with costs.

Madhavan Nair, J.—(His Lordship after stating facts and contentions raised proceeded). In the application in support of his claim, the appellant relied on two specific agreements of suretyship—one agreement each time the money was borrowed—alleged to have been entered into between himself and the insolvent. In his evidence he set up a general "custom" amongst the Nattukottai Chetties that in such borrowing transactions each borrower becomes surety for the amount taken by the other. The learned Judge held neither the "agreements" set up nor the "custom" was proved and so dismissed the petition. On the evidence it is not seriously contended that the learned Judge's conclusions are incorrect. The evidence does not establish the agreements of guarantee set up nor does it support the alleged custom. Ss. 140 and 141, Contract Act, regulate as against the principal debtor the rights of a surety who performs or otherwise discharges the liabilities of the principal debtor. These sections are as follows: (His Lordship after quoting Ss. 140 and 141 proceeded). S. 140 lays down a general principle of which the most important practical application is to be found in S. 141; see Pollock and Mulla, p. 479. Under S. 141 a surety is entitled to the benefit of every security which the creditor has against the principal debtor. This was the section relied on by the appellant before Waller, J. If this section applies there can be no doubt that the appellant is entitled to claim a charge on the shares of the Bank held by it (the creditor) as a security against the insolvent.

Having regard to the finding of the learned Judge and our opinion that the agreements set up by the appellant have not been proved, what is now urged is not that S. 141, Contract Act, is directly applicable, but that the general princi-

2. Rev Rep 89.

3. (1894) A C 586.

4. 14 Ves 160=9 R R 264.

5. (1859) 121 R R 238=3 De G & J 572.

6. (1891) 15 Bom 48.

ple of equity underlying that section would apply to the appellant who though he is not a surety strictly speaking occupies a position analogous to that of a surety; and since he has admittedly discharged the liability of the insolvent by paying the creditor his portion of the debt, viz., Rs. 50,000, he is in equity entitled to the benefit of the security held by the Bank (the creditor), against the insolvent. This argument is sought to be supported by the decision in the well-known case of *Duncan Fox & Co v. North & South Wales Bank* (1). It is doubtful if this argument was put before the learned Judge but it is stated that the case was quoted before him. The question is purely one of law. It was held in that case that:

“ the acceptor of a bill of exchange knows that by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his endorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of equity of indemnification attendant on the suretyship.”

The facts of the case were these: R. & Sons offered a bill of exchange for a portion of the price due from them for a cargo of corn purchased from D. & Co. D. & Co. declined to take the bill of exchange. They were customers to N. S. W. Bank. One of the partners of R. & Sons had deposited with this Bank the title deeds of two of its own freehold properties and these were held by the Bank as securities for what the Bank might advance in the way of discount. R. & Sons told D. & Co., that if they would inquire of the bankers they would find it would be all right with their bill. The Bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than nominal liability by making the endorsement, placing the amount to the credit of D. & Co. R. & Sons later on stopped the payment of the bill when it became due and the bill was dishonoured. D. & Co. then became acquainted with the fact that securities had been deposited with bankers by R. & Sons to cover advances on their bills and brought an action against the Bank to have the benefit, so far as they would

go, of the securities deposited with them claiming to be sureties to the bankers for what was due upon the bill. It was held that D. & Co. were sureties on their bill and that as such they were entitled to the benefit of these securities: see the head-note.

In examining the principles and authorities applicable to the question to be decided the Lord Chancellor distinguished between three kinds of cases: (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor, is a stranger, and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as between the two that *of one of those persons only, and not equally of both*, (the italics are mine) so that the other if he should be compelled to pay it, would be entitled to reimbursement from the persons by whom (as between the two) it ought to have been paid.

In all these three kinds of cases it was pointed out by their Lordships that the person who discharges the liability due to the creditor, would be entitled to the benefit of the security held by the creditor though a case of suretyship strictly speaking would fall only under class 1, as a contract of guarantee is confined to agreements where the “surety” agrees with the creditor that he would discharge the liability of the “principal debtor” in case of his default: see S. 126, Contract Act. Obviously classes 2 and 3 are not cases of suretyship strictly so called. Their Lordships observed that the case before them did not fall within the first or the second class as admittedly there was no agreement either between R. & Sons and D. & Co. constituting the relation of principal and surety to which the Bank was a party, or a similar agreement between the two, to which the Bank was a stranger; and that the case fell within the third class in which though there is strictly speaking no contract of suretyship

“ there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not

primarily liable, he has a right to reimbursement or indemnity from the other."

It was for this reason that D. & Co. were held to have the rights of sureties though they were, strictly speaking, not sureties on the bill. In the case before us no contract between the appellant and the insolvent constituting the former a surety for the latter to which the Bank was a party, has been pleaded and the specific contracts of suretyship pleaded have not been substantiated. The appellant therefore argues that though he is not strictly speaking a surety, he falls within the third class enumerated above and that he occupies in equity a position analogous to that of a surety as mentioned therein as he has discharged the liability of the insolvent to the Bank. The question is whether he occupies this position. If he does then he is, by extension of the principle to the case of sureties strictly so called, entitled to the benefit of the 'security held by the Indian Bank. To fall within class 3 mentioned above and to assimilate his position with that of a surety strictly so called, a person who discharges the liability to the creditor should be only secondarily but not primarily liable to the creditor. This was the position of D. & Co. in *Duncan Fox & Co. v. North & South Wales Bank* (1). Having regard to the facts of the present case, it cannot be said that this is the position of the appellant with respect to his liability on the promissory notes.

As already pointed out the liability on the promissory notes of the appellant and the insolvent is joint and several. There is only one debt in the present case, a debt which is equally a debt of both the parties. The Indian Bank can recover the entire amount either from the appellant or from the insolvent. Thus there is no question of one person being primarily liable for the debt and the other only secondarily liable. In these circumstances the principle of the decision in *Duncan Fox & Co. v. North & South Wales Bank* (1), has no application to the present case and on the strength of that decision the appellant cannot claim that his position is analogous to that of a surety and that therefore he is entitled to the benefit of the security held by the creditor.

Various other cases were cited by the

appellant's learned counsel, but all of them are distinguishable. In the case in *William Rouse v. The Bradford Banking Co. Ltd* (3), there was an express agreement between the parties. The case in *Cray Thorney v. Swimburne* (4) is one of the co-sureties and the cases in *Younge v. Reynell* (2) and *Monypenny v. Monypenny* (5), are all cases of strict suretyships. The case in *Goverdhan Das Goculdas Tejpal v. The Bank of Bengal* (6), is also a case of a contract on suretyship. Reference was made to a passage in *Sheldon on Subrogation* 256, Ch. 4. S. 169, which shows that the right of subrogation between joint debtors exists in some States in America, but the existence of such rights is denied in some other States. However no English decision has been cited in support of the contention that such right exists in England. In my opinion persons who are jointly and severally liable on promissory notes are not sureties under S. 126, Contract Act, nor do such persons occupy a position analogous to that of a surety strictly so called to attract the provisions of S. 141, Contract Act. For the above reasons I must hold that the appellant is not entitled to the benefit of the security held by the Indian Bank against the insolvent. I would therefore dismiss this appeal with costs.

P.R.S./M.N.

Appeal dismissed.

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JACKSON AND MOCKETT, JJ.

Sobhanadri Rao Pantulu Garu and others In re—Petitioners.

Civil Revn. Petns. Nos. 1195 to 1229 of 1931, Decided on 30th August 1932, against order of Sub-Judge, Masulipatam, D. - 26th August 1931.

Court-fees Act (1870), S. 7 (4) (c)—Suit by landholder to eject tenants after notice praying for declaration of his kudivaram rights—S. 7 (4) (c) applies and not Court-fees Act (1870), S. 7 (5) or S. 7 (11) (cc).

Where the inamdar claims both varams, and though he has no proof of actually letting the defendants into possession, he claims declaration of his title and the right to eject them after due notice, by virtue of his title to the kudivaram and the tenants do not dispute his claim to the melwaram, but assert occupancy right, the court-fee payable will be under S. 7 (4) (c) and not S. 7 (11) (cc) or S. 7 (5) as S. 7 (11) (cc) is applicable where the suit is based on lease but not when the plaintiff also wants a decree establishing his title and S. 7 (5) will not apply as the defendant admits the plaintiff to be the land-

holder but question only, his right to eject. *A I R 1915 Mad 654, Ref.* [P 43 C 1, 2]

*S. Varadachariar for N. Rama Rao—*for Petitioners.

P. Venkataramana — for Government.

Jackson, J.—This is a question of court-fees. The plaintiff, an inamdar, claims to have full right to both kudivaram and melvaram in the land which comprises the inam (para. 3), so the letting to tenants is for temporary periods (para. 4) and the inam is not an estate within the definition in Act 1 of 1908, (para. 5), all tenants are tenants at will (para. 6). In December 1926 the defendants who are temporary tenants were given notice to quit (para. 7), and the plaintiff prays for a decree establishing his right in the suit lands, and removing the defendants. This plaint plainly sets forth a familiar form of suit. The inamdar claims both varams, and therefore though he has no proof of actually letting the defendants into possession, he claims the right to eject them after due notice by virtue of his title to the kudivaram. The tenants do not dispute his claim to the melvaram, but assert occupancy right. The court-fee has been paid under S. 7, Cl. 11 (cc), Court-fees Act. The lower Court has ordered that the fees shall be computed under S. 7 (v) and the plaintiff appeals.

Clause 11 is applicable when the suit is based on a lease, but not when the plaintiff also wants a decree establishing his title: *Balasiddhantam v. Perumal Chetti* (1). So far the order of the lower Court is unexceptionable. But the learned Subordinate Judge finds that the suits are for the declaration of plaintiff's title to the plaint schedule lands which is not quite correct. The defendants, though they do not put plaintiff's title as high as he would like, at least admit that he is the land-holder of the land in question, and, so far, his title to the land is not in dispute. The only quarrel between them is whether he is entitled to the kudivaram, and that is not on the same footing as a dispute between alleged owner and trespasser. Cl. 5 (c) would apply to a case where the plaintiff is suing to be put into possession of an inam, and it can hardly have been contemplated that the plaintiff should pay the same court-fee when he sues for posses-

sion of an inam against a rival claimant and when as undisputed inamdar he asserts his title to the kudivaram. The appropriate section would therefore seem to be (4) (c) to obtain a declaratory decree (that he is entitled to the kudivaram) and consequential relief of possession. The record will be returned to the lower Court to value the suits accordingly.

P.R.S./M.N.

Order accordingly.

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CURGENVEN AND SUNDARAM

CHETTY, JJ.

*Manikyanayanim Varu and others—*Defendants—Appellants.

v.

*Lakshminarasimha Sastrulu and others—*Plaintiffs—Respondents.

Appeal No. 10 of 1930, Decided on 6th April 1932, against decree of Sub-Judge, Chittoor, D/- 14th March 1929, in O. S. No. 18 of 1927.

Civil P. C. (1908), O. 22, R. 4 — Decree against wrong legal representative not in possession of estate of deceased is not binding on estate even in absence of fraud.

A decree passed in a suit, wherein the true legal representatives of a deceased party were not brought on record, would not be binding on the estate of the deceased party in the hands of the true legal representatives because under O. 22, R. 4 it would not be sufficient for an applicant to allege that a particular person is the legal representative of a deceased defendant to enable a decree to be passed which should be valid even in absence of fraud against the true heir although that heir is not a party to the suit: *A I R 1927 Bom 63, Foll.* [P 48 C 1]

*T. Kumaraswamiah—*for Appellants.

*V. Ganapathi—*for Respondents.

Sundaram Chetty, J.—This appeal has been preferred by defendants 3 to 7 and arises out of a suit brought by plaintiff (respondent 1) for a declaratory relief in the Court of the Subordinate Judge of Chittoor. The facts of the case have been set out in the judgment of the Subordinate Judge and a brief reference to them is necessary in order to understand the nature of the dispute in this case. Palayagar Chengama Nayanam Varu (No. 1) was in possession of 62 villages including the three villages mentioned in the plaint Sch. B as usufructuary mortgagee under two mortgage-deeds dated 17th May 1890 and executed by the Rajah of Karvetnagar. He died in or about 1893 leaving behind him four sons, namely Vijayappa Nayanam Varu, Govindaswami Nayanam Varu and defen-

dants 3 and 4. By means of an award, a partition was effected among these four sons, whereby 14 out of the 62 villages including the three villages mentioned in Sch. B were allotted to the share of Govindaswami Nayanam Varu who died in 1897. His widow was Venkatamma. His elder brother Vijayappa Nayanam Varu had two sons, namely, Chengama Naidu (No. 2) and the present defendant 2. Defendants 5 to 7 are the sons of defendant 4. According to the plaintiff's case, Chengama Naidu (No. 2) was the adopted son of Govindaswami Nayanam Varu. The present defendant 1 is the minor son of Chengama Naidu (No. 2). Subsequent to the death of Govindaswami Nayanam Varu, his estate became a veritable apple of discord and was the subject-matter of several suits in a long series of litigation. Venkatamma denied the truth and validity of the adoption of Chengama Naidu (No. 2) which was set up by his natural father Vijayappa.

The disputes between them were referred to the arbitration of one Krishnamachariar, a pleader of Tirupathi, who passed an award on 5th January 1898 (Ex. E). Curiously enough this arbitrator purporting to act on a consent statement given by the parties effected a sort of division between them without deciding the question of adoption one way or the other. He divided the properties between Chengama Naidu (No. 2) and the widow Venkatamma in the proportion of 3: 1. It is under this award that Venkatamma got the three villages mentioned in Sch. B with absolute rights whereas the properties allotted to Chengama Naidu (No. 2) were subject to a defeasance clause to the effect that if Venkatamma should beget a male child he should be divested of the properties given to him under the award. The dispute did not end with this award, but it proved to be the beginning of further disputes. Venkatamma filed O. S. No. 21 of 1900 on the file of the Sub-Court of Chittoor, for a declaration that the award is void and that the alleged adoption is neither true in fact nor valid in law. To this suit Vijayappa and his son Chengama Naidu (No. 2)—the alleged adopted son and also the present defendants 3 and 4 were parties (Ex. 3).

In the written statement filed by defendant 3 and 4 they denied the truth and the validity of the alleged adoption,

questioned the award as being a fraudulent one and also set up an oral will by the late Govindaswami Nayanam Varu, whereby he bequeathed all his properties in their favour to be divided equally between them, (Ex. 4). That suit ended in a razi and was dismissed. Subsequently, the present defendant 4 filed O. S. No. 16 of 1905 in the District Court of North Arcot for the recovery of Govindaswami's estate on the strength of the nuncupative will alleged to have been left by him. He also sought for a declaration that the alleged adoption of Chengama Naidu (No. 2) is neither true nor valid. Vijayappa and the alleged adopted son were defendants 1 and 2 in that suit. The present defendant 3 was also defendant 3 and Venkatamma was defendant 4 and her brother was defendant 5 in that suit. It would appear that a decree was passed in that suit declaring the adoption of Chengama null and void, but subsequently the decree was set aside and the suit was restored to file. It was numbered as O. S. No. 26 of 1908 on the file of the District Court of North Arcot. Eventually it ended in a razinama decree on 31st July 1909 (Exs. 7 and 8). The compromise was between the plaintiff in that suit and defendants 1, 2 and 3 therein.

Venkatamma and her brother were no parties to that compromise and they were exonerated from the suit. Under this razinama, one of the 14 villages above referred to, namely, Nandimangalam, was allotted to Chengama Naidu (No. 2) who was defendant 2 therein with the burden of paying one-third of the debts due by the deceased Govindaswami, and the other properties should be taken by the plaintiff and defendant 3 therein, (the present defendants 3 and 4) in equal shares with the corresponding liability of paying two-thirds share of the debts due by the deceased. This razinama was entered into without deciding the status of Chengama Naidu in either way but leaving that question completely open. As Venkatamma was exonerated from the suit with costs she was not bound by this compromise. The right which she acquired to the three villages as per the award referred to above remained unaffected by the razinama decree which was passed on 31st July 1909. There is no doubt that defendants 3 and 4 who survived the widow Venkatamma would be

entitled to the estate of Govindaswami as the nearest reversioners, if the alleged adoption of Chengama Naidu (No. 2) be not true and valid. It is pretty clear that, though the question relating to this adoption was raised in ever so many proceedings, somehow the decision of this question was shelved and some arrangement with respect to the properties in dispute in those proceedings were entered into as a result of compromise, leaving the question relating to the adoption in a nebulous condition.

While matters stood thus, Venkatamma was dealing with the three villages given to her under the award by creating mortgages over the same and also leased them to the present plaintiff's father on 27th March 1907 for a period of 20 years fixing the annual rent at Rs. 550. It is alleged in para. 8 of the plaint that under the terms of the lease deed the lessee could appropriate the expenses incurred by him in connection with the litigation concerning the villages out of the rents and profits thereof. During the continuance of the lease, Venkatamma filed O. S. No. 34 of 1918 on the file of the Sub-Court, Chittoor, against the present plaintiffs and his brothers for the recovery of arrears of rent, namely Rs. 3,863-12-0. In the written statement filed by the defendants therein, they pleaded that a sum of Rs. 16,000 was due to them on account of the expenses incurred by them on behalf of Venkatamma in conducting the litigation relating to those villages. During the pendency of that suit, Venkatamma died and Chengama Naidu (No. 2) brought himself on record as her legal representative and was made plaintiff 2. The suit was subsequently transferred to the Additional Sub-Court, Chittoor, and numbered as O. S. No. 26 of 1920. A razinama was eventually put in on 17th March 1920 and was recorded by the Court (vide Ex. G.). Under this razinama, Chengama Naidu (No. 2), plaintiff 2 therein, agreed to pay to the defendants therein, a sum of Rs. 15,000 together with interest till payment and further created a charge for the realization of this sum over the three villages (mentioned in the present Sch. B), which formed the subject-matter of the lease granted by Venkatamma. It is on the strength of this razinama that the pre-

sent plaintiff, who says that the amount due under this razi decree was allotted to him in a partition between him and his brothers, has filed this suit for a declaration.

The usufructuary mortgage right in the aforesaid 62 villages possessed by the family of Palayagar Chengama Nayanam Varu (No. 1) is now represented by the amount deposited in the Sub-Court, Chittoor, in pursuance of a redemption decree passed in O. S. No. 31 of 1919 in favour of the Mahant of Tirupathi who filed that suit for redemption, as he became the purchaser of the equity of redemption, in those 62 villages in execution of a decree obtained against the Rajah of Karvetnagar. Out of the proportionate amount due to Govindaswami Nayanam Varu in respect of his othi right in the 14 villages allotted to his share in the family partition, a certain amount would be payable to the owner of the othi right in the three villages mentioned in Sch. B by apportionment, and what the present plaintiff wants in this suit is a declaration of his right to receive that amount by virtue of the razinama decree in O. S. No. 26 of 1920, whereby a charge is created in his favour over the othi right in those three villages. This claim is opposed by defendants 3 and 4 who state that Chengama Naidu (No. 2) was never adopted by Govindaswami and the alleged adoption is also invalid in law. They further contend that on the death of Venkatamma, they became entitled to the estate of her husband Govindaswami as the nearest reversioners. They attack the razinama in O. S. No. 26 of 1920 as collusive and fraudulent and contend that they are in no way bound by that razinama; and the debt mentioned in that razinama is neither true nor binding upon them as reversioners to the estate.

Plaintiff's claim to enforce the charge created under the razinama in O. S. No. 26 of 1920 as against the othi right held by the deceased Govindaswami in the three villages now in question, is mainly based on the case set up in the plaint, namely, that Chengama Naidu (No. 2) who entered into that razinama as the legal representative of Venkatamma, was competent to do so as he was the validly adopted son of Govindaswami. The truth and validity of his

adoption having been denied by the reversioners, namely the present defendants 3 and 4, this question was made the subject of issue 1. The learned Subordinate Judge has found that issue in the negative. As observed by him in para. 21 of his judgment, the direct evidence about the alleged adoption is so meagre and worthless that no reliance can be placed upon it. He has discussed the circumstances connected with this point, and in the face of the improbabilities and suspicious features connected with the story of adoption, it must be held that the finding of the lower Court is the only possible conclusion upon the evidence. No serious attempt has been made before us by the learned advocate for the plaintiff (respondent 1) to challenge the correctness of that finding. He had to concede the utter inadequacy of the proof adduced in support of the alleged adoption, but what he tried to do was to persuade us to hold that defendants 3 and 4 are in some way estopped from disputing the truth and validity of the adoption. In the first place, it must be observed that no such case of estoppel has been set up in the plaint. If the plaintiff really wanted to rely upon an estoppel, either as a rule of evidence or as part of the substantive law, which would preclude defendants 3 and 4 from disputing the adoption in the present case, he must have set up such a plea specifically in the plaint making the necessary averments for sustaining such a plea. Such a specific plea is conspicuous by its absence in the plaint, nor was any issue taken on this point in the trial Court.

The adoption on which alone the plaintiff based his claim in the plaint not having been made out, we have to hold that Chengama Naidu (No. 2) who intervened in O. S. No. 26 of 1920 after the death of Venkatamma (the plaintiff therein) as her legal representative, was not competent to represent the estate, and consequently the razinama entered into by him with the defendants therein, whereby a charge was created by him for a certain amount over the properties appertaining to the estate is invalid and unenforceable against the actual heirs who became entitled to the estate on the death of Venkatamma, namely, the present defendants 3 and 4.

It is however argued on behalf of respondent 1 that Chengama Naidu (No. 2) could at least be deemed to be a legal representative within the definition given in S. 2 (11), Civil P. C., if it could be shown that he was an intermeddler with the estate of the deceased by getting into possession of some portion thereof. The three villages in question having been leased out by Venkatamma to the father of the present plaintiff, they were not in the possession of Chengama Naidu (No. 2) when he brought himself on record in O. S. No. 26 of 1920 after the death of Venkatamma. It is not clearly shown that he was in possession of any other property appertaining to the estate of Govindaswami about that time, in order to make him a legal representative in the sense of an intermeddler with the estate. Here again, an attempt has been made to invoke for aid the plea of estoppel in order to prevent defendants 3 and 4 from disputing the status of a legal representative to Chengama Naidu (No. 2) in O. S. No. 26 of 1920. This contention is based upon the facts relating to certain proceedings carried on after the death of Govindaswami. One Mari Subbaraya Chetti filed O. S. No. 37 of 1909 on the file of the District Court of North Arcot to recover a sum of money due on a mortgage executed by Vijayappa as guardian of Chengama Naidu (No. 2) the alleged adopted son of Govindaswami. The widow Venkatamma and also the present defendants 3 and 4 were made parties to that suit. These defendants denied the adoption in their written statement. However the suit ended in a compromise: vide Exs. D and D-1. At about that time the will suit above referred to, namely O. S. No. 26 of 1908 filed by the present defendant 4, was pending. By virtue of the aforesaid compromise, the mortgagee was allowed to have a decree in his favour for the amount claimed by him irrespective of any decree that may be passed in the will suit.

As pointed out by the learned Subordinate Judge, the trend of the razinama Ex. D-1 is that, irrespective of any finding as to the will or adoption that may be given in O. S. No. 26 of 1908, the mortgagee could recover the amount due to him. This decree was allowed to be passed in that manner without having the effect of an admission of the adoption by defendants 3 and 4. Similarly, in

the subsequent compromise entered into in O. S. No. 26 of 1908, vide Ex. 8, there was no reference to the adoption at all, and in fact it was neither affirmed nor negatived. A decree for money was obtained by one Chandra Veerasami Naidu against the estate of Govindaswami. That decree was transferred to Messrs. P. Orr & Sons. The latter executed the decree against Venkatamma (the widow) and Chengama Naidu (No. 2). The present defendants 3 and 4 were not made parties to the execution proceedings. It would appear that the present defendant 3 took a transfer of that decree in 1914 and paid off the money due to Messrs. P. Orr & Sons. It is argued that by such conduct defendants 3 and 4 must be deemed to have recognized Chengama Naidu at least as a joint legal representative with Venkatamma in respect of the estate of Govindaswami. It is significant that in the aforesaid two proceedings execution was taken out against the widow and Chengama Naidu (No. 2). If the latter was really treated as the adopted son of Govindaswami, there was no need to implead the widow. If there was no adoption the widow would be the proper and sole legal representative.

However as the adoption was being set up, though that question was never allowed to be decided one way or the other in any of the proceedings, the creditor who was interested in the recovery of the money due to him under the decree chose to implead both the widow and the alleged adopted son by way of abundant caution. There is hardly any doubt that the present defendants 3 and 4 were throughout denying the truth and the validity of the alleged adoption of Chengama Naidu (No. 2) and their objection was so constant and persistent that the Court had to order the deletion of the description of Chengama Naidu as the adopted son in some transfer deeds: vide Ex. 1. In O. S. No. 39 of 1922 on the file of the Sub-Court of Chittoor which was filed by B. Kuppuswami Reddi against the present defendant 1 and some others including the present defendants 3 and 4, the same questions were raised as would appear from the judgment in that suit: vide Ex. 12 which was on 18th November 1924. The alleged adoption of Chengama Naidu (No. 2) was found to be neither true nor valid and it was held that Venkatamma had no absolute rights

in the three villages in question. In this tangled mass of proceedings, it is impossible to draw any reasonable inference, that the present defendants 3 and 4 have, by any declaration or conduct, intentionally caused or permitted the present plaintiff to believe that Chengama Naidu (No. 2) was either the adopted son of Govindaswami or his proper legal representative. In no proceeding to which the present plaintiff was a party could he show that anything was done by defendants 3 and 4 so as to create an estoppel in his favour. That being so, we are clearly of opinion that not only was Chengama Naidu (No. 2) not the adopted son of Govindaswami but he was also not the proper legal representative of Venkatamma in O. S. No. 26 of 1920. Even assuming that Venkatamma was absolutely entitled to the three villages mentioned in Sch. B, which formed the subject of the lease granted by her to the present plaintiff's father, we fail to see how Chengama Naidu (No. 2), if he was not the adopted son, could be her legal representative for the recovery of the money claimed in O. S. No. 26 of 1920 or for creating a charge over her properties for any amount alleged to be due by her.

The present defendants 3 and 4, either as reversioners to the estate of Govindaswami or as heirs to Venkatamma, could not be bound by the razinama filed in O. S. No. 26 of 1920 to which they were no parties. The debt mentioned in that razinama is impugned by them to be untrue and the razinama itself is attacked as collusive and fraudulent. That being so, the present plaintiff, who seeks to enforce the terms of that razinama as against defendants 3 and 4, should prove the truth and the binding character of the debt therein mentioned by adducing the necessary evidence. The recital in the razinama cannot be deemed to be proof of the debt or its binding character as against persons who were not parties to it. No independent proof has been adduced in this case. If Venkatamma herself was a party to that compromise and if the villages in question were her absolute property, it can be said that her heirs should be bound by that compromise and should take her estate subject to the encumbrances created by her. That is not the case here. What right had Chengama Naidu (No. 2) to interpose in her suit as her legal representative

and to create a charge or an encumbrance over the villages which belonged to her? The answer to this question must be in the negative. The principle that a decree passed in a suit wherein the true legal representatives of a deceased party were not brought on record would not be binding on the estate of the deceased party in the hands of the true legal representatives, has been clearly stated in a decision of the Bombay High Court reported in *Pukharaj Jestraraj v. Jamsetji Rustum* (1).

This question has been discussed at some length by Marten, C.J. That learned Judge has observed that, in view of the altered wording of O. 22, R. 4, Civil P. C., it would not be sufficient for an applicant to allege that a particular person is the legal representative of a deceased defendant to enable a decree to be passed which should be valid against the true heir, although that heir is not a party to the suit. If a plaintiff who seeks to enforce a debt owing by the deceased adds wrong persons as legal representatives and obtains a decree, such a decree, even in the absence of fraud will not be binding against the true representatives or heirs of the deceased. This principle clearly governs the present case. The learned Subordinate Judge has failed to consider the vital questions in this case which are in a narrow compass, though he has discussed at length various subsidiary matters. From what he has stated in para 24 of his judgment it seems to us that he took it for granted that the razinama in question should be binding on defendants 3 and 4, if an outsider like the present plaintiff bona fide believed Chengama Naidu to be the legal representative to Govindasami when he entered into it. As we have already pointed out there is no estoppel alleged in the plaint against defendants 3 and 4, nor is it made out in the evidence in respect of the razinama in question. Even assuming that Chengama Naidu (No. 2) was believed to be a legal representative, is it not necessary for the plaintiff to prove the truth and the binding character of the debt specified in the razinama so as to enforce it against the true reversioners or heirs? The need for such proof has been entirely overlooked by the learned Subor-

dinate Judge. We cannot therefore accept his finding on issue 4. We are clearly of opinion that the plaintiff has failed to make out that the razinama decree in O. S. No. 26 of 1920 relates to a true debt binding upon the reversioners to the estate of Govindasami or the heirs of Venkatanma. Consequently, the plaintiff is not entitled in this suit to any declaration, on the strength of that razinama decree as against the reversioners or heirs.

In the result the plaintiff's claim for a declaration in respect of the amount standing to the credit of the mortgagees in O. S. No. 31 of 1919 on the file of the Sub-Court, Chittoor, should fail, and this appeal is allowed with costs payable by the plaintiff respondent 1. He should pay the costs of defendants 3, 4 and 10 in the lower Court and bear his own costs. The other defendants will bear their own costs.

P.R.S., M.N.

Appeal allowed.

A. I. R. 1933 Madras 48

CURGENVEN AND SUNDARAM
CHETTY, JJ.

Thiagaraja Mudaliar and another—
Defendants—Appellants.

v.

Vedathanni—Plaintiff—Respondent.

Appeal No. 162 of 1929, Decided on 17th March 1932, against decree of Sub-Judge, Negapatam, in O. S. No. 22 of 1928.

(a) Evidence Act (1872), S. 101—Burden of proving that registered deed was sham is on person alleging who he was party to deed.

When a person wants to prove that a registered deed to which he was a party does not disclose the true intention of parties and that it was only a sham, the burden of proof lies on him: 21 *Mad* 56, *Rel on.* [P 50 C 1, 2]

(b) Evidence Act (1872), S. 92—Document evidencing disposition—Evidence to show that it is enforceable in some manner other than expressly stated is inadmissible—But evidence to show it to be sham and meant to be inoperative is admissible.

It is only when parol evidence is sought to be let in for proving that a document affecting a disposition is enforceable not according to its plain terms but in a modified form by something being substituted for or subtracted from or added to the terms expressly mentioned therein that S. 92 would be a bar and render such oral evidence inadmissible. But a party to a document is entitled to prove by oral evidence that the agreement or disposition in writing was only a sham and was not intended to be operative: 7 *M H C R* 189; *A I R* 1925 *PC* 75; 17 *Cal* 291(*PC*) and 8 *Bom L R* 761, *Rel on*; *A I R* 1927 *All* 422, *Diss from*; 34 *Bom* 59;

1. *A I R* 1927 *Bom* 63=100 *PC* 185=50 *Bom* 802.

38 *Mad* 226; *A I R* 1930 *Mad* 547; 7 *I C* 842, *Dist.* [P 50 C 2]

(c) **Civil P. C. (1908), O. 26, R. 1—Claim for great magnitude—Parties even if women should be examined by Court.**

Especially in a claim involving thousands the parties, even if they are women should rarely be allowed to be examined on commission. They should be required to give their evidence direct to the Court even if it had to be taken in chambers unless there is good reason for not doing so.

[P 53 C 2]

The Advocate-General and *A. V. Viswanatha Sastri*—for Appellant.

T. V. Muthukrishna Ayyar and *N. Muthuswami Ayyar*—for Respondent.

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff-respondent to recover a sum of Rupees 1,15,000 from out of the estate in the hands of defendants, on account of the arrears of maintenance due to her for a period of nearly 11½ years at the rate of Rs. 10,000 per annum. The plaintiff's case is, that her deceased husband Ramalinga Mudaliar and his elder brother, the late Somasundara Mudaliar, were brothers who were the last surviving male co-parceners of a very rich family known as the Vadapathimangalam family, that the plaintiff's husband died issueless on 23rd December 1912 at Tiruvarur and that soon after the annual ceremony of her deceased husband, she left the family house in which Somasundara Mudaliar was living and went over to her parent's house about the beginning of the year 1914 and from that time onwards she was living separately from the family of her husband's brother. The plaintiff's husband and his elder brother owned properties (moveable and immovable) of the approximate value of 50 lakhs. The extent of their wet and dry lands was about 1,500 velis (about 10,000 acres).

The annual income of the family properties would be about 2½ lakhs according to the estimate given in the plaint. For more than 12 years before his death the plaintiff's husband was living separately from his brother in one of the family houses situated at Vijiapuram near Tiruvarur and was also in separate enjoyment of a portion of the family properties. Immediately after the death of the plaintiff's husband, Somasundaram apprehended trouble on account of a possible claim being put forward by the plaintiff at the instigation of her relations for a moiety of the family properties, alleging a division in status

between her husband and his brother. Feeling nervous at the idea of a possible litigation which would be fraught with disastrous consequences, Somasundara was anxious to secure some sort of admission from the plaintiff as to the undivided status of the family and with this object in view he got executed a document on 28th December 1912 containing a recital as to the undivided status of the family and in that document he also purported to make certain arrangements for the maintenance of the plaintiff, but it was however, distinctly understood between the parties that the provisions for the maintenance contained in the deed should not be given effect to or acted upon by them. This document was solely intended as a voucher for the recognition of the joint status of the family by the plaintiff and the real and final arrangement for the plaintiff's maintenance was agreed to be left over for future settlement at leisure on a scale commensurate with the position and status of the family. It is further alleged in the plaint, that the immovable properties set forth in that deed as having been allotted for the plaintiff's maintenance were never enjoyed by her but continued to remain in the possession and enjoyment of Somasundara himself as part of his family properties down to his death which occurred on 17th January 1925. During the lifetime of Somasundara, the plaintiff was making demands for adequate provision being made to her for her maintenance and he was promising to make suitable provision in conformity with the status of the family.

Somasundara died issueless leaving behind him his two widows who are defendants 1 and 2. In pursuance of an alleged authority given to defendant 2 by the late Somasundara, she adopted defendant 3 as her son on 1st July 1925, having entered into an ante-adoption agreement with the natural father of the minor on 21st June 1925. That agreement provides agreeably to the intentions of the deceased Somasundara that the plaintiff was to be given for her maintenance Rs. 6,000 and 500 kalams of paddy per year besides being permitted to enjoy for her lifetime the lands mentioned in the deed dated 28th December 1912. Those lands would yield an income of about Rs. 2,500 per year.

In the interests of the peace of this respectable family the plaintiff is inclined to accept Rs. 10,000 per annum on account of the arrears of maintenance due to her.

Defendant 1, senior wife of Somasundara, was disputing the validity of the adoption of defendant 3, and had also instituted O. S. No. 22 of 1925 on the file of the Tiruvavur Sub-Court for a declaration of the invalidity of the adoption. Defendant 2 for herself and as guardian of the minor defendant 3 states that she had no knowledge of the circumstances under which and the purpose for which the registered maintenance deed dated 28th December 1912 came into existence, and she accordingly puts the plaintiff to proof of the allegations made by her in respect of it. It is admitted that the plaintiff did not receive the income of the lands set apart for her maintenance under the said deed and therefore she should only be entitled to the profits of those lands in respect of her past maintenance after ascertainment of those profits by the Court.

The learned Subordinate Judge found the case set up in the plaint to be substantially true and held that the maintenance deed in question (Ex. 1) was never intended to be acted upon and was also never acted upon. In the view that that document purporting to be a maintenance deed was only a sham, he treated it to be inoperative and held that it would not debar the plaintiff from claiming a reasonable rate of maintenance for the plaint-mentioned period on account of arrears due to her. Considering all the circumstances of this case, he allowed the plaintiff's claim for arrears of maintenance at the rate of Rs. 6,000 per annum and passed a decree accordingly. As against this decision, defendants 2 and 3 have filed this appeal, while the plaintiff has filed a memorandum of objections stating that the full rate claimed by her in the plaint should have been allowed by the lower Court. When the present claim of the plaintiff is resisted on the strength of the registered deed, Ex. 1, to which she and her husband's brother Somasundara were parties, there is no doubt that the burden of proving that this deed which is ostensibly a deed of maintenance was only a sham is upon the plaintiff. As observed in the decision

in *Ranga Ayyar v. Srinivasa Ayyangar* (1), there must be clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. In order to substantiate such a case it should be shown for what purpose other than the ostensible one the deed was executed. It is necessary to understand under what circumstances Ex. 1 came to be executed.

* * * * *

In the view I have taken of the facts disclosed in this case, I consider that the deed in question, which sounds ostensibly like a deed of maintenance, was executed nominally, or in other words, not with the intention of giving effect to that deed as an operative contract, grant or disposition, but it was brought about in this form by Somasundara with the sole object of securing a sort of acknowledgment by the plaintiff of the undivided status of her husband. This object has been achieved by the insertion of a recital to that effect as a preamble to the maintenance deed, Ex. 1, but that is only a statement of a fact and not part of any contract, grant or disposition. Ex. 1, if treated as a contract, grant or disposition is shown to be wholly nominal or sham and as such it is void and unenforceable. It does not represent any real agreement arrived at as between the plaintiff and Somasundara. This is not a case where oral evidence is sought to be adduced for showing that Ex. 1 is enforceable not according to its plain terms, but in a modified form by something being substituted for or subtracted from or added to any of the terms expressly mentioned therein. It is only when parol evidence is sought to be let in for proving such a case, that S. 92, Evidence Act, would be a bar and render such oral evidence inadmissible. What the plaintiff seeks to prove in this case is that there was never any real disposition at all under Ex. 1. Evidence to prove such a plea does not come within the scope of S. 92. The observations in *Harris v. Rickett* (2), which was followed in *G. Ruthna Mudaliar v. K. Arumuga Mudaliar* (3), seem to be pertinent to the present case. Bramwell, J. says :

1. (1898) 21 Mad 56.

2. (1859) 28 L J Ex 197=4 H & N 1.

3. (1871-74) 7 M H C R 189.

"The principle of the rule is, that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The difficulty is, that in this case there was evidence that the parties did not agree that the written agreement should be the evidence of the contract."

In *Ruthna Mudaliar v. Arumuga Mudaliar* (3), the principles laid down in the case of *Pym v. Campbell* (4) were followed, and Morgan, C. J., observes at p. 196 as follows :

"But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its term can be made by parol. With respect to this, I take the law to be that notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract, and the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it."

It is true that this decision was given before the passing of the Evidence Act. But this same principle has been adopted in later decisions given after S. 92, Evidence Act, had come into operation. In the case reported in *Baijnath Singh v. Vally Mahomed Hajee Abba* (5), their Lordships of the Privy Council have explained the scope of S. 92, Evidence Act, in the following passage occurring at p. 125 :

"The preamble to the Evidence Act recites that 'it is expedient to consolidate, define and amend the Law of Evidence', and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances."

This observation shows that in respect of S. 92, Evidence Act, oral evidence is admissible to prove that an agreement in writing was really no agreement at all but was only a sham as it was not intended to be operative. The dictum in Woodroffe and Ameer Ali's Commentary on the Evidence Act, namely :

"although evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible,"

has been disapproved by Ashworth, J., in the decision reported in *Lachman Das v. Ram Prasad* (6), as not being the correct law. The learned Judge says at p. 685 (of 49 All.) that evidence in any shape cannot be admitted for the purpose of showing that there was no agree-

ment at all or, in other words, that a deed was meant to be inoperative. If this be the correct view, I am afraid that several cases which have arisen in India wherein deeds of various kinds have been held to be nominal or sham transactions or intended to be inoperative on the strength of proof adduced in the shape of oral evidence and surrounding circumstances should be deemed to have been not rightly decided. With great respect, I have to dissent from the view expressed by the learned Judge in the aforesaid case.

In the case reported in *Pertab Chander Ghose v. Mohendranath Purkait* (7), the Privy Council have held that a tenant, who had executed a kabuliyat containing a stipulation which the landlord had told him would not be enforced could not be held to have assented to it and the kabuliyat was not the real agreement between the parties and the plaintiff could not sue upon it. This principle was followed by the Bombay High Court in the case reported in *Navalbai v. Sivubai* (8). Sir Lawrence Jenkins, C. J., after referring to a relevant passage in the aforesaid Privy Council decision, observes at p. 763 as follows :

"So in this case if the plaintiffs were told that the document which in form is a sale deed, would not be enforced as such against them and on the faith of that representation Hariba executed the document, then the sale deed cannot be upheld as against him or the plaintiffs as a sale deed."

In the case reported in *Ramdhani v. Kewal Mani*, A. I. R. 1926 Pat. 156, it is observed that the authorities establish that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. The decisions in *Pym v. Campbell* (4) and *Baijnath Singh v. Vally Mahomad Hajee Abba* (5) have been cited and considered as authorities for the aforesaid principle. These decisions are in my opinion applicable to the facts and circumstances of the present case. There is an indication in the decision reported in *Appa Dhond v. Babaji Krishnaji* (9), that proof is permissible even where a deed is attacked as partly genuine and partly not genuine. Sir Macleod, C. J.,

4. (1856) 6 E & B 370=25 L J Q B 277.

5. A I R 1925 P C 75=86 I C 392=3 Rang 106 (P C).

6. A I R 1927 All 422=100 I C 1029=49 All 680.

7. (1890) 17 Cal 291=16 1 A 233 (P C).

8. (1906) 8 Bom L R 761.

9. A I R 1922 Bom 107=64 I C 364=46 Bom. 85.

has expressed his view on this point at p. 87 as follows :

" But though the Courts have in the past recognized that the ostensible owner in a benami transaction can be ordered to restore the property to its original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion."

In view of all the aforesaid authorities, it should be held that the oral evidence let in by the plaintiff in this case is admissible and cannot be deemed to be obnoxious to the provisions of S. 92, Evidence Act.

As I have already observed, this is not a case where oral evidence is sought to be adduced for proving that the deed is operative not in the manner set forth therein, but in a different manner as settled by a contemporaneous oral agreement. Such a case would be one of substituting a new and different contract for the one expressed in writing. The plaintiff in the present case does not say that Ex. 1 should be held to be operative not as it purports to be but in a different manner or as a different kind of contract or grant. Such a plea would not be open to her and no evidence can be adduced to substantiate that plea. This is the principle of the decisions in *Sangira Mallappa v. Ramappa* (10) and *Mottayappan v. Palani Goundan* (11). This is the view which my learned brother Curgenvén, J., has expressed in the decision in *D. Lakshmi Ayya v. C. Murahari* (12). Similarly in *Afar v. Surja Kumar Ghose* (13) evidence to prove that the real intention of the parties was something at variance with one of the terms of the contract and that that term should be enforced in the manner intended but not in the manner expressed, was held to be inadmissible. These cases have really no application to the present case, in view of the findings of fact set forth above.

I uphold the finding of the lower Court, that the deed Ex. 1 was never intended to be acted upon as a maintenance deed. If it was not meant to be really operative as between the parties and to be acted upon, then it is virtually a sham and would not be an effec-

tive bar to the present claim of the plaintiff.

It follows therefore that the plaintiff is not bound to claim only the profits of Andiyur village provided for her in Ex. 1 on account of the arrears of maintenance now claimed by her. It is left to the discretion of the Court to fix a proper and adequate rate of maintenance having due regard to all the circumstances of the case. (The judgment then discussed the lower Court's findings and concluded). I consider that the rate allowed is moderate and perfectly reasonable. In this view, no higher rate can be allowed to the plaintiff as claimed by her in the memorandum of objections. In the result, I would dismiss both the appeal and the memorandum of objections with costs.

Curgenvén, J.—I confess to having felt some hesitation in deciding whether the view of this case taken by the lower Court and by my learned brother is justified by the evidence ; that is to say, whether the plaintiff's claim to arrears of maintenance can be allowed in spite of the provisions of the maintenance deed, or what is in form a maintenance deed, Ex. 1.

I fully agree that it is clear from all the surrounding facts—the removal of the plaintiff's husband, Ramalinga Mudaliar, to his brother Somasundara's house in spite of the opposition of his wife and others, the extreme and almost indecent haste with which the maintenance deed was put through, although there is no reason to suppose that any claim of this character was made upon Somasundara or any wish expressed for such provision, the state of distress and seclusion in which the widow must have been at the time, the gross inadequacy of the provision made for her in the deed, the abstention of the plaintiff from availing herself of the maintenance so provided—that this is not a case of voluntary acceptance after discussion of the terms of the provision made. It is quite evident that Somasundara was a masterful personality, that he intended to have things all his own way, and that he succeeded in imposing his will upon his brother's widow and such advisers as may have been available to her at the time. It is also pretty clear that he procured the execution of Ex. 1 with a view to avoid claims being made upon

10. (1910) 34 Bom 59=4 I C 257.

11. (1915) 38 Mad 226=20 I C 924.

12. A I R 1930 Mad 547=128 I C 512.

13. (1911) 7 I C 812.

him at some later date when the plaintiff perhaps would be in a better position to assert them—whether such claims might take the form of an allegation of divided status or of a demand for maintenance commensurate in amount to the whole value of the estate. There are sufficient indications to justify the conclusion that to no part of the document can the plaintiff have given her free consent except indeed to the concession to her of the jewels which are now claimed as her own. So far I have no hesitation in accepting the conclusions of the learned Subordinate Judge. My only doubt has been whether all these circumstances are not equally compatible with the theory, not that the document was intended by the parties to be inoperative but that the plaintiff was compelled to execute it by the exertion of undue influence on the part of Somasundara. It seems clear that if the plaintiff wants to establish her version of the circumstances she must exclude this possible alternative, because it would have required her to get the deed set aside before she could make an independent claim to arrears of maintenance, and since the period of three years allowed under Art. 91, Lim. Act, has long since expired this form of relief would have been closed to her. It has in fact been suggested on behalf of the appellants that the plaintiff has been forced to make out that the deed was nominal in order to get over the difficulty created by limitation.

It is necessary therefore to decide specifically that the document was really intended by the parties to it to be nominal and that the theory that the plaintiff was so influenced by her brother-in-law as to execute it as an acceptance of his terms is not a true explanation of the evidence. As to this I think in the first place that quite a plausible reason has been given for inserting the maintenance provisions in the document. The brothers had been living apart, and so far as external indications went it looks as if quite a good case for separation in status having occurred might have been made. The allegation that Somasundaram was uneasy upon this score is very probably true and is borne out by the express recital in the document that he and Ramalinga had been living as members of one and the same

undivided family. He was therefore anxious to make the widow subscribe to a declaration of this character, without making it appear this was the sole purpose of the document obtained from her. As to the extreme inadequacy of the provision made, my learned brother is a better judge of this than I am and I am prepared to accept his view that it reveals the sham character of the document rather than that the plaintiff's consent was extorted. The evidence relating to the house provided for the widow is then said to betray the real truth, because in the first place it was so situated that she could not with any self respect live in it and in the second, Somasundara actually leased it for a period of three years after the maintenance deed had been executed.

It is clear that he must at least have known that she would never want to occupy it. Lastly, there is the circumstance that Somasundara kept the document in his own possession, which is easily understood if he looked upon it merely as a declaration that he and his brother had been undivided in status. We have to read the oral evidence in the light of these considerations. It is true, as is pointed out for the appellants, that not much of it can be said to come from an independent source. It is to be regretted I think that the plaintiff herself should have been examined on commission. Such a course, especially in a claim of this magnitude, ought very rarely to be allowed and I can see no good reason why this lady should not at least have given her evidence direct to the Court even if it had to be taken in chambers. As matters stand, the trial Court was deprived of the opportunity of seeing the witness depose and of recording its impressions of her demeanour. (The judgment then discusses the evidence and proceeds.) On the whole I think that there are sufficient grounds for holding that the finding of fact reached by the learned trial Judge is correct.

On the question of application of S. 92, Evidence Act, it is to be observed that Ex. 1 compromises, or purports to comprise, three matters, a declaration of status, a release by Somasundara of any rights he may possess in the jewels, etc. and a provision for maintenance. The declaration of status is a mere recital and is not in the form at any rate of a con-

tract or of a term in a contract, and I do not think that for the purpose of applying S. 92 it has to be so regarded. As regards the jewels, etc., it is not denied that the plaintiff was allowed to retain these articles. It is argued that they were in fact her own property and that the provision was only inserted in order to lend an appearance of completeness to the document as a settlement of all her claims. It would have been better if the title of the plaintiff to these articles had been more explicitly examined at the trial, but I think there can be little doubt that, possibly, with some trivial exceptions, they formed her own stridhanam property. It is significant that in the ante-adoption agreement subsequently entered into between defendant 2 and defendant 3's natural father (Ex. C) there is a clause stating that "as Janaki Ammal's (defendant 2's) jewels, gold vessels, etc., silver vessels, etc., and stridhana properties belong to her exclusively and as Somasundara Mudaliar Avargal's estate has no right whatsoever thereto, the adopted boy has no right or concern whatsoever therein," and this was probably how matters stood in the case of the plaintiff also. I agree therefore that this term of the document may be treated as nominal equally with the provision for maintenance. If so, I think it is clear that the case reduces itself to one of a wholly nominal contract, and the learned Advocate-General has confessed himself unable to contend that S. 92 can be applied to such a document; and as my learned brother has shown, there is no legal obstacle in the way of proving it to be a sham. Such proof having been adduced, the way lies open to the plaintiff to claim arrears of maintenance irrespective of the terms of the deed. I agree that the rate of maintenance fixed by the lower Court should be accepted and that the appeal and the memorandum of objections should be dismissed with costs. We certify for two sets of fees in the appeal.

P.R.S./M.N.

*Appeal dismissed.***A. I. R. 1933 Madras 54**VENKATASUBBA RAO AND REILLY, JJ.
Rajagopala Ayyar—Appellant.

v.

S. Adinarayana Chettiar and another
—Respondents.Appeal No. 305 of 1931, Decided on
27th July 1932, against order of Sub-
Judge, Madura, in E. A. No. 909 of 1930.

Civil P. C. (1908), O. 21, R. 89—Mortgage decree against A and B directing sale of A's interest first and B's interest in case of deficiency—A's interest sold and he applied under O. 21, R. 90—B's interest sold for deficiency—B applied under O. 21, R. 89—A's application rejected—B's application was competent and was not barred by A's making his application.

A mortgagee decree was passed against a father and son ordering that the father's interest in the property should be first sold and then if any balance remained due the son's interest was to be sold. The father's interest was sold and for the balance the son's interest was also sold which more than satisfied the decree. The father had applied for setting aside the sale under O. 21, R. 90 and the application was pending when the son's interest was sold. The son deposited the balance due after sale of the father's interest and the solatium applied for setting aside the sale of his interest under O. 21, R. 89. The father's application was subsequently rejected.

Held: that the father's application was no bar to the maintainability and granting of the son's application and the liability of the son's interest was sufficiently defined in the decree to enable him to apply under proviso to O. 21, R. 89. [P 55 C 2]

K.P. Mahadeva Ayyar—for Appellant.*K. V. Sesha Ayyangar* and *S. Ranga Raja Ayyangar*—for Respondents.

Venkatasubba Rao, J.—The mortgage decree was passed against the father and the son. It was provided both by the preliminary and the final decrees, that the father's interest in the properties mortgaged should be proceeded against first and only in the event of the decree still remaining unsatisfied, the son's interest should be sold. It is no use contending that a joint decree was passed; for the decree makes defendant 2's share in the property liable only when defendant 1's share is found insufficient. Thus, the decree fixes the measure of defendant 2's liability although as Mr. Mahadeva Ayyar, for the appellant (the auction-purchaser) contends, neither is the proportion fixed nor is the actual sum specified. But the decree, all the same, makes it clear that the son's liability is only for the portion remaining due after the father's share is sold. I fail to see how the facts relied upon by Mr. Mahadeva Ayyar militate against the view that the extent of the son's liability is defined by the decree. The rights of the parties must be taken to be governed by the decrees which have now become final. Why the decrees came to be passed in that way, it would be idle to inquire.

Now let us look at the facts that gave rise to the application. The father's share in the family property was sold in execution and fetched a certain sum. The balance, which after that amount was credited, was still due under the decree was Rs. 2,000 odd. To realize that sum, the son's share was sold and fetched Rs. 7,510. Thereupon, he paid into Court Rs. 2,000 odd referred to above along with the additional sum specified in O. 21, R. 89 and applied under that rule to have the sale of his share set aside. The auction-purchaser's contention is that the application made by the son, without his depositing the full amount of the decree, was bad. The son is protected by the proviso to R. 89 which was added by way of amendment and which reads thus:

"Provided that where the immovable property sold is liable to discharge a portion of the decree debt the payment under Cl. (b) of this sub-rule need not exceed such amount as under the decree the owner of the property is liable to pay."

The argument is, that at the very passing of the decree, the extent of the liability must be specified either in the terms of the sum payable or as a fixed fraction of the whole amount. There is nothing in the rule countenancing the contention, and I therefore reject it. Next it is contended that the father's act in applying under R. 90 to set aside the sale of his interest, should be held to be a bar preventing the son from applying under R. 89. The father's application was rejected by the lower Court and the appeal filed by him has also been withdrawn and we have just made an order dismissing that appeal. Was the son bound to wait till the father's application was disposed of? In that case the son would be met with the plea that his application was out of time. Mr. Mahadeva Ayyar when pressed, has had to concede that if his view be correct the son would be without a remedy. The son could not apply, if the appellant's contention be right, when his father's application was pending, as at that time it was not definitely known whether the sale of the father's interest would be upheld or not; if, on the other hand, the son waited till his father's application was disposed of, he would be too late and his application should be rejected on that ground. Thus, according to the appellant, because the father chose to apply

under R. 90, the son should be deprived of his right. That is the position taken up, but the son's rights cannot be made to depend upon the conduct of his co-judgment-debtor. It would no doubt be quite a different matter, if in the event the sale of the father's interest had been set aside. In that case, under the very terms of the decree the son would be liable to pay a larger amount than he has chosen to deposit under R. 89; but that is not what has happened and I must therefore uphold the lower Court's order and dismiss the appeal with costs of the son (defendant 2).

The appellant (the auction-purchaser) will be at liberty to draw out the price he paid, namely, Rs. 7,510 along with the 5 per cent deposited by the son and interest, if any, on these sums standing to the credit of the proceeding.

Reilly, J.—I agree that defendant 2 made his deposit within the meaning of the new proviso to R. 89, O. 21, Civil P. C. His undivided share of the property was liable at the time it was put for sale in execution to a determined part of the decree-debt, and it was put up for sale to realize that part of the decree-debt. He deposited that part of the decree-debt with the addition of poundage and the 5 per cent due to the auction-purchaser. In consequence of the curious way in which the decree was framed he has fortunately for himself been able to come within the meaning of the proviso. I agree that this appeal must be dismissed with costs as proposed.

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1933 Madras 55

JACKSON AND MOCKETT, JJ.

Tadepalli Sriramulu and others—
Plaintiffs—Appellants.

v.

*The Firm of Kollipara Sriramulu, Kollipara Venkata Ramachandrayya and another—*Defendants—Respondents.

Second Appeal No. 1148 of 1928, Decided on 11th August 1932.

Civil P. C. (1908), O. 34, R. 5 (3)—Dismissal of applications for making final decree does not bar subsequent application—Civil P. C. (1908), O. 9, R. 4.

The previous dismissals of the applications for making a preliminary mortgage decree final for non-payment of process fees does not make the Court functus officio to pass a final decree on a subsequent application. What was dismissed was merely the application for final decree and not the suit itself and the applications which are

not one in execution can be made again under O. 9, R. 4: *A I R 1921 Mad 795* and *A I R 1924 P C 198*. *Rel. on: A I R 1922 Mad 65*; *35 All 331* and *A I R 1925 All 622*. *Inf.*

[P 56 C 1, 2]

B. Somayya—for Appellants.

P. Venkataramana Rao and *P. V. Rajamannar*—for Respondents.

Jackson, J.—This is a class of a case which has given Courts considerable trouble. The present defendant 1 obtained a preliminary decree upon a mortgage against the father of the present plaintiffs. There then followed these applications for a final decree:

Ex. A. Steps not taken . . . Dismissed.

" B. Dismissed for failure to pay batta.

" C. Dismissed.

" D. 29th September 1919. Order on 14th November 1919.

The plaintiffs have brought a suit to set aside the consequent sale on the plea that when the Court passed orders upon Ex. D, it had already dismissed the suit and was functus officio. The lower appellate Court has held that the Court's final decree was not made without jurisdiction and plaintiffs appeal. In this case it is a pure assumption that the suit was dismissed, and there is no reason to suppose that the Court really intended anything of the sort. In *Lachmi Narain Marwari v. Balmakund Marwari* (1), where the Judge actually used the phrase "the suit is dismissed for want of further prosecution," he explained that the object of dismissal "had not been to discharge or vacate the appellate decree." And as pointed out by the Judicial Committee in that case he would have no jurisdiction to dismiss the suit:

"The parties have on the making of the (preliminary) decree acquired rights which are fixed unless the decree is varied."

All that the Munsif did in the present case was to dismiss the applications for a final decree because batta had not been paid. Before its amendment in 1st September 1931, there was no provision in O. 34, R. 5 (3) for serving notice on parties; and a Court dismissing an application for a final decree on the ground of nonpayment of batta for serving notice was acting under its inherent and not under any statutory power. It arrogates to itself the right to dismiss an application filed under O. 34, R. 5 (3). It is difficult to see how this peculiar

action can be construed to be the dismissal of the suit itself, which as pointed out by the Judicial Committee is not within the power of the Court. A Court will not ordinarily be presumed to do an illegality. It seems better to follow the face of the record and to hold that the Court successively dismissed applications for a final decree. Such applications as observed by Cargenven, J., in *Venkatarama v. Marudachala*, *A. I. R. 1931 Mad. 795*, are not applications in execution, and by force of S. 141, Civil P. C., are governed by O. 9 and O. 17 as though they are suits. Under O. 9, R. 2 the Court dismisses the "suit," here, the applications, for non-service. Then under O. 9, R. 4 the plaintiff may bring a fresh "suit," here, put in a fresh application. There is then no need for the plaintiff to get the previous order of dismissal set aside: *M. Venkatiah v. Venkata Subbiah* (2), upon which the appellant strongly relies lays down that the previous order is not ultra vires, though it may be erroneous.

To this we entirely defer, and think it is a dangerous doctrine that the judicial acts of Courts can be treated as mere nullities, and of no effect whatsoever. It was for this reason that this Court declined to interfere in revision in *Sreeramulu v. Nagabhushanam* (3). We also think it dangerous to carry the principle that a Court may rectify mistakes inadvertently made beyond the ambit of the facts in *Debi Baksh Singh v. Habib Shah* (4), and should hesitate to say, as in *Jodha Singh v. Gokaran Das Pande* (5), that a Court can revoke its own order of dismissal. But the line of reasoning in *Venkatarama v. Marudachala*, *A. I. R. 1931 Mad. 795*, makes revocation unnecessary. The orders of dismissal, Exs. A, B and C, stand as good orders, but plaintiff has in O. 9, R. 4, a locus penitentiae which gives room for a fresh application. It may be added that this is no artificial way of avoiding a hard case, but runs with the real facts of the situation. The Court when it dismissed the applications had no real intention of dismissing the suit and was only acting in terrorem as said in

2. *A I R 1922 Mad 65=69 I C 366*.

3. *A I R 1928 Mad 963=112 I C 19*.

4. (1913) *35 All 331=40 I A 150=16 O C 194=19 I C 526 (P C)*.

5. *A I R 1925 All 622=57 I C 225=47 All 546*.

1. *A I R 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 P C*.

Lachmi Narain v. Balmakund (1), to induce plaintiff to pay process fees; and when plaintiff put in a fresh application it was precisely what the Court expected. Artificially is imported by the assumption that the Court deliberately dismissed the whole suit, and rendered itself functus officio. Accordingly the appeal is dismissed with costs.

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1933 Madras 57

PANDALAI, J.

M. Chengayya Pantulu—Petitioner.

v.

Medarametla Kottayya and others—Opposite Parties.

Civil Revn. Petn. Nos. 1734 to 1736 of 1928, Decided on 18th August 1932.

(a) **Hindu Religious Endowments Act, (1 of 1925), S. 53 (4)—Scheme before Act—Application under S. 53 (4) lies—Hindu Religious Endowments Act (1925), S. 71.**

Applications under S. 53 (4) do lie in respect of schemes settled by Courts before the Act as well as in respect of schemes settled subsequently: *A I R 1929 Mad 322 held obiter and not Foll.* [P 57 C 2]

(b) **Madras Religious Endowments Act (1925), S. 53 (4)—Applications can be continued even after passing of Act (11 of 1927) without payment of further court-fee—Madras Religious Endowments Act (1927), Ss. 7 (1) and 57 (4).**

Applications under S. 53 (4), Act 1 of 1925, are not rendered incompetent of continuance on the passing of Act 11 of 1927 inasmuch as there is nothing inconsistent in the provisions of the later Act with continuing the applications already filed. No further court-fee also is necessary for such continuance. [P 58 C 2]

(c) **Interpretation of Statutes—Repealing Act does not affect proceedings instituted under previous Act unless expressly provided—Madras General Clauses Act (1891), S. 8 (f).**

A repealing Act shall not affect any legal proceeding in respect of any rights etc., acquired beforehand and such legal proceeding may be continued as if the repealing Act had not been passed subject to there being nothing in the repealing Act to express a contrary intention.

[P 58 C 2]

P. Venkataramana Rao—for Petitioner.

U. S. Narasimhachariar—for Opposite Parties.

Judgment.—These petitions by the Hindu Religious Endowments Board arise from applications under S. 53, Cl. 4, Act 1 of 1925, the first Hindu Religious Endowments Act which was afterwards repealed by Act 2 of 1927. The applications were severally for the modification of schemes which had been settled in respect of three temples

by the civil Courts and were made on 3rd January 1927 when the first Act was still in force. They were opposed by the counter-petitioners concerned and were dismissed by the learned District Judge on a preliminary point. That point is that applications under S. 53 (4) will not lie in respect of schemes settled by Courts before the Act and will lie only in respect of schemes settled subsequently. For this opinion the learned Judge relied on a decision of Sreenivasa Ayyangar, J., in *Chinnan v. Sundaresa*, *A. I. R. 1929 Mad. 322*. That was not a decision on this point, although there is an observation to the effect that the scheme under consideration in that case was of an earlier date than the Act of 1927 and therefore S. 75 of that Act corresponding to S. 71 of the Act of 1925 does not apply to the scheme. The matter before the learned Judge arose out of an application before the Subordinate Judge of Cuddalore made under "the liberty to apply" clause in a scheme which had been framed and the Subordinate Judge in that application removed the petitioner, trustee. The trustee brought up the matter to this Court and submitted that the "liberty to apply" clause in pursuance of which proceedings had originated against him was itself ultra vires and his dismissal was therefore illegal. With this argument the learned Judge concurred. It was then argued for the other side that under the Religious Endowments Act, which had been enacted while the proceedings against the petitioner were pending, whatever may have been the inherent fault of schemes passed before the Act they had all been cured and validated by S. 71 of the Act of 1925, corresponding to S. 75 of the Act of 1927. The true answer to this, I venture to think, was that the Religious Endowments Act did not purport to do anything of the kind. All that the above section meant was that schemes passed by the civil Courts before the Act must be deemed to have been passed under the Act. Mark why. In order that they may be dealt with under the Act inter alia under S. 53 of the Act of 1925 (S. 57 of the Act of 1927). There was no question of validation or invalidation of any clause or provision in any scheme which was ultra vires of the Court. But the answer given by the

learned Judge was that S. 75 of the Act of 1927 applied only to schemes settled after that Act. I cannot convince myself that the above observation was the result of a deliberate opinion. In any case I am not able to agree with it. Ss. 53, Cls. 4 and 71 of the Act of 1925, are clear and explicit. S. 53, Cl. 4 refers inter alia to any scheme of administration which under S. 71 is deemed to be a scheme settled under the Act; and it says that all such schemes may be modified or cancelled by the Court on the application of the Board. S. 71 says that "where the administration of a religious endowment is governed by any scheme settled under S. 92, Civil P. C., such scheme shall be deemed to be a scheme settled under this Act, and such scheme may be modified or cancelled in the manner provided by this Act," in other words, may be modified or cancelled by the procedure laid down in S. 53. The reference in S. 71 to schemes settled under S. 92, can apply only to schemes settled before the Act for the reason that under S. 69 (2) of the Act future suits under S. 92, Civil P. C., are prohibited and that section is to have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no such suits can be brought except under the Act. Therefore the schemes settled by Courts under S. 92 referred to in the section must be only those which had been already settled. To construe the section otherwise would be to stultify the beneficent effect of the scheme of the Act, by making it possible for the very thing to be done which the Act was intended to prevent, viz., unending litigation about the management of religious endowments. I have no hesitation in thinking that the objection by which the learned District Judge thought himself bound does not exist.

Another point raised in this Court for the respondents is that although these applications may have been competent at the time when they were presented, i.e., on 3rd January 1927, yet as soon as Act 2 of 1927 was passed, i.e., on 19th January 1927, their continuance became incompetent because in the corresponding section in the new Act, viz., S. 57 (4), it is provided that schemes of administration which under S. 75 are deemed to be schemes settled under the Act, i.e. schemes settled by a Court under S. 92 must be modified or cancelled only

by suit and not otherwise, instead of by application as was provided in S. 53 (4) of the earlier Act. The learned Judge himself was not inclined to accede to this objection, because he thought that there was nothing under the Act of 1927 to prevent the old applications being continued, if necessary, by payment of additional court-fees.

The respondent's learned advocate canvassed this opinion of the learned Judge and says that after the new Act it would be illegal to continue the old applications. The argument is as follows: No doubt S. 8 (f), Madras General Clauses Act, says that a repealing Act shall not affect any legal proceeding in respect of any rights, etc., acquired beforehand and that such legal proceeding may be continued as if the repealing Act had not been passed. But this is subject according to S. 4 to there being nothing in the repealing Act to express a contrary intention. There is a contrary intention expressed in the Religious Endowments Act of 1927 to the effect that modifications and cancellation of schemes of administration can only take place by suit and not otherwise. Therefore to allow the old applications to continue is contrary to S. 75 (4). The whole of this argument is based upon a misapprehension because S. 75 of the Act of 1927 was certainly not intended to be retrospective and can apply only to proceedings taken after it came into force. It is one thing to say that under the Act of 1927 the modification of a scheme can be obtained only by a suit. It is another thing to say that by reason of that section it is illegal to continue applications which had already been legally filed. The only provision in the Act of 1927 about continuation of proceedings begun under the Act of 1925 is S. 7 (2). It says that all proceedings taken under the earlier Act may be continued after that Act in so far as they are not inconsistent with the provisions of this Act. There is nothing in S. 75 (4) which is inconsistent with continuing the application presented already because as already said all that S. 75 says is that after the new Act the proceedings for modification must be begun by way of suit. There being nothing in the Act which expresses any contrary intention, the ordinary rule of interpreting repealing legislation holds especially in view

of S. 7 (2). The learned Judge's view on this point was right. But it is necessary to point out that it is not necessary to convert these applications into suits; nor as far as I can see is there any question of court-fees. The applications must be heard and decided on the footing that they were validly presented and and that they have been improperly dismissed.

The respondent's advocate wanted to raise a question that one of the reliefs claimed in the petition was not available in these proceedings. That does not now arise and may be raised before the lower Court. The order of the lower Court is set aside and the petitions sent back to the District Court for disposal according to law. The petitioner will have his costs in the three petitions.

P.R.S./M.N. *Petitions allowed.*

A. I. R. 1933 Madras 59

SUNDARAM CHETTY, J.

Chairman, Chingleput Municipality—
Plaintiff—Appellant.

v.

M. Murugesu Mudaliar and others—
Defendants—Respondents.

Second Appeals Nos. 1088 to 1092 of 1930, Decided on 28th July 1932.

(a) Civil P. C. (1908), S. 11—**Decision against Municipal Council is binding against its chairman—Madras District Municipalities Act (1924), S. 22.**

A decision in a former suit obtained against the Municipal Council is binding on its chairman who is the chief functionary of the Council. For the purpose of applying the principle of res judicata the Municipal Council and its chairman cannot be viewed as two independent entities.

[P 61 C 1]

(b) Civil P. C. (1908), S. 11—**Erroneous decision on point of law is not res judicata—But subsequent decision cannot affect rights under former decision.**

An erroneous decision on a question of law in a previous suit would not be a bar in a subsequent suit between the same parties, and a different decision may be given on that question but the decision so given should not in any way affect the operation of the former decree or take away any rights acquired by the parties thereunder: 30 Mad 461 and A I R 1923 Cal 777, *Foll.*

[P 61 C 1]

*V. Ramaswami Ayyar—*for Appellant.

*T. V. Muthukrishna Ayyar—*for Respondents.

Judgment.—These five appeals have been preferred by the Chairman of the Chingleput Municipality and arise out of five suits filed by him for a declaration that the defendants are liable to take annual licences in respect of their rice

mills and for payment of licence fees under S. 249, Madras District Municipalities Act of 1920. The main plea of the defendants is that the suits are barred by res judicata by reason of the decision in a batch of former suits filed by them against the Municipal Council, Chingleput, represented by its Chairman, for a declaration that in respect of all these rice mills no annual license was necessary under S. 249 of the Act and for a permanent injunction restraining the Municipal Council from compelling the plaintiffs to take out licenses either by threat of prosecution or otherwise. Ex. 1 is a certified copy of the judgment in the former suits. It is clear that the declaration and injunction asked for in those suits have been granted against the Municipal Council, Chingleput. The identical question raised in the present suits was decided in the former suits, and both the Courts below have held that according to the rule and principle of res judicata the relief asked for by the Municipal Chairman in the present suits cannot be granted. The correctness of that view is challenged in these second appeals.

The question for consideration is whether a decision of a civil Court which has become final as against the Municipal Council of Chingleput in respect of the subject-matter of the present suits will operate as res judicata in these suits and the main contention urged by the learned advocate for the appellant, is that the former suits having been laid against the Municipal Council and not against the Municipal Chairman, the decision in those suits would not operate as res judicata in the present suits. The point for consideration is whether there is legal identity of parties in the two suits having due regard to the whole scheme of the District Municipalities Act and the relevant provisions thereof. The exact relationship between the Municipal Council and its Chairman is not defined in the Act, but it must be a matter of inference. According to S. 4 of the Act, the Local Government has the power to constitute any town, village, or other station as a Municipality. The Municipal Council should be a body corporate and be vested with the capacity of suing or being sued in its corporate name, according to sub-S. 2, S. 6 of the Act. S. 19 says that the Municipal

administration shall vest in the Council and according to S. 22 the Chairman shall be bound to give effect to every resolution of the Council, unless such resolution is modified, suspended or cancelled by a controlling authority. There seems to be no doubt that the chairman who is necessarily a member of the Council is its executive head. Certain special functions are assigned to the chairman under the Act, just as some other functions are assigned to the Municipal Council. The Municipal authorities charged with the carrying out of the provisions of this Act are stated to be a Council and its Chairman (S. 6, Cl. 1).

The functions of the chairman are specified in S. 13. As regards the filing of suits, the whole scheme of the Act clearly indicates that generally the Council as a corporate body has to sue and to be sued. But the chairman may institute and also prosecute any suit, only with the approval of the Council (vide S. 351, Cl. (g)). In spite of the fact that the chairman is invested with certain specific powers under the Act, there is nothing to show that he is an altogether independent functionary, and any powers which for the sake of convenience are vested in him have to be exercised on behalf of the Municipal Council which is a body corporate. The chairman as such can have no independent existence apart from the Council. That is clear from the provisions of S. 41 of the Act. If the Local Government should choose to dissolve or supersede a Council, the chairman who is a member of the Council could not have any independent locus standi as chairman. It is true that in the matter of demanding annual licenses to be taken in respect of the rice mills in question, the chairman has got the power under S. 249 of the Act to grant or refuse to grant such licences; but the foundation for the exercise of that power by the chairman is the resolution of the Council for the publication of a notification in the District Gazette and by beat of drum, that certain localities should not be used for any of the purposes specified in Sch. 5 without the chairman's licence. If a particular rice mill does not come within the place specified in the notification issued by the Council, the chairman has no power to grant or refuse to grant such licences in respect

of it. Looking at the question in issue in the light of the aforesaid sections, it seems to me that if by a decision of the civil Court the Municipal Council is precluded from declaring that the rice mills of the present defendants are liable for the payment of the annual licence fees, the chairman as the executive head of the Council cannot demand the taking of a license in respect of such a mill and levy the annual licence fee. If the distinction in the functions assigned to the Council and its chairman should be an indication for the absence of legal identity between the two for the purposes of the rule of res judicata, I am constrained to observe that the result would be startling and anomalous.

Any decision obtained in a suit to which the Municipal Council is a party, which affects the rights of strangers may be ignored by the chairman or any other officer of the municipality, for the simple reason that the Council and not that particular officer was a party to that suit. It would never be the intention of the legislature, if regard be had to the whole scheme of the District Municipalities Act, to constitute the chairman, as an independent entity who would not be bound by any decision affecting the Municipal Council itself. There is a further circumstance adverted to by the learned District Judge which may also throw some light on this question. Any order of the chairman granting or refusing a licence under S. 249 is subject to appeal to the Municipal Council. It is the order of the Municipal Council passed in appeal that must be deemed to have been substituted for the order of the chairman. Having this in view, if the contention of Mr. Ramaswamy Ayyar is to be upheld, the result will be that the Municipal Council of Chingleput is precluded from ordering that these defendants should obtain annual licence in respect of the rice mills, but the chairman of this Council is free to enforce the taking of such licences. If the chairman passes such an order the aggrieved party has to appeal to this very Municipal Council and urge the decision in the former suits as a ground for setting aside the order of the chairman. This anomalous situation will arise by holding that the previous decision passed against the Municipal Council does not operate as res judicata. It cannot be

said that for any act done by the chairman in pursuance of a power vested in him under the Act, a suit could not lie against the Municipal Council. The chairman carries out the provisions of the Act as a representative of the Municipal Council.

That being so, it does not stand to reason that if there is a binding decision as against the Municipal Council in respect of a matter affecting the rights of third parties, the chairman can do anything in order to abrogate the benefit which was obtained under such a decision. I have no hesitation in agreeing with the finding of both the Courts below, that the decision in the former suits obtained against the Municipal Council is binding on its chairman who is the chief functionary of the Council. For the purpose of applying the principle of res judicata, I do not think that the Municipal Council and its chairman can be viewed as two independent entities. I hold that there is the legal identity of parties and therefore the bar of res judicata exists. Mr. Ramaswamy Ayyar, the learned advocate for the appellant, contends that the decision in the former suits was based upon an erroneous view of law and therefore such a decision cannot operate as res judicata in the present suits. A number of authorities have been cited, but it is enough to refer to the decision in *Mangalathammal v. Narayanaswami Ayyar* (1), where the important qualification with which the proposition contended for by the appellant should be adopted has been laid down. An erroneous decision on a question of law in a previous suit would not be a bar in a subsequent suit between the same parties, and a different decision may be given on that question, but the decision so given should not in any way affect the operation of the former decree or take away any rights acquired by the parties thereunder.

The same view has been upheld in a decision relied upon by Mr. Muthukrishna Ayyar for the respondents, viz., *Tairi Charan v. Kedar Nath* (2). The effect of these pronouncements is that though the former decision may be deemed to have been based on a wrong view of law, the decision arrived at, i. e., the decree given, can in no way be

affected by giving a different finding in a subsequent suit on the same question. That being so, the circumstance that the previous decision was based on an erroneous view of the law does not help the plaintiff in these suits. By reason of the declaration and perpetual injunction given in the former suits, it cannot be said that the relief asked for in the present suits is something not covered by the former decision. If the present suits should be decreed, the result would be the abrogation of the former decision which has been allowed to become final. The decision of the Courts below is correct and these second appeals are dismissed with costs.

P.R.S./M.N. *Appeals dismissed.*

A. I. R. 1933 Madras 61

PANDALAI, J.

Sattamuthu Chettiar—Petitioner.

v.

Abdul Kareem Maracayar—Opposite Parties.

Civil Revn. Petn. No. 596 of 1929, Decided on 3rd August 1932.

(a) **Negotiable Instruments Act (1881), S. 35—Liability of indorser is subject to contract to contrary either express or implied—Father and major son partitioning—Father indorsing pro-note in son's favour as its result—Implied contract to contrary can be inferred.**

The rule whereby the indorser of a negotiable instrument who indorses without restricting his liability in the endorsement by express words makes himself liable to the indorsee as surety for the amount of the instrument in case of dishonour is subject to there having been no contract to the contrary, i. e., that although the indorsement is ex facie unrestricted, the indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction, excluded personal liability to the latter. [P 62 C 1, 2]

Where a father as a result of a partition with his major son indorses a promissory note to the son and the maker defaults in payment, the father is not liable as a surety or otherwise by reason merely of the indorsement along with the maker: 5 Q B 475, *Rel. on.* [P 62 C 2]

(b) **Partition—In partition of family property there cannot be guarantee of title.**

Where at a partition family properties are divided and the parties being majors and able to look after themselves accept the properties allotted for their share of the assets, it is too much to say that there is as between them a covenant for title or guarantee of payment by strangers to the family. [P 63 C 1, 2]

S. Panchapagesa Sastri and *K. R. Krishnaswami Ayyar*—for Petitioner.

A. V. Viswanatha Sastri—for Opposite Party.

Judgment.—The petitioner is the plaintiff. His suit was brought on a

1. (1907) 30 Mad 461=17 M L J 250.

2. A I R 1928 Cal 777 =56 Cal 723 (F B).

promissory note executed by defendant 1 in favour of the father of the plaintiff and defendants 2 to 4 and endorsed by the father to the plaintiff as one of the family assets allotted to the plaintiff on the latter's releasing his rights in the family properties. The only point now arising for consideration is whether the lower Court was right in dismissing the suit as against defendants 2 to 4, or whether it should have given a decree against them also on the ground alleged by the plaintiff that the father having indorsed the note to the plaintiff and the maker having defaulted payment, the father was himself personally responsible as the indorser and defendants 2 to 4 are liable as his legal representatives to the extent of his assets in their hands. The ground on which, while giving a decree against the maker of the note, defendant 1, the learned Judge in the Court below refused to give a decree against the assets of the father in the hands of defendants 2 to 4 is that the note was endorsed to the plaintiff as part of a partition, and it is to be presumed that the learned Judge thought that in those circumstances the personal liability of the indorser was negatived by the nature of the transaction.

In this Court the petitioner's learned advocate has urged first, that under S. 35, Negotiable Instruments Act, the only way in which the father could have excluded personal liability as indorser of the note was by expressly endorsing it "without recourse" and that not having been done, it is not open to the Court to infer any other ground of exemption from liability. It was also urged that there was nothing in the nature of the transaction that the endorsement was part of a family partition wherefrom it may be inferred that the indorser intended to exclude personal liability.

On the first question the words of S. 35, Negotiable Instruments Act, are clear enough. It says that

"in the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without in such indorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage by such dishonour, etc."

The words make it clear that the rule whereby the indorser of a negotiable in-

strument who indorses without restricting his liability in the endorsement by express words makes himself liable to the indorsee as surety for the amount of the instrument in case of dishonour is subject to there having been no contract to the contrary, i. e., that although the indorsement is *ex facie* unrestricted, the indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction, excluded personal liability to the latter. No Indian authority was cited on this point; but English authorities are ample. In *Denton v. Peters* (1), a partner indorsed to his co-partner a bill accepted by a person who was indebted to them for goods sold. On the debtor defaulting payment the indorsee brought a suit against the indorser and pleaded that the indorsement being on its face absolute and unrestricted he was entitled to a decree. But when it appeared that the parties had been partners and the indorsement was made to enable the plaintiff to collect the money from the debtor for their joint benefit, the Court held that the form of the indorsement notwithstanding, the defendant was not liable to the plaintiff. That decision was in 1870 before the Bills of Exchange Act. In *Macdonald v. Whitefield* (2), a case from Canada where the law on this point is the same as that of England, the directors of a company in order to make themselves personally liable to a bank from which the company was borrowing money made successive indorsements of the bill on which the money was borrowed. And the indorsements by one director to another and by him to a third and by him to a fourth and so on were on their face unconditional and unrestricted. But it was proved that the purpose of the indorsements and the arrangement in pursuance of which they were made was not that they might stand surety to each other but that they might all as between themselves and the bank be surety for the debt advanced to the company. On those facts it was held that far from the indorser being liable for the whole amount to his indorsee and that indorsee in his turn as indorser to his indorsee and so on, they were all liable

1. (1871) 5 Q B 475=23 L T 281.

2. (1884) 8 A C 733=52 L J P C 70=49 L T 466.

equally to contribute to the debt if one of them had paid it. Lord Watson stated:

"It is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or as indorsers, and that reasonable inferences derived from the facts and circumstances, are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law-merchant would otherwise assign to them."

This decision was in 1883 soon after the English Bills of Exchange Act. Nothing has been cited to show that these decisions which are of the highest authority are not good law according to S. 35, Negotiable Instruments Act. It follows that the lower Court was right in looking at the nature of the transaction to ascertain whether there was in fact any undertaking by the father of the plaintiff to stand guarantee for the payment of the note indorsed to the plaintiff.

It appears to me that the only answer possible upon the facts which are admitted is in the negative. The family was a trading family, the plaintiff was a son by the first wife of the father; and defendants 2 to 4, who are minors, are the children of the second wife. It was found necessary to effect a partition and the plaintiff was given a share. Thereupon he withdrew from the family by Ex. 1 which recites quite explicitly that he had no longer any rights in the family properties and took for his share the assets therein stated altogether amounting to Rs. 35,500. One of these assets was the suit note for Rs. 550 executed by a stranger, defendant 1, to the head of the family, the father. Besides this, there were four other notes, which were similarly indorsed, of the total value of Rs. 5,000, and the rest of the amount was made up of Rs. 18,950 paid in cash, Rs. 5000 by credit opened in the plaintiff's name in the firm at Negapatam and Rs. 11,000 secured by a promissory note given by the father. Having regard to the nature of this transaction it is impossible to understand how the father, who was handing over family assets, should have made himself personally liable—and he could only do so out of his own share of the family property—to the plaintiff in case any of the outstandings were not duly paid. Where

at a partition family properties are divided and the parties, being majors and able to look after themselves accept the properties allotted for their share of the assets, it is too much to say that there is as between them a covenant for title or a guarantee of payment by strangers to the family. In my opinion the learned Judge drew the correct inference from the facts that there was no such undertaking between the plaintiff's father and himself.

It was urged that this question was res judicata by a decision given in respect of another promissory note on which the plaintiff succeeded in getting a decree against defendants 2 to 4. If the plaintiff was fortunate enough to get such a decree, I cannot deprive him of it, but certainly it is not res judicata in this case. The civil revision petition must be dismissed with costs.

P.R.S./M.N.

Petition dismissed.

A. I. R. 1933 Madras 63

RAMESAM AND WALSH, JJ.

Venkata Reddi—Appellant.

v.

T. V. Dorasami Pillai—Respondent.

Appeal No. 353 of 1928, Decided on 5th August 1932, against order of Sub-Judge, Vellore, D/- 26th September 1928.

Civil P. C. (1908), O. 21, R. 20—Mortgage-decree for sale imposing personal liability in case of deficiency—Set off can be given even before sale—Civil P. C. (1908), O. 34, R. 6.

A mortgage decree for sale ordering that the mortgagor is liable for all the deficiency that may remain after the sale imposes a personal liability. If the sale realises nothing, he is liable for the whole amount. In such a case the mortgagee decree-holder need not necessarily wait till the sale is held to claim a set off in satisfaction of a money decree against him held by the mortgagor: 33 *All* 240, *Rel on*; 38 *All* 669 and *A I R* 1930 *Rang* 68, *Dist*. [P 64 C 2]

B. Somayya—for Appellant.

C. S. Venkatachariar—for Respondent.

Ramesam, J.—In this case the appellant before us is defendant 4 in O. S. No. 1 of 1926. The plaintiff obtained a decree in that suit for Rs. 4,214-0-4 towards peishcush and road cess. In O. S. No. 25-A of 1918 which was a suit for redemption of a mortgage the defendant obtained a final decree for Rs. 6,908-14-4. This final decree is a decree directing the sale of the mortgaged property and if there is any deficiency it should be paid by the plaintiff. In the connected appeal, No. 35 of 1931, we have held that

that final decree should not have been amended by the Subordinate Judge of Chittoor and should remain as it was originally passed. The result is the mortgage decree is a decree for an amount which in the last resort may have to be paid personally by the plaintiff. In the petition against which this C. M. A. arises, E. A. 512 of 1928, defendant 4 seeks to set off the money decree against him in O. S. No. 1 of 1926 against the mortgage decree obtained by him and to stop all further proceedings for his arrest in E. P. No. 86 of 1928 in execution of O. S. No. 1 of 1926. The question of law that arises before us is whether the two decrees can be so set off against each other. O. 21, R. 20, now enacts:

"the provisions contained in Rr. 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge."

This shows that the mere fact that the decrees in which the set off is sought are mortgage decrees or one of the two decrees is a mortgage decree, does not by itself amount to an objection to the set off claimed. I do not mean to say that there may not be some other objection. Without any other objection the mere fact that one of the decrees is a mortgage decree is not enough to refuse the set off. This is the view of the Allahabad High Court in *Nagar Mal v. Ram Chand* (1) and this was always the view of the Madras High Court prior to the Civil Procedure Code of 1908. But the decision in *Nagar Mal v. Ram Chand* (1) had to be considered and was distinguished in *Sheo Shankar v. Chuni Lal* (2). In that case the decree is a foreclosure decree which is of a nature giving simply an option to the mortgagor to redeem and if he does not, his right to redeem is simply foreclosed. It is not a decree to which ordinarily O. 21, R. 20 applies. Therefore that case is distinguishable. But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold and in such a case if he is not liable for the deficiency it cannot be said there is any decree for money against him and it may be proper to describe the decree as one giving an option like the decree for foreclosure. In *Sheo*

Shankar v. Chuni Lal (2) the person against whom the decree was sought to be set off was the purchaser of a portion only of the mortgaged property and he was under no personal liability. In such a case it may be said that he was filling a different character in the mortgage suit from the one in the decree sought to be set off. In the present case there is a personal decree against the plaintiff. By saying he is liable for all the deficiency that remain after the sale, the true character of his liability is known. If the sale realises nothing, he is liable for the whole amount. In such a case to say that the sale must first be held and only for the balance the judgment-debtor in the mortgage decree is personally liable is to look at the matter too technically and to cause unnecessary expense to the parties.

In such a case it may be very equitable and just to deduct the amount of the money decree from the mortgage decree and to permit execution for the balance only. The case in *The Burma Oil Co. Ltd. v. Ma Tin* (3) is also a case of a mortgage decree in which it is not clear that the mortgagor will be liable personally for the deficiency. In that case the decree at the time the question arose was only against the property and the decree provides for liberty to apply for a personal decree for the amount of the balance and one does not know how the application may end. On the actual facts I think that the decisions in *The Burma Oil Co. Ltd. v. Ma Tin* (3) and *Sheo Shankar v. Chuni Lal* (2) are correct; but they do not apply to the facts of the case before us. Therefore in this case there is no objection to the set off claimed. The set off is a satisfaction of the decree to that extent and if the balance after set off is paid, the whole decree must be regarded as satisfied. We now direct the Subordinate Judge of Vellore to proceed with the execution of the mortgage decree after setting off the money decree towards it and to proceed with the execution for the balance. The appellant will be entitled to his costs in appeal. In the Court below each party will bear its own costs.

Walsh, J.—I agree.

P.R.S./M.N.

Appeal allowed.

3. A I R 1930 Rang 68=120 I O 699=7 Rang 505.

1. (1911) 33 All 240=8 I C 835.

2. (1916) 33 All 669=36 I C 948.

A. I. R. 1933 Madras 65 (1)

JACKSON AND MOCKETT, JJ.

(Kovuru) Subbayya and others — Accused—Petitioners.

v.

Peta Veerayya—Complainant — Opposite Party.

Criminal Revn. Case No. 214 of 1932, and Criminal Revn. Petn. No. 199 of 1932, Decided on 25th July 1932, against order of Second Class Magistrate, Pon-nuru, D/- 21st January 1932.

Criminal P. C. (1898), S. 162 — Statement to police during investigation of offence different from one under trial can be used by accused for cross-examination.

On behalf of the accused in an assault case the complainant can be cross-examined by confronting him with a statement which the complainant made to the police when they were investigating a theft case, a case different from the case of assault and when the case of assault was not under investigation by the police. When the statement has not been made in the course of investigating the offence in respect of which the trial is held, neither the main part of S. 162 nor the proviso has any application. [P 65 C 1, 2]

P. Satyanarayana Rao — for Petitioners.

K. Kottayya—for Opposite Party.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Jackson, J.—The point raised in this revision case is whether on behalf of the accused in an assault case the complainant can be cross-examined by confronting him with a statement which the complainant made to the police when they were investigating a theft case, a case different from the case of assault. (The case of assault was not under investigation by the police.) A statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Evidence Act and in the Criminal Procedure Code. In S. 162, Criminal P. C., it is laid down that a statement made to the police in the course of an investigation of an offence cannot be used as evidence at any trial in respect of that offence, with the proviso that such a statement may be used by the accused to contradict a prosecution witness. But when the statement has not been made in the course of investigating the offence in respect of which the trial is held, neither the main part of S. 162 nor the proviso has any application.

If in an investigation of theft *A* says to the police that *B* and *C* beat him, that statement can be proved when *D* and *E*

are being tried for assault, the trial in no way being in respect of the investigated theft. Though of course if in any way the assault had been under investigation by the police the statutory bar would apply. The Magistrate did wrong therefore to shut out this evidence. His mistake is apparently reading S. 162 as "disallowing all statements to police officers," as though there were a full stop after "for any purpose." But those words are clearly qualified by (for any purpose) "at any trial in respect of any offence under investigation at the time when such statement was made." If it is sought to use the statement at a trial in respect of some offence which was not being investigated when the statement was made, there is no statutory bar whatsoever to its use. And of course the proviso only applies to such trials in which there is a statutory bar. The petition must be allowed and the Magistrate is ordered to proceed as directed herein.

P.R.S./M.N.

*Petition allowed.***A. I. R. 1933 Madras 65 (2)**

BARDSWELL, J.

Pulikonda Venkatasubbayya — Accused—Petitioner.

v.

Maddi Venkata Lakshmayya — Complainant—Opposite Party.

Criminal Revn. No. 67 of 1932 and Criminal Revn. Petn. No. 63 of 1932, Decided on 2nd August 1932, against order of Sub-Divl. Magistrate, Ongole, D/- 23rd December 1931.

(a) Criminal P. C. (1898), S. 253—Complaint under certain sections—Charge under different section amounts to discharge under sections complained against—Criminal P. C. (1898), S. 254.

The complaint in a case was one of offences punishable under Ss. 406, 409 and 477, I. P. C. The Magistrate framed a charge of an offence punishable under S. 204, I. P. C. But he did not formally discharge the accused in respect of the other offences.

Held: that his procedure amounted to a discharge of the accused in regard to the other offences. [P 66 C 1]

(b) Criminal P. C. (1898), S. 254—Complaint under certain sections—Charge and acquittal under another—Retrial of charge ordered—Trying Magistrate cannot frame charge under sections complained against—Criminal trial.

In a complaint under certain sections the Magistrate framed a charge under a different section and acquitted the accused. In revision the case was remanded for retrial on the charge framed.

Held: that the retrying Magistrate was incompetent to frame a charge under one of the sections mentioned in the complaint: 31 Mad 543, Dist. [P 66 C 2]

V. L. Ethiraj and A. S. Sivakamianathan—for Petitioner.

Public Prosecutor—for the Crown.

K. S. Jayarama Ayyar and G. Krishna Arya—for Opposite Party.

Order.—This is an application by the accused in C. C. No. 50 of 1931, on the file of the Subdivisional Magistrate, Ongole, for quashing the first head of the charge that has been framed against him, of an offence punishable under S. 409, I. P. C. The complaint in this case was one of offences punishable under Ss. 406, 409 and 477, I. P. C. The Magistrate who first heard the case framed a charge of an offence punishable S. 204, I. P. C. He did not formally discharge the accused in respect of the other offences, but it is well established that his procedure in framing a charge only as to an offence under S. 204, I. P. C. amounted to a discharge of the accused in regard to them. In the end the Magistrate acquitted the accused, but on revision this Court set aside the acquittal and ordered a retrial.

It is contended for the accused-petitioner that the Magistrate who is now hearing the case could not legally frame a charge under S. 409, I. P. C. On the other side it is contended that the law enables him so to do. In support of this latter contention *Emperor v. Chinna-kaliappa Goundan* (1) and *In re. Pon-nuswami Goundan* (2) are quoted, but neither of these cases is directly in point as they both deal with complaints which have been dismissed under S. 203, Criminal P. C. The ruling that is most favourable to the contention that the head of charge now under consideration was passed with jurisdiction is that in *Emperor v. Maheswara Kondaya* (3), in which it was held that it is competent for a Magistrate who has discharged an accused under S. 253, Criminal P. C., to take fresh proceedings and issue processes against the person discharged in respect of the same offence without such order being set aside by a higher Court.

But the facts of that case can be distinguished from those of the case now under notice on two grounds. One is that the case had never reached the final stage of a judgment being written, and the other, which is the more important one, is that there had been no order from a revisional authority as to what should be the nature of the further proceedings. Now in his order in Cr. R. C. No. 116 of 1931, setting aside the acquittal of the petitioner accused, Lakshmana Rao, J., has given as his grounds for setting aside the acquittal that it has been found that the accused might be lawfully compelled to produce the document as evidence in Court and that, on the further finding that he had secreted it the order of acquittal was unsustainable. I must agree with the learned Public Prosecutor that his language shows that he intended no more than that the case should be retried in respect of the charge under S. 204, and that he did not mean that the case was to be reopened with respect to any other offence that was indicated by the complaint. I would hold then that the action of the Magistrate in framing the head of charge now under consideration cannot be justified by the ruling in *Emperor v. Maheswara Kondaya* (3), but that it was an action which he was not competent to take.

Two other decisions have been called to my attention, namely, those in *Krishna Reddi v. Subbamma* (4) and *Gandi Appa Razu v. Emperor* (5). Neither of these is directly in point. They decide that when a Magistrate has acquitted a person of a charge of an offence which the Magistrate was competent to try, and has at the same time by implication discharged him in respect of an offence triable only by a Court of Session, a Sessions Judge has power to order his committal in respect of the offence of which he has been so discharged. As I find that by the order of this Court on revision the Magistrate was limited to retrying the petitioner accused only for an offence punishable under S. 204, I. P. C., I quash the head of charge now framed against him under S. 409, I. P. C., and direct that his trial

1. (1906) 29 Mad 126=16 M L J 79=3 Cr L J 274 (F B).

2. A I R 1932 Mad 369=(1932) Cr C 353=137 I C 317=55 Mad 622 (F B).

3. (1908) 31 Mad 543=9 Cr L J 80.

4. (1901) 24 Mad 136=2 Weir 544.

5. A I R 1920 Mad 94=54 I C 491=21 Cr L J 91=43 Mad 330.

proceed only with reference to the other head of charge.

P.R.S./M.N.

Charge quashed.

A. I. R. 1933 Madras 67 (1)

JACKSON AND MOCKETT, JJ.

(Chilukuri) Ramayya — Accused —
Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 480 of 1932, and Criminal Revn. Petn. No. 446 of 1932, Decided on 26th July 1932, against order of Dist. Magistrate, Kistna, D/- 28th April 1932, in Cr. Misc. Petn. No. 13 of 1932.

Criminal P. C. (1898), S. 476—Finding that inquiry into offence is expedient in interest of justice is necessary.

Under S. 476 the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a specific record to that effect if that is their opinion: *A I R 1928 Mad 783*; *A I R 1929 Mad 74* and *A I R 1930 Cal 352*, *Rel. on.*; *A I R 1931 Mad 16*, *Dist.* [P 67 C 2]

K. Kameswara Rao and C. Krishna-chandra Mouleswar—for Petitioner.

K. N. Ganpathi for the *Public Prosecutor*—for the Crown.

Order.—The Sub-Divisional Magistrate of Gudivada passed an order purporting to be under Ss. 195-B and 476, Criminal P. C., that the present petitioner should be prosecuted for perjury under S. 195, I. P. C. He accordingly forwarded the records to the District Magistrate, Kistna, for taking action against the petitioner under the above section. It is hardly the procedure contemplated in the Code as revised in 1928 and the Sub-Divisional Magistrate ought to have complained under S. 476, a point which was taken up on appeal to the District Magistrate who found that the Sub-Divisional Magistrate's proceedings were practically a complaint and that the petitioner had not been in any way prejudiced. The point which is now taken in revision against the District Magistrate's order is not quite the same. It is now complained that the Sub-Divisional Magistrate erred in not recording a precise finding that it was expedient in the interests of justice that an inquiry should be made into the offence. It might be possible to argue when the Sub-Divisional Magistrate records in these terms

“further I find that he perjured himself on an important fact touching the issue in question regarding possession. I therefore consider, etc.” that he was in effect giving his opinion that a prosecution was expedient in the interests of justice. But considering the clear language of the Code we are not disposed to admit any argument of that sort. The Code lays down so as to leave no room for any doubt that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts will be well advised always to make a record to that effect if that is their opinion, because most regrettable delays and waste of time sometimes arise by putting the superior Courts to the task of discovering whether they mean something which they have not written. We therefore allow the petition and remit these proceedings to the Sub-Divisional Magistrate of Gudivada for such action as he deems necessary in the light of the above remarks. If he wishes to regularise the complaint at this stage there is no legal objection to his doing so.

In regard to the case law on the subject it may be noted that our opinion is affirmed by two Judges of this Court in *Munuswami Naidu v. Emperor*, *A. I. R. 1928 Mad. 783*, *Y. Satyanarayana, In re* (1) and also in *Surendra Nath Jana v. Kumedacharan Misra* (2). The ruling in *Namberumal Chetti v. Nainiappa Mudali* (3) was based on the special wording of the order then in question. The learned Judges there observed that the order was very detailed and comprehensive.

P.R.S./M.N.

Application allowed.

1. *A I R 1929 Mad 74=114 I C 834=30 Cr L J 370.*
2. *A I R 1930 Cal 352=126 I C 416.*
3. *A I R 1931 Mad 16=128 I C 719=32 Cr L J 200=54 Mad 331.*

A. I. R. 1933 Madras 67 (2)

BARDSWELL, J.

P. S. S. Meyappa Chettiar—Petitioner.

v.

Nagammai Achi—Opposite Party.

Criminal Revn. Case No. 658 of 1932, and Criminal Revn. Petn. No. 613 of 1932, Decided on 9th September 1932, against order of Joint Magistrate, Devakottai, D/- 22nd August 1932.

Criminal P. C. (1898), S. 146—Party to dispute obtaining lease for indefinite period

from receiver by practising fraud on Court—Lease can be summarily set aside without filing suit after notice under Transfer of Property Act (1882). S. 111—Civil P. C. (1908). O. 40, R. 1.

Where after property is attached and placed in the possession of the receiver till the decision of the civil suit which was ordered to be filed one of the parties with the connivance of the receiver, has been guilty of a very impudent fraud upon the Court and has by these means obtained a lease of the property which he would not have otherwise got, by the terms of which he was to have possession of the property in dispute so long as the dispute remained undecided the Court has every jurisdiction in setting aside the lease and to order its cancellation. The party can be summarily ejected without filing a suit after due notice as required by S. 111, T. P. Act: 33 Cal 52 Dist, A I R 1929 Cal 828, Rel on; A I R 1927 Pat 393, Ref.

[P 69 C 2]

K. S. Jayarama Ayyar and G. Gopala-swami—for Petitioner.

V. Ramaswami Ayyar—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—The petitioner was a party to the proceedings under S. 145, Criminal P. C., the dispute being one as to the possession of a house. The Subdivisional Magistrate found that possession was not established by either party and on 27th February 1930, passed an order attaching the house until the right to possession of it by one party or the other was determined by a civil Court. This order was confirmed by the High Court in revision on 12th December 1930. The applicant for revision was the present petitioner. On 30th June 1932 the receiver who had been appointed in accordance with Cl. 2, S. 146, Criminal P. C., asked for permission to lease the house and on the following day he leased it to the petitioner. On its becoming known to the Joint Magistrate that the lease had been given to one of the disputing parties he removed the receiver from his appointment and set aside the lease. Against the order cancelling the lease the petitioner has come up on revision.

The point taken for the petitioner is that when the lease had once been granted, it could not be cancelled summarily as it has been, by the Joint Magistrate, but that the only procedure was to bring a suit against the petitioner after giving him notice under S. 111, T. P. Act. Cl. 2, S. 146, provides that a receiver who is appointed under it is to have, subject to the control of the Court, all

powers of the receiver appointed under the Civil P. C. By O. 40, R. 1, Civil P. C., the Court may confer on a receiver all powers of management, etc., or such powers as the owner himself has as the Court thinks fit. In the present instance there seems to have been no limitation imposed upon the powers of the receiver and so it is to be taken that he had all the general powers of management, and these powers of management include the granting of leases. It is stated in Woodroffe and Ameer Ali's commentary on the Civil P. C., that, under the general permission of the Court, a receiver may in his discretion let out the property for any period not exceeding three years, but that he may not do so for a longer period without obtaining special permission. I should note that in this case a lease has been granted to the petitioner until such time as the civil Courts have decided the matter. It is possible that the lease may endure for less than three years, but it is equally possible that it may last for a considerably further period. Such an indeterminate lease was certainly not a proper one for the receiver to grant. That however a lease can be granted by the receiver within the limitations above stated seems beyond question and is not indeed disputed. The Magistrate has stated in his order that it has been clearly held by various High Courts that a receiver must take specific instructions from Courts and act strictly in accordance with the same, but he has not stated what his authorities are, neither have they been mentioned in this Court in the course of the arguments on this petition. The receiver has in fact, in this case, asked permission beforehand of the Magistrate to grant the lease, but once he has got that permission, it does not seem that he needed to ask the permission of the Court as to whom the lease should be granted, so long, at least, as he did not practise a fraud upon the Court.

The Joint Magistrate has based his decision on the ruling in *Mt. Lachmi Kuer v. Gajadhar Prasad* (1). But this decision does not bear on the point raised by Mr. K. S. Jayarama Ayyar for the petitioner. It has nothing whatever

1. A I R 1927 Pat 393=104 I C 104=28 Cr L J 776=7 Pat 1.

to do with the granting of any lease. What it does is to declare the principle that, when an attachment has been made under S. 146 pending the decision of the civil Courts, possession should not be made over to either party to the dispute so long as the attachment continues. For such a principle authority is hardly required. Though the order under S. 146 does not prohibit the entrance of any party upon the property in dispute pending the decision of the civil Court, it is clearly implied by the fact of attachment that neither party is meant to enter upon the property in any circumstance till the civil Courts have decided the matter. The decision on which Mr. Jayarama Ayyar lays stress is in *Krista Chandra Ghose v. Krista Sakha Ghose* (2), a decision of Woodroffe, J., who is an eminent authority on the law of receivers. In that case it was held that, when a lease had been already granted by a receiver, the matter had passed beyond the Court's control and that, even though the lease had been granted to one of the parties, that party was not subject to the jurisdiction of the Court as lessee. It was also made to appear in that case that, even in the case of collusion between the receiver and his lessee, the proper course was to proceed by a suit. Nothing however is said in this decision as to what will be the position if a fraud has been practised upon the Court. As to that there is another decision of the same High Court, which is found in *Sirish Chandra v. Debendra Nath*, A. I. R. 1929 Cal. 828. In that case it was held by a Divisional Bench that misrepresentation or concealment by a receiver of material facts are sufficient to justify the Court in setting aside a lease summarily when that lease has been granted in consequence of such misrepresentation or concealment of facts. It has been pointed out by Mr. Jayarama Ayyar that in that particular instance it would appear that the receiver had no authority to grant leases, but this does not matter from the point of view of Mr. Jayarama Ayyar's contention, which is that in no circumstances can a lease once granted by a receiver be set aside except by means of a suit. In the circumstances of that case the learned Judges of the Calcutta High Court did not set aside

2. (1909) 36 Cal 52=1 I C 470.

the lease as they found that there had been no fraud, but they made it clear that if there had been a fraud they would have set it aside. I take this as an authority that, if it is found that there has been a fraud upon the Court in granting and obtaining a lease, a Magistrate is entitled to set the lease aside in a summary manner as the Magistrate has done in the case under review.

The receiver in this case applied on 30th June 1932, for permission to grant a lease without stating to whom it was intended that the lease should be granted. On the very next day, after the permission was given, the lease was granted to the present petitioner. Mr. Jayarama Ayyar urges that it was an indication of the good faith of the receiver, that he reported the matter to the Court on the very day of the lease, i.e., on 1st July 1932, but I find that this does not help the petitioner at all, as in that report there was concealment of facts which has to be regarded as deliberately intended to mislead the Court. The name of the person to whom the lease was given was indeed mentioned, the name being Meyappa Chetty, but this name is not a very unusual one and the Court cannot be expected to bear in its mind the names of all parties to proceedings before it. There is no reference in the report to the lessee being one of the parties to the proceedings under S. 145. There is indeed a reference to the lessee having in his possession 71 keys, but it is not mentioned in what capacity he had those keys, and it was not to be expected from this casual reference, which came at the end of the report, as to the 71 keys, that the Magistrate should gather that the lessee was one of the parties to the inquiry under S. 145. Had the Magistrate known that the party to whom the lease was being given was one of the parties to the inquiry, he would not have allowed the lease to be given to that party.

I am satisfied that the petitioner, with the connivance of the receiver, has been guilty of a very impudent fraud upon the Court and has by these means obtained a lease which he would not have otherwise got, by the terms of which he was to have possession of the property in dispute so long as the dispute remained undecided. The Magistrate, therefore had every justification in set-

ting aside the lease and I am further satisfied that he had authority to order its cancellation. The petition is dismissed.

P.R.S. M.N.

Petition dismissed.

A. I. R. 1933 Madras 70

SUNDARAM CHETTY, J.

Ramannuja Krishna Ayyangar and another—Defendants—Appellants.

v.

Ramannuja Alwarappa Ayyangar — Plaintiff—Respondent.

Second Appeal No. 720 of 1930, Decided on 23rd August 1932, against decree of Sub-Judge, Tuticorin, in A. S. No. 118 of 1928.

Civil P. C. (1908), S. 92—Tests of applicability—If direction of Court is necessary or breach of trust exists and relief is one specified, S. 92 applies.

In order to see whether Sub-S. (1), S. 92, applies to any case, there are two tests. One is, whether the case relates to any breach of an express or constructive trust mentioned therein or whether the direction of the Court is deemed necessary for the administration of any such trust. The second test is whether the relief asked for is one of the reliefs specified in that section. If both these tests are satisfied the suit is one covered by S. 92, which must be instituted after satisfying the requisites laid down in that section: *A I R 1928 P C 16, Rel. on*; *A I R 1922 Mad 17 (F B), Ref.*; *A I R 1927 Mad 948, Dist.* [P 71 C 1]

B. Sitarama Rao and K. Venkateswaram—for Appellants.

K. Desikachari—for Respondent.

Judgment.—The only point for consideration in this second appeal is, whether the plaintiff's suit, so far as it asks for the settlement of a scheme for the management of the trust properties in rotation by the plaintiff and defendants 1 and 2, is maintainable in this form, or, in other words, whether S. 92, Civil P. C., is a bar to the maintainability of this suit so far as the above-mentioned prayer is concerned. The trial Court was of opinion that such relief could be granted only in a suit under S. 92, Civil P. C., whereas the lower appellate Court came to a different conclusion and held that that relief could be granted to the plaintiff even in this form of action. The question is not altogether free from difficulty. There is, no doubt, that the trust mentioned in the plaint was created for public purposes of a charitable nature. The plaintiff's status as a co-trustee along with defendants 1 and 2 and his right to be in joint possession of the trust pro-

perties have been declared. The further relief asked for in the plaint is the subject-matter of dispute in the present second appeal.

The observation in the order of reference to a Full Bench in the case reported in *Appanna Poricha v. Narasinga Poricha* (1), at p. 116 (of 45 Mad.), is to the effect, that even in a suit brought by a plaintiff for the establishment of his personal right as a trustee, if he asks the Court to settle a scheme for the management of the trust properties, he cannot obtain such relief except in a suit instituted under S. 92, Civil P. C. But the observations in the judgments of two of the learned Judges who comprised the Full Bench indicate that the test is not merely the relief asked for being one of the reliefs mentioned in S. 92, but it must be also considered whether the suit is brought by the plaintiff in order to vindicate his own individual or personal right as against other persons interested in denying his rights or whether the suit is one brought by him on behalf of the public as a representative suit in the interests of the institution. It would appear that if the suit be one for the vindication of the right of management by a trustee and the dispute is between the trustees inter se, then the relief asked for in such a suit, though one specified in S. 92, could be granted, without the sanction of the Advocate-General or the Collector as required by the aforesaid section. But for the pronouncement by the Privy Council in the decision reported in *Abdur Rahim v. Mahomed Barkat Ali* (2), I should follow the view expressed in the aforesaid Full Bench decision. On a perusal of the observations of their Lordships of the Privy Council at p. 529 of 55 Cal. it seems to me that they wanted to set at rest the conflict of judicial opinion by a clear pronouncement as to the real scope of S. 92, Civil P. C. After stating that in some decisions it was held that private persons who had individual rights under such trusts could bring suits to enforce such individual rights by ordinary suits without being obliged to bring a suit of a representative nature, it is stated that great divergence of opinion had arisen in

1. *A I R 1922 Mad 17=69 I C 304=45 Mad 113 (F B).*

2. *A I R 1928 P C 16=108 I C 361=55 I A 96=55 Cal 519 (P C).*

India in this connexion not merely as between different High Courts but also different Benches of the same Court.

Their Lordships construe sub-S. (2), S. 92, Civil P. C., adopting the view taken by the Bombay High Court as opposed to the view taken by the other High Courts generally, and state that a suit which prayed for any of the reliefs mentioned in S. 92 could only be instituted in accordance with the provisions of that section. They further observe that the words used in sub-S. (2) are appropriate and sufficient if that was the purpose. I take it, that this pronouncement has been made to set at rest the controversy on this point, and as I understand the judgment of their Lordships it must be taken that the real test for applying S. 92 is to see whether the plaintiff has prayed for any of the reliefs mentioned in that section. In order to see whether sub-S. (1), S. 92 applies to any case, there seem to be two tests. One is, whether the case relates to any breach of an express or constructive trust mentioned therein or whether the direction of the Court is deemed necessary for the administration of any such trust. The second test is whether the relief asked for is one of the reliefs specified in that section. If both these tests are satisfied we must hold that the suit is one covered by that section, which must be instituted after satisfying the requisites laid down in that section.

It is unnecessary to consider the argument by Mr. Sitarama Rao on behalf of the appellants that a relief of this kind, namely, settlement of a scheme for the management of a public charitable property, is one that was not within the competence of the mofussil Courts to grant, apart from S. 539 of the old Code or S. 92 of the present Code. It is unnecessary to canvass that point in the present case, in the view I have taken that the present suit, in so far as it asks for the settlement of a scheme for the management by way of invoking the directions of the Court for the administration of the trust, is covered by S. 92. If any relief of this kind is based upon an agreement arrived at between co-trustees or on the terms of a will executed by the founder of the trust or any other descendant of his when he was the sole trustee, the matter would be different. A suit brought on the basis of such an agree-

ment or arrangement or the will would be merely to enforce the terms of the contract or the terms of the will. It cannot be considered to be a suit where the directions of the Court for the administration of the trust are asked as being necessary for the proper management of the trust. In the present case, there is no such contract or arrangement; nor is there any evidence as to any usage regarding the mode of management of the trust property. I take it that the plaintiff by virtue of his being the holder of the office of trustee along with his co-trustees asks for directions of the Court regarding the administration of the trust by settling a scheme for its management by rotation. It seems to me that the decision in *Durai v. Duraiswami Pillai*, A. I. R. 1927 Mad. 948, relied on by the lower appellate Court, does not govern the present case for the reasons already mentioned by me. In that case the direction for the management of the trust by rotation was based on the terms of the will and those directions were not given by the Court in the exercise of its discretion in the absence of any previous arrangement come to between the parties. If any scheme for the management of this trust is required, the proper course is to adopt the procedure prescribed in S. 92, Civil P. C. I therefore allow this appeal and set aside the decree of the lower appellate Court, and restore the decree of the first Court. The order of the first Court passed as to costs will stand. In view of the partial success and failure of either party, I think fit to direct the parties to bear their respective costs here and in the lower appellate Court.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 71

PANDALAI, J.

Chendrasekaran Pillai and another—
Plaintiffs—Petitioners.

v.

*Srinivasa Pillai—*Defendant—Opposite Party.

Civil Revn. Petn. No. 1413 of 1928, Decided on 15th August 1932, against decree of Sub-Judge, Tiruvarur, D/- 11th February 1928.

Evidence Act (1872), S. 91—Pro-note with contemporaneous consideration inadmissible—Suit fails—Promissory note.

A suit is not maintainable on the consideration for an inadmissible promissory note when

that consideration is contemporaneous with the note : A. I. R. 1914 Mad. 657, *Poll. and held not requiring reconsideration* : 34 I. C. 417, *Expl.*; A. I. R. 1926 Mad. 1148 ; 40 Mad. 727; A. I. R. 1925 Mad. 351 and A. I. R. 1932 Mad. 693, *Ref.* [P 72 C 1, 2]

S. Nagaraja Ayyar—for Petitioners.

K. Balasubramania Ayyar and K. Chandrasekara Ayyar — for Opposite Party.

Judgment. — The plaintiff's suit brought for the return of Rs. 300 borrowed on a promissory note which not being properly stamped was inadmissible in evidence was dismissed on the ground that the suit cannot be maintained in view of the decision of this Court in *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1). The only question is whether that decision must be treated as settled law or in view of the opinions that have been expressed in later cases, whether the matter requires further consideration. The remarks which are supposed to cast doubt upon *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1) are those of Srinivasa Ayyangar, J. in *Chockalingam Chetty v. Annamalai Chetty* (2), of Wallace, J. in *Gopala Padayachi v. Rajagopala Naidu* (3) and of Abdur Rahim, J., in *Shanmuganatha Chettiar v. Srinivasa Ayyar* (4). The remarks of the two former learned Judges are to the effect that a note or bill given for consideration, either contemporaneous or antecedent, is only a conditional discharge and that, when the note or bill fails, a suit may be brought on the consideration. The remarks of the third learned Judge are to the effect that there is no reason why a suit should not be maintainable on the consideration for an inadmissible note even when that consideration is contemporaneous with the note.

But there are other cases in which the validity of the decision in *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1), was considered by other learned Judges of this Court, namely, by Madhavan Nair, J. in *P. Somaraju v. Venkata Subbarayudu* (5), by Curgeaven, J. in C. R. P. No. 1486 of 1928 and the latest by Anantakrishna Ayyar, J.,

in *Alimune Sahiba v. K. Subbarayudu* (6). In the first of these cases, Madhavan Nair, J., refused to treat the decision as weakened by the remarks first above referred to and declined to send the matter before a Bench. Both the learned Judges also treated the matter as beyond dispute and, in that view, I am not prepared to say that the decision requires further consideration.

It seems to me that the question is not whether a note or a bill is merely a conditional payment or discharge of the consideration for which it is given whether the consideration be contemporaneous or antecedent. It might be that, and the suit is therefore maintainable on the consideration when a payment is not made on the note or bill. In the case of a note or bill given for contemporaneous consideration which is not paid by the party liable on it, a suit on the consideration would certainly lie against the party liable for the consideration, who may or may not be the party to the note or bill. That is all the remarks referred to in the first of the three above cases, in my opinion, mean. But the point of the decision in *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1), is not dependent on the conditional or other of the payment or discharge which a note or bill amounts to, but it depends upon S. 91, Evidence Act, which enacts that where the terms of a contract, grant or disposition of property have been reduced to the form of a document, no other evidence can be given about such terms than the document itself or secondary evidence of it. In the case under discussion, the assumption is that where the consideration for the note is contemporaneous with it, the note is the complete expression of a contract between the parties. In circumstances where that can be correctly stated, where the note becomes inadmissible in evidence, no other evidence about the terms of the contract can be given because the writing is the contract. But where the consideration is not contemporaneous but antecedent, as where a valid note is renewed by another which is improperly stamped or where a note or bill is given for moneys previously advanced or for any other kind of consideration which in fact and in substance is anterior in time to the date of the note, then the note is

6. A I R 1932 Mad 693=199 I C 486.

1. A I R 1914 Mad 657=21 I C 864=38 Mad 660.

2. (1916) 34 I C 417.

3. A I R 1926 Mad 1148=98 I C 75.

4. (1917) 40 Mad 727=35 I C 219.

5. A I R 1925 Mad 351=85 I C 389.

not deemed to be a complete expression of the terms of the contract between the parties which are deemed to include not merely the note but the transaction which gave rise to the consideration. When these are the facts, although the note is excluded, the consideration is allowed to be proved because S. 91, Evidence Act, does not stand in the way of that proof being given.

The decision of the lower Court was right and this petition must be dismissed with costs.

P.R.S./M.N. *Petition dismissed.*

A. I. R. 1933 Madras 73

MADHAVAN NAIR, J.

Shankaranaraina—Appellant.

v.

Official Receiver of South Kanara—Respondent.

Appeal No. 129 of 1930, Decided on 2nd August 1932, against appellate order of Dist. Judge, South Kanara.

Provincial Insolvency Act (1920), S. 28—Insolvency of manager of Hindu family—Receiver can lease out whole property—Lease does not amount to dispossession of other members so as to make him liable for mesne profits.

The Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things: (1) the undivided interest of the insolvent in a joint family property, and (2) his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. Hence the granting of leases of the entire joint family property by the Official Assignee is within his powers if the insolvent could have done so, and such leasing does not amount to dispossession of the other members so as to entitle them to claim mesne profits: *A I R 1923 Mad 55, Rel. on.*; *A I R 1926 Mad 994*; *A I R 1928 Mad 735* and *A I R 1932 All 353, Ref.* [P 74 C 1]

B. Sitarama Rao and T. Krishna Rao—for Appellant.

M. A. T. Coelho—for Respondent.

Judgment.—This civil miscellaneous second appeal arises out of a petition filed by five minor sons of an insolvent to direct the Official Receiver of South Kanara to deliver possession of the immovable property mentioned in the schedule attached to the petition together with mesne profits from 26th April 1928 until redelivery of possession to the petitioners. In this second appeal the question as to the delivery of possession of the property does not arise inasmuch as subsequent to the commencement of

the proceedings it is admitted that the Official Receiver sold the property to pay off the insolvent's debts and that the Official Receiver was legally justified in so selling the property. The property in question was the share of the family property belonging to the minors. It is the minor's father that became insolvent. The law is well settled that when the father of a joint Hindu family becomes an insolvent the Official Receiver can discharge the father's debt to the creditors, if necessary by selling the son's share in the joint family property provided the debts are not illegal or immoral. In this case, as I have already said, the right to sell the sons' share in the family property is not disputed; but what is now argued is that the Official Receiver has no right to remain in possession of the sons' shares, and since he remained in possession from 28th April 1928, till the date of sale, 28th August 1930, the minors are entitled to recover from him the mesne profits for that period. Whether they are so entitled or not is the question that arises now in this second appeal.

The facts are all admitted. Subraya, the father of the minor petitioners, was adjudged insolvent in I. P. No. 73 of 1927, and his property, both moveable and immovable was vested in the Official Receiver under the provisions of the Insolvency Act. The Official Receiver, before he sold the minor's shares in the family property to pay off the debts, granted leases of their shares in the property to tenants and later on sold them. It is argued that since the property in question does not vest in the Official Receiver he has no right to lease them and exercise acts of management over them. It is well-settled law that on the insolvency of the father of a joint Hindu family the shares of the sons of the family do not vest in the Official Receiver. But so long as the father's debts are neither immoral nor illegal he has got the right to sell them. In fact he is entitled to be in joint possession with the sons of all the family properties. This position was established by the decision in *Official Assignee of Madras v. Ramachandra Ayyar* (1). The following propositions of law are stated in that judgment:

1. *A I R 1923 Mad 55=68 I C 898=46 Mad 54.*

"It can be taken as established law that the Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things: (1) the undivided interest of the insolvent in the joint family property, and (2) his rights as managing member so far as they can be exercised for his own benefit. It is also established that he is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency."

Though the shares of the minor sons do not vest in the Official Receiver his right to deal with these shares lawfully in the same way as the insolvent could have done is established by this judgment. If the Official Receiver has the right to sell the minor's shares in the joint family properties, I take it that he has also the right to collect the rent due from them in order to pay off the insolvent's creditors. The decision in *Official Assignee of Madras v. Ramachandra Ayyar* (1) has been accepted as laying down correct law in the subsequent decisions such as *Seetharama Chettiar v. Official Receiver, Tanjore* (2), *In the matter of Baluswamy Ayyar (Insolvent)* (3) and *Venkatram v. Chokkier* (4). No doubt there has been no direct decision on the question under consideration in our High Court, but I think the trend of the decisions which I have referred to is in support of the contention urged by the respondents. It must be understood that by giving leases of the property belonging to the minors the Official Receiver is not dispossessing them. He may have no right to dispossess them as was decided in *Sitaram v. Jado Rai*, A. I. R. 1932 All. 353, but he is entitled to be in joint possession of all the properties. And in exercise of the rights of the manager which accrued to him on account of the insolvency of the father I think the Official Receiver has a right to collect the rents from the shares belonging to the minor sons for the purpose of paying off their father's creditors. In my view the decisions of the lower Courts are right and this second appeal is dismissed with costs.

P. R. S. / M. N.

Appeal dismissed.

2. A. I. R. 1926 Mad 994=97 I C 825=49 Mad 519 (F B).

3. A. I. R. 1928 Mad 735=112 I C 541=51 Mad 417 (F B).

4. A. I. R. 1928 Mad 531=109 I C 516=51 Mad 557.

A. I. R. 1933 Madras 74

BEASLEY, C. J. AND CORNISH, J.

Valliammal and another—Appellants.

v.

Official Assignee, Madras—Respondent.

Appeals Nos. 23 and 24 of 1932, Decided on 11th May 1932, against decision of Stone, J., D/- 29th February 1932.

(a) **Presidency Towns Insolvency Act (1909), S. 7—Administration under S. 108—S. 7 does not apply—Official Assignee cannot examine deceased's representatives and if he does he cannot take proceedings under S. 7—Presidency Towns Insolvency Act (1909), Ss. 108 and 36.**

It was not intended by the use of the words "in any case of insolvency" in S. 7 to include the exercise of the powers of the Insolvency Court in cases of administration in insolvency of a deceased debtor's estate. S. 7 is only intended to apply to cases where there had been an adjudication of the debtor in insolvency. The Official Assignee has no power to examine the representatives of a deceased debtor who had not been adjudged an insolvent under S. 26 of the Act and no power to take proceedings under S. 7. Even if he possessed the latter power, he cannot without their consent proceed with the application under S. 7 after having examined them under S. 36 and the possession of the documents etc., having been denied by them: *A I R 1929 Mad 705*; *A I R 1914 Mad 101*; *In re Hewitt* (1885) 15 Q B D 159; *A I R 1926 Rang 157*, *Rel. on*; *A I R 1927 Rang 284*, *Ref.* [P 78 C 1]

(b) **Presidency Towns Insolvency Act (1909), S. 58—Official Assignee believing property of deceased debtor to be in possession of third persons but unable to take possession—Assignee can apply to Court for its production.**

Where the Official Assignee has a well founded belief that property of an insolvent or a deceased debtor lies in the house of a third person and is unable to discover that property because such person denies possession, the Official Assignee is not necessarily driven to file a suit against him instead of applying to the Court for directions or for an order for its production in Court. *In re Crowther, ex parte Ellis*, 20 Q B D 38, *Dist.* [P 79 C 1]

(c) **Administration—Suit for—Proper parties.**

The next kin and intermeddler with the estate are proper parties to an administration suit.

[P-79 C 2]

(d) **Presidency Towns Insolvency Act (1909), S. 58—Administration of deceased debtor's estate—Application for production of property—Official Assignee has to prove that property is in non-applicant's possession—Report is no evidence—Presidency Towns Insolvency Act (1909), R. 117.**

Before an order for the production of account books, etc., can be made against a deceased debtor's representatives the Official Assignee has to make out a prima facie case that the non-applicants have in their possession the property he seeks to get delivery of. Mere report of the Official Assignee is no evidence at all. R. 117

does not make such report prima facie evidence.
[P 80 C 1]

(e) **Presidency Towns Insolvency Act (1909), S. 109—Administration of deceased debtor's estate—Only Part 3 applies—But S. 8 applies by necessary implication—Presidency Towns Insolvency Act (1909), S. 8.**

Unless there are strong reasons to the contrary, the words of S. 109 mean that all the other parts of the Act except Part 3 shall not be applicable to an administration of the estate of a deceased debtor. But S. 8 though not contained in Part 3 is applicable to such proceedings by necessary implication: *A I R 1926 Rang 157, Rel. on.* [P 80 C 1]

*K. Narasimha Ayyar and S. Doraiswami Ayyar for P. Viswanatha Ayyar—*for Appellants.

*V. C. Gopalratnam—*for Respondent.

Beasley, C. J.—This is an appeal from an order of Stone, J., made in the insolvency Court on the application of the Official Assignee that the appellants should be ordered to produce certain account books or be committed for contempt of Court. On 29th February 1932 Stone, J., passed the following order: "Books to be delivered within two weeks." Against that order this appeal has been presented. It raises some interesting and important questions. The proceeding in which the order under appeal was made was the administration by the insolvency Court of the estate of one Gurunatha Mudaliar who died on 5th June 1930. His estate was insolvent but he had not before his death been adjudicated an insolvent. One of the creditors presented a petition to the Insolvency Court for the administration of the deceased debtor's estate under S. 108, Presidency Towns Insolvency Act, and an order for the administration of that estate in insolvency was made after notice of the petition had been served upon the deceased's widow, appellant 1, who appeared by Mr. Varadaraja Mudaliar on the hearing of the petition but did not oppose it.

The deceased debtor during his lifetime carried on a timber business but he did not live at his place of business but lived at No. 52, Vellala Street, Purasawalkam, Madras, with his wife. He had a brother Ranganatha Mudaliar who is appellant 2. Immediately after the order for the administration of the estate in insolvency the Official Assignee took possession of a superstructure belonging to the deceased and some timber and some old pieces of furniture, and although the house and the business pre-

mises of the deceased were searched and an inventory was taken of all articles and documents, no account books and other documents or papers relating to the timber business were discovered, except some bill books for timber sold, and certain title deeds which the Official Assignee alleges to have been in the possession either of appellant 1 or appellant 2 were not found. At this time there was in Madras Murugesu Mudaliar, appellant 3, alleged to be a relation of the deceased debtor, or appellant 1, who was assisting appellant 1 in the administration of the estate and took some action with regard to the leasing of some properties. The Official Assignee's case is that the appellants have taken possession of the account books and other documents relating to the timber business carried on by the deceased and also the title deeds to some of the properties. The Official Assignee made a number of efforts to get the appellants before him for the purpose of examining them under S. 36, Presidency Towns Insolvency Act, in order to ascertain whether they had the property in the shape of account books, documents and title deeds, etc. of the deceased debtor in their possession and eventually all the appellants were examined and all of them denied having in their possession those documents. Faced with these denials and being unable to get the documents the Official Assignee presented the application to the Court upon which the order appealed from was made. Affidavits in answer to the Official Assignee's application were filed by all the three appellants contradicting the Official Assignee's case. No evidence was taken by the learned trial Judge although we are informed by Mr. V. C. Gopalratnam appearing on behalf of the Official Assignee that he had his witnesses in Court.

The learned trial Judge upon the report of the Official Assignee on the one side and the affidavits of the respondents on the other side passed the order that the books were to be delivered within two weeks. As learned counsel before us were unable to agree as to what happened in the trial Court we have consulted Stone, J., who states that he made his order very quickly without considering any evidence other than the documentary evidence before him, intending on the next occasion, namely, at

the end of the period prescribed in his order, to inquire into the question of the possession of the account books. We also ascertained from him that Mr. Narasimha Ayyar who was then appearing for appellant I did not state that he wished to argue any question as to the jurisdiction of the Court to entertain the application although we accept Mr. Narasimha Ayyar's statement that he intended to take the point and had the necessary authorities to support his argument ready in Court and it was only the rapidity with which the order was made by our learned brother that prevented him taking this legal objection. It is conceded however that he informed our learned brother that the order made by him amounted really to a finding that either his client or the other appellants, or all of them acting together, were in possession of this property. Notwithstanding that, the order was passed.

The points taken here in appeal are: (1) that the Court had no jurisdiction to entertain a claim under S. 7 of the Act; (2) that even if it had as the appellants had been examined under S. 36 and had denied possession of the books etc., the Official Assignee's remedy was by suit and not under S. 7; (3) that if the application was not one under S. 7 there is no other section in the Insolvency Act which entitles the Official Assignee to present it and (4) that there was no evidence before Stone, J., upon which he could make the order that he did as the report of the Official Assignee cannot be evidence upon such an application and that therefore the denials of possession of the books by the appellants stood uncontradicted whereas the allegations made by the Official Assignee in his report remained unproved.

With regard to the first point the contention is that as this is an administration of the estate of a person dying insolvent under S. 108 the only provisions of the Act, except of course Part 10 in which S. 108 is, that apply are those contained in Part 3. It is necessary to refer to S. 109. S. 109 (1) reads as follows: "Upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act,

and (2) with the modifications hereinafter mentioned, all the provisions of Part 3, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act." It is argued that as S. 7 is in Part 1 of the Act its provisions do not apply to these administrations. In support of this argument reference was made to *Soranammal v. Official Assignee, Madras* (1). It was there held that S. 7 is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. Sir Arnold White, C. J., held that the decision in *In re Hewitt* (2) governed the question. The facts in *In re Hewitt* (2) were that the deceased debtor's estate was being administered by the bankruptcy Court under S. 125, Bankruptcy Act, 1883, the section corresponding to S. 108, Presidency Towns Insolvency Act. The Official Receiver applied to the county Court having jurisdiction in the matter of the administration for an order for the examination on oath before the Court of the widow and executrix of the deceased, and the deceased's son upon the ground that they were capable of giving information respecting the deceased's property. It was ordered by the county Court that these persons should attend before the Court for examination on oath under S. 27, Bankruptcy Act, the section corresponding to S. 36, Presidency Towns Insolvency Act. This order they did not obey and an order for their committal for contempt was obtained. They appealed. Under the Bankruptcy Act of 1883 there is a provision similar to S. 109 (2), Presidency Towns Insolvency Act, applying the provisions of Part 3, Bankruptcy Act, to such administration. That is S. 125 (5) to (8). S. 27 is not in Part 3, Bankruptcy Act of 1883, and it was held on appeal there was no power in cases of such administrations to apply the provisions of S. 27. Wills, J., who together with Cave, J., decided this matter at p. 167, states thus:

"Now by sub-S. 6, S. 125, the legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying

1. A I R 1914 Mad 101=24 I C 239.

2. (1885) 15 Q B D 159=54 L J Q B 402=53 L T 156=2 Morrell 184.

insolvent. According to the ordinary rule of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part 3 shall be applicable, they must be considered to mean that other parts of the Act shall not be applicable."

This case has been referred to repeatedly in English decisions and in the course of the arguments in reported English cases and as an authority upon this point has never been questioned. Indeed it is probable that it was in consequence of this decision that in the Bankruptcy Act of 1914 an alteration was made in the law and the power to examine persons in such administrations was given to the bankruptcy Court. No such alteration has been made to the Presidency Towns Insolvency Act. *In re Hewitt* (2) therefore strongly supports the appellants' contention that no sections of the Act which are not included in Part 3 have any application to administrations of estates under S. 108 unless there are very strong reasons for applying other sections. *In re Hewitt* (2) was considered by a Full Bench of the Rangoon High Court in *D. J. Kolapore v. The Port Commissioners, Rangoon* (3). There the question to be considered was whether the provisions of S. 7 of the Act could be applied in the case of an administration under S. 108 and it was held by Rutledge, C. J. and Maung Ba, J., Heald, J., dissenting, that S. 7 is not a provision of the Act which, either expressly or by necessary implication, can be applied in such cases. Heald, J., took the view that the words "case of insolvency" in S. 7 of the Act are sufficiently wide to cover a case of administration in insolvency. Great reliance was placed by the majority of the Full Bench upon *Hewitt's* case (2) and it is very difficult to understand why Heald, J., did not consider that *Hewitt's* case (2) strongly supported the view expressed by the other two learned Judges. At p. 167 he says:

"The position is therefore that there is one English ruling, namely, *Hewitt's* case (2), which suggests that the fact that a section which is sought to be applied to cases of administration in bankruptcy or insolvency falls outside Part 3 of the Act, precludes its application to such cases and with the greatest respect I find myself unable to apply that suggestion to the Indian Act."

I am quite unable to follow Heald J.'s inability to apply *Hewitt's* case (2) to the Indian Act which is almost word for

word the English Bankruptcy Act. As I have already stated, *Hewitt's* case (2) has, since its decision, been treated with the greatest respect both in the argument at the Bar and in the judgments found in many English reported cases. In *In the matter of P. A. Mohamad Ganny* (4) Chari, J., held that Ss. 36, 55 and 56, Presidency Towns Insolvency Act, are not applicable to administrations under S. 108 of the Act, S. 36 because of the authority of *Hewitt's* case (2) and the other two sections because of *Ex parte Official Receiver In re Gould* (5). In the latter case it was held that S. 47, Bankruptcy Act, 1883, corresponding to S. 55 of our Act, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of bankruptcy under S. 125 of the Act. The ratio decidendi of this case was that S. 125, Bankruptcy Act, 1883, corresponding to S. 108 of the Indian Act, is confined to the administration of the estate of a deceased debtor and does not include the administration of the property of other persons. The property having been voluntarily transferred by settlement ceased to be the property of the deceased debtor and hence it was not the property, the subject-matter of S. 125. *Hewitt's* case (2) therefore confines the provisions of the English Bankruptcy Act applying to administrations under S. 125 of that Act to those in Part 3 of the Act. *In re Gould* (5) goes further and decides that even some sections included in Part 3 of the Act have no application to such administrations because the Court has power to deal only with the property of the deceased debtor and not that of other persons. In my view the decision in *D. J. Kolapore v. The Port Commissioners* (3) is correct. It appears to me that it was not intended by the use of the words "in any case of insolvency" in S. 7, Presidency Towns Insolvency Act, to include the exercise of the powers of the insolvency Court in cases of administration in insolvency such as this. The deceased debtor was not an adjudicated insolvent and, in my view, S. 7 was only intended to apply to

4. A I R 1927 Rang 284=104 I C 89=5 Rang 375.

5. (1887) 19 Q B D 92=56 L J Q B 333=56 L T 806=35 W R 569=4 Morrell 202.

3. A I R 1926 Rang 157=97 I C 224=4 Ran 157 (F B).

cases where there had been an adjudication in insolvency. In my view, the Official Assignee had no power to examine the appellants under S. 36 of the Act and no power to take proceedings under S. 7. Even if he had possessed the latter power, he could not without the consent of the appellants have proceeded with the application having examined them under S. 36 and the possession of the documents, etc., having been denied by them. This right is clearly negatived by a Full Bench of this Court of which I was a member, in *The Official Assignee of Madras v. Narasimha Mudaliar* (6), where it is pointed out that in such cases the Official Assignee's only remedy is to proceed by way of suit. This disposes of points 1 and 2.

I shall now proceed to deal with the third point taken by the appellants, namely, that if S. 7 is inapplicable, there is no other section in the Insolvency Act which entitles the Official Assignee to proceed with this application. It is argued that S. 58 of the Act does not give the Official Assignee this power because S. 58 (2) says:

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure 1908, and the Court may on his application enforce such acquisition or retention accordingly."

This, it is argued by the appellants, limits the power of the Official Assignee to that possessed by a Receiver appointed under the Civil Procedure Code and that a Receiver thus appointed has no power to deal with persons who are not parties to the suit in which he has been appointed Receiver. Hence it is argued that, as a Receiver can only get the property of the estate which is in the hands of strangers to the suit by filing a suit against them, the Official Assignee is in no better position and his remedy is by way of a suit and not by such an application as this. In support of this argument the notes to O. 50, R. 16 of the Rules of the Supreme Court were referred to, (p. 899 of the Annual Practice, 1932). There it is stated:

"As against a stranger to the action who is in actual possession the appointment of the Receiver is of no effect."

In re Crowther Ex parte Ellis (7) was also referred to. There it was held that a County Court Judge, sitting in bankruptcy, has no jurisdiction unless by consent, to order payment to the Official Receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered under S. 122, Bankruptcy Act of 1883. The County Court Judge made the order and the persons who had attached the debt appealed and Cave, J., in allowing the appeal said:

"Section 125, Bankruptcy Act, 1883, has given power to the Court of Bankruptcy to administer the estate of a debtor who has died insolvent. Unless there is some provision to the contrary the Court in acting under this section must follow the practice of the Chancery Division of the High Court of Justice with regard to the administration of the estates of deceased persons. In the High Court an application for an order such as that now appealed against would not be entertained without the consent of the person against whom the order was asked for."

I do not however think that this case goes as far as Mr. Doraiswamy Ayyar for the appellants argues it does. When the facts of the case are examined it will be seen that what was decided that the Bankruptcy Court had no power to do was to entertain an application for the delivery up to the Official Receiver of money which the appellant not only claimed a right to possess but had got an order from the Court showing that he had made out a prima facie case for such a claim. That this is so will be seen from the argument of Mr. Herbert Reed, who appeared for the appellant in that case. His first point was that the section under which the County Court Judge acted was not contained in part 3 of the Act and therefore following *In re Hewitt* (2) the Court had no jurisdiction to act under that section. His second point was that the order affected not only the estate of the deceased debtor but also the property of another person, namely, the appellant, and in support of that argument he relied upon *In re Gould* (5). This case, in my view, does not say that where a third person is in possession or is alleged to be in possession of property admittedly belonging to a deceased debtor such an application as this cannot be made although it must be conceded that the notes to O. 50, R. 16 of the Rules of the Supreme Court certainly do support

6. A I R 1929 Mad 705=118 I C 506=52 Mad 717 (F B).

7. (1888) 20 Q B D 88=57 L J Q B 57=58 L T 115=86 W R 189=4 Morrell 305.

Mr. Doraiswami Ayyar's argument. Although the Official Assignee is to have the same powers as a Receiver appointed under the Civil Procedure Code, S. 58 (1) says:

"The Official Assignee, shall as soon as may be take possession of the deeds, books and documents of the insolvent, and all other parts of his property capable of manual delivery;"

and sub-S. (2) provides that on his application the Court will enforce his acquisition of that property or its retention. In my opinion, the words of the section are sufficiently wide to cover an application made to the Court for delivery up of possession of the documents of a deceased debtor, admittedly his property, the only question being whether or not the respondent to the application is possessed of them. S. 59 entitles the Court to issue a search warrant and under it houses belonging to a person not the insolvent may be searched and the property of the insolvent discovered there seized. I cannot accede to the appellants' contention that where the Official Assignee has a well-founded belief that property of an insolvent or a deceased debtor lies in the house of a third person, obtains a search warrant from the Court, searches the house and is unable to discover that property because it is cleverly concealed by the occupier of the house, the Official Assignee is driven to file a suit against him instead of applying to the Court for directions or for such an order as was made in this case.

Mr. Narasimha Ayyar for appellant 1 argues that the Official Assignee's remedy must be by way of suit because noncompliance with the order such as was made in this case exposes his client to the risk of being committed for contempt where if a suit is filed against her and a decree is obtained she runs no such risk. The answer to that contention is that under O. 21, R. 31, Civil P. C., such a decree could be executed by the detention in a civil prison of his client, the judgment-debtor, and/or by the attachment of her property. Holding the view that the Official Assignee was entitled to make this application under S. 58 of the Act because the appellants are persons alleged to be in possession of property admittedly belonging to the deceased debtor, it is not necessary for me to consider the question as to whether or not

he was entitled to do so because the appellants are to be regarded as parties to the suit. It was argued alternatively by Mr. Gopalratnam for the Official Assignee that the appellants would be proper parties to an administration suit and therefore the receiver would be entitled to make this application. Appellant 1 is the next of kin of the deceased and a next of kin is certainly a proper party to an administration suit. As regards the other appellants and indeed as regards appellant 1, the allegations are that they have intermeddled in the estate and if those allegations are true—it is not for us to inquire into them—that is a matter for the learned trial Judge—then obviously they would be proper parties to the suit; but in my view it is unnecessary to go into this question.

There remains the fourth point argued by the appellants, namely, that there was no evidence before the learned Judge upon which he could make his order. With this contention I entirely agree. Before such an order as this could be made, the Official Assignee had to make out a *prima facie* case that the appellants had in their possession the property he sought to get delivery of. What was the sworn evidence put forward by the Official Assignee in support of his claim? Sworn evidence there was none, either oral or by affidavit. The whole case of the Official Assignee was set out in his report. Most of what is contained therein is derived from persons who did not give evidence. On the side of the appellants were the affidavits contradicting the Official Assignee's allegations. The question which arises here is, is the report of the Official Assignee in such a proceeding as this, *prima facie* evidence in support of his application? It was argued on behalf the Official Assignee that R. 117, Presidency Towns Insolvency Act, makes the Official Assignee's report *prima facie* evidence of the matter reported upon. That rule is as follows:

"Except where otherwise provided by the Act or these rules, evidence to be given by the Official Assignee may be given by his report to the Court and need not be upon affidavit; and such report shall be *prima facie* evidence of the matter reported upon."

The Act does not provide anywhere that the evidence on such an application as this to be given by the Official Assignee is not to be by his report nor must be upon affidavit. That rule is sufficiently

wide even to enable the Official Assignee who has a money claim against strangers in an insolvency and against debtors to an insolvent's estate and in many other cases to rest his case upon his report only. This rule offends against two of the most important rules of evidence, namely, that testimony shall be on oath or by affirmation and that hearsay evidence shall be excluded. Under the English Bankruptcy Act the report of the Official Assignee is only receivable in evidence in the cases provided for in the Act and the rules, such as cases of composition or applications for discharge or where the conduct of the insolvent is in question, i. e., failure to attend for examination, file his schedule or assist the Official Assignee and R. 190 of the Bombay Rules under the Act provides for the cases in which the Official Assignee's report is receivable by itself as evidence. If R. 117 is intended to allow the Official Assignee's report to be prima facie evidence in such a case as this, then I have no hesitation whatever in saying that the rule is ultra vires. In my opinion, the Official Assignee's report was not evidence at all. The learned trial Judge therefore had no evidence before him upon which he could make the order. With all respect to the learned trial Judge, I think he should have decided the question of possession first before making the order and after taking evidence. Indeed the only inference arising from his order, is that he had decided that question and not left it for decision, as he intended to do on the next occasion.

There is one other matter to be dealt with and that is the respondent's argument that if, the appellants' contention is right, namely that the only sections of the Act applicable to such an administration are those contained in Part 3, the appellants have no right of appeal because S. 8 is the section giving the right of appeal and that is not contained in Part 3. Adopting the view of Wills, J., in *In re Hewitt* (2), unless there are strong reasons to the contrary, the words of S. 109 of our Act must mean that all the other parts of the Act except Part 3 shall not be applicable. But there are the strongest reasons to the contrary. No right of appeal is given by any of the other sections of the Act and it seems to me to be an amazing contention that, whereas

in the case of an insolvent there is a right of appeal and the Court may review, rescind or vary any order made under its insolvency jurisdiction, where you have a deceased debtor no such right exists. Amongst other things, Part 3 deals with the proof of debts, and when in an insolvency a creditor whose proof of debts has been rejected is entitled to appeal, why should the creditor whose proof is rejected merely because his debtor is dead be deprived of such a right? I am supported in the view I take about this matter by Rutledge, C. J., in *D. J. Kolapore v. Port Commissioners, Rangoon* (3), who says that he would be prepared to hold that by necessary implication S. 8 (1) of the Act applies to orders of the insolvency Judge arising in administration of the estate of deceased debtors. In my view that contention fails.

In the result the appeal must be allowed and the case remanded to the insolvency Court where this application will be reheard in the light of the opinion expressed by this Court with regard to the evidence. With regard to costs, as a great deal of the appellants' argument was directed to the third point raised and it has been decided in favour of the respondent, I think the proper order will be to direct the costs of the appeal to abide the rehearing of the Official Assignee's application.

Cornish, J.—I am of the same opinion and for the same reasons.

P.R.S./M.N.

Case remanded.

A. I. R. 1933 Madras 80

SUNDARAM CHETTY, J.

Govindaraja Pillai and others—Plaintiffs—Appellants.

v.

Mangalam Pillai and another—Defendants—Respondents.

Second Appeal No. 712 of 1930, Decided on 2nd August 1932, against decree of Sub-Judge, Cuddalore, in A. S. No. 65 of 1928.

Transfer of Property Act (1882), S. 11—Intention to grant absolute estate—Conditions repugnant are void—Absolute estate subject to defeasance clause not contrary to any law is valid—In latter case disposition by prior transferee does not prevent operation of defeasance clause—Nor can events subsequent to vesting divest persons in

whose favour gift over is made—Transfer of Property Act (1882), S. 28.

The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law is that where the intention of the transferor is to maintain the absolute estate conferred on the transferee, but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute transfer and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative. Hence an absolute gift to a wife by the husband subject to the condition that if she dies without issue the property would pass to other persons living at the date of gift is valid in favour of third person on the fulfilment of the condition. The gift over being valid any disposition by the wife during her life or the adoption by the husband after her death would not prevent the vesting of the property in or divest the third persons: 9 *M I A* 123 (*P C*), *Rel. on.*; *A I R* 1931 *P C* 179; 34 *Mad* 250; 4 *Cal* 23 and 16 *Cal* 383, *Ref.*; 31 *I C* 405 and *A I R* 1929 *P C* 283, *Dist.* [P 81 C 2; P 83 C 2]

B. Sitarama Rao and J. R. Gundappa Rao—for Appellants.

S. Panchapagesa Sastri and K. R. Krishnaswami Ayyar—for Respondents.

Judgment.—This second appeal arises out a suit brought by plaintiffs 1 and 2 to recover possession of the plaintiff-mentioned properties, alleging that they became entitled to the same on the death of their sister Madurambal in 1924 without any issue. Defendant 1 is the husband of Madurambal. When he married her, he was a man of advanced age, and at the instance of the parents of the girl he executed a registered settlement deed, Ex. A, on 2nd June 1916 in favour of the girl. The material portion of Ex. A runs thus:

"I have accordingly given you the under-mentioned properties valued at Rs. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers (plaintiffs 1 and 2) should take the properties."

The plaintiffs' case is that their sister Madurambal having died without any issue the properties covered by Ex. A devolved on them and therefore they are entitled to recover possession of the same. The first Court was of opinion that the intention of the donor (defendant 1) was to confer only a life estate on Madurambal and the gift over in

favour of plaintiffs 1 and 2 became operative on the happening of the specified contingency, namely, the death of Madurambal without any issue. But the lower appellate Court came to a different conclusion as regards the construction of Ex. A. In its view Madurambal was given an absolute estate in the properties, and the gift over in favour of plaintiffs 1 and 2 on the happening of a contingency is void as a repugnant provision and such a clause could not be deemed to be a defeasance provision. The plaintiffs' suit was therefore dismissed.

In this second appeal, it is contended on behalf of the appellants (plaintiffs 2 to 4, plaintiff 1 having died during the pendency of the suit and plaintiffs 3 and 4 having been added as his legal representatives) that on a proper construction of Ex. A it should be held that either a life estate in favour of Madurambal with a remainder over in favour of plaintiffs 1 and 2 or an absolute estate in her favour subject to defeasance in the event of her failing to have any issue at the time of her death was really conferred on her. Having regard to the terms of the earlier portion of the deed which are to the effect, that the donee should enjoy the properties absolutely or with all rights, it cannot be reasonably contended that what was conferred upon her was primarily a life estate alone. The tamil word "*sarva suthantharamai*" clearly indicates an absolute estate. The more difficult question is whether the subsequent clause should be deemed to be a mere repugnant condition imposed on the estate so created or makes the absolute estate primarily granted subject to defeasance in the event of the contemplated contingency. The distinction between a repugnant provision and a defeasance provision is sometimes, subtle but the general principle of law seems to be, that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a

violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

The disposition under a will which was the subject of consideration by the Privy Council in two cases reported as *Sreemutty Sooreemoney Dossee v. Denobundoo Mullick* (1) and *Sreemutty Soornamoneyee Dossee v. Denobundoo Mullick* (2) is almost similar to the one under Ex. A. In the aforesaid cases, a Hindu testator devised under his will his entire estate to his five sons. On a construction of the will it was found that the testator conferred an absolute estate on the sons. There was a further clause in the will that if any of the five sons should die without leaving any son or son's son, his estate should devolve upon such of the surviving sons or their son's sons who shall then be alive. Their Lordships of the Privy Council have held that it was competent to a Hindu testator to give property by way of an executory bequest upon an event which is to happen, if at all immediately on the close of a life in being. I should observe that in the present case the defeasance clause is exactly similar to the one found in the will above referred to. The provision in Ex. A is that in the event of the donee (Madurambal) dying without any issue the properties should go to her brothers (plaintiffs 1 and 2). The principle of the decision in *Sreemutty Sooreemoney Dossee v. Denobundoo Mullick* (2) is recognized and also explained in a recent decision of the Privy Council reported; *Sarajubala Debi v. Jyotiramayee Debi* (3) at p. 149 (of 59 Cal.). Their Lordships have observed thus:

"A Hindu no doubt may give property by way of an executory gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift, and such a gift over might be sufficient indication that only a life estate to the first taker was intended."

The disposition under Ex. A, being exactly of such a nature, the defeasance clause in it must be held to be valid on the authority of the view expressed by the Privy Council. This is a not case where the executory gift is made to depend

upon an event such as an indefinite failure of the male issue of the donee which would not necessarily happen on the close of the donee's life and such a defeasance clause has been held to be void. There is also the decision of this High Court in *Lakshminarayana Nainar v. Valliammal* (4), which is almost on all fours with the present case. In that case the decision depended on the construction of a razinama by which A and B became entitled to hold and enjoy in common certain properties absolutely. There was a defeasance clause to the effect, that in the event of A dying issueless, his share of the properties should go to B and then B should become entitled to the entire properties. The question was whether the alienation of the properties by A during his lifetime could have any legal validity after his death and prevent his share of the properties from devolving on B. On the footing that A had an absolute estate in a moiety of the properties covered by the razinama, it was held that there was a clear gift over of that moiety on his dying without issue to B. Following the Privy Council decision in *Sreemutty Sooreemoney Dossee v. Denobundoo Mullick* (2), the learned Judges have held such a defeasance followed by a gift over in favour of a person in being to be perfectly valid under the Hindu law.

Reference was also made to the observations in the Privy Council decisions reported in *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (5) and *Kristoromoni Dasi v. Narendro Krishna Bahadur* (6). Holding that the effect of such defeasance was to cut down the original absolute estate of A to a life estate, the alienation made by him was held to be invalid beyond his life time and not affecting the gift over in favour of B. These authorities in my opinion bear directly on the present case, and I am clearly of opinion that the absolute estate conferred upon Madurambal under Ex. A was subject to defeasance in the event of her dying without any issue and such a defeasance clause is not opposed to any rule of law and has been recognized by the Privy Council to be

1. (1854-57) 6 M I A 526-4 W R 114=1 Suth 291=1 Sar 583 (P C).

2. (1861-63) 9 M I A 123 (P C).

3. A I R 1931 P C 179=124 I C 618=58 I A 270=59 Cal 142 (P C).

4. (1911) 34 Mad 270=11 I C 767.

5. (1879) 1 Cal 23=5 I A 138=2 C L R 359=3 Sar 15 (P C).

6. (1889) 16 Cal 353=16 I A 29=5 Sar 235 (P C).

valid. As observed in *Lakshminarayana v. Valliammal* (4), by reason of the operation of the defeasance clause on the happening of the contingency, the original estate was cut down to a life estate and the gift over to plaintiffs 1 and 2 became valid and operative.

On the respondent's side reliance was placed on the decision of the Calcutta High Court reported as *Seres Chandra Palait v. Lalit Mohun Dutta* (7). There is an elaborate review of the case-law on a question of this kind in that decision. The principle of the Privy Council decisions in *Sreemutty Sooreemoney v. Denobundoo* (1) and *Sreemutty Sooreemoney v. Denobundoo* (2) has been held to have no application to the facts of that case. The distinguishing feature in the will, which was the subject of consideration in that case, was that though the testator gave an absolute interest in the estate to his widow, the gift over was of what might remain undisposed of by her. The confinement of the gift over to such portion of the estate, if any, which may remain undisposed of by the donee, was held to be an indication that the testator intended to maintain an absolute estate in the donee throughout and the gift over was void for uncertainty. Such is not the nature of the defeasance or gift over in the present case. Even the decision of the Privy Council in *Raghunatha Prasad Singh v. Deputy Commissioner, Partabgarh* (8) has no application to the present case. After conferring an absolute estate on the legatee, the testator added clauses which were clearly restrictive of the incidents of ownership. One of the conditions imposed is that the legatee shall be bound to adhere strictly to the Hindu religion. Another condition is that he shall have no power to alienate the properties. A further clause is that the entire property shall gradually descend to the successors of the legatee subject to the restrictions laid down as binding upon the legatee. That was a glaring case of a grant of an absolute estate with all sorts of restrictions upon the legatee and his heirs which are certainly repugnant to the grant.

It is next argued that by reason of the compromise in a suit between Maduram-

bal and defendant 1 some of the properties were allotted to defendant 1 absolutely, the rest being taken by Madurambal. The question is whether such a compromise can bind plaintiffs 1 and 2 who were not parties to it. As I have already observed the gift over in favour of plaintiffs 1 and 2 being valid and as the defect of the defeasance clause was to curtail the absolute estate of Madurambal to a life estate in the event of the contingency happening as was held in *Lakshminarayana v. Valliammal* (4), any arrangement or disposition in respect of the properties covered by Ex. A by Madurambal can have no legal force or validity after her death and cannot affect the rights of plaintiffs 1 and 2.

The fact that defendant 1 adopted defendant 3 subsequent to the death of Madurambal is not of much avail to the respondents. It cannot be denied that Madurambal died without any issue either natural or adopted. The moment that contingency happened, the properties devolved on plaintiffs 1 and 2 by reason of the defeasance clause and the gift over to them. The properties having thus vested in plaintiffs 1 and 2 on the death of Madurambal, they could not be divested of those properties by reason of the subsequent adoption made by defendant 1. There is hardly any doubt on this point. For all these reasons I am unable to agree with the decision of the lower appellate Court. The decision of the first Court should be restored, except as regards items 12 and 21 which are not comprised in Ex. A, on which alone the claim of plaintiffs 1 and 2 was based. In the result the decree of the lower appellate Court is set aside and a decree is passed in favour of plaintiffs 2 to 4 in respect of the suit properties except items 12 and 21 with costs against the defendants in all the Courts.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 83

MADHAVAN NAIR, J.

Raja Rajeswara Sethupathi and another—Appellants.

v.

Kuppusami Pillai—Respondent.

Appeal No. 164 of 1927, Decided on 5th August 1932, against order of Temporary Sub-Judge, Devakottah, D/- 5th February 1927, in A. S. No. 34 of 1926.

7. (1915) 31 I C 405.

8. A. I. R. 1929 P C 283=120 I C 641=56
I A 372=4 Luck 483 (P C).

Limitation Act (1908), Art. 182 (5)—Subsequent remittances to jail authorities by money order is application to Court and is step-in-aid — Civil P. C. (1908), O. 21, R. 39 (4).

Under a previous execution the judgment-debtor was sent to the Civil Jail. The decree-holder made monthly remittances by money order to the Superintendent of the Jail. Within three years from the last remittance the decree-holder again applied for execution.

Held : that the application was within time. The last remittance by money order even without any formal application was sufficient application and it was to the Court and it was a step-in-aid : *A I R 1921 Mad 532, Expl and Dist.* [P 85 C 1]

S. Soundararaja Ayyangar—for Appellants.

V. Ramaswamy Ayyar—for Respondent.

Judgment.—The question in this appeal is whether the application for execution is barred by limitation. The decree is dated 1st December 1917. The application for execution was presented on 28th June 1926, the date on which the first Court reopened after the summer recess of 1926. The prior execution application was presented on 1st February 1923. It is clear that the present application would be barred by limitation unless the facts relied upon by the decree-holder are sufficient to save limitation. The judgment-debtor was committed to jail on 28th February 1923. This decree-holder has remitted by postal money orders to the Jail Superintendent subsistence allowances, necessary for the detention of the judgment-debtor in prison. Those remittances had been made on 24th March 1923, 23rd April 1923, 23rd May 1923 and 25th June 1923. It is argued that the remittance made on 25th June 1923 is sufficient to save limitation as being a step-in-aid of execution. If this payment could be considered to be a step-in-aid of execution, it is clear that the present application is not barred by limitation. The lower Courts held that as the payment was made to the Superintendent of Jail, it cannot be considered that the application was made to the "proper Court" within the meaning of Art. 182, Lim. Act, to save limitation and therefore the present petition is barred by limitation. The respondent relies on a decision of this Court, *Ramudu Chetti v. Varadaraja Chariar* (1), by Krishnan, J. The facts of that case are not very clear. Appa-

rently the learned Judge's view is that if payment was made within three years of the prior application, then such payment would be a step-in-aid of execution provided there was an application. And with regard to the application the learned Judge says :

"We cannot presume that an application would have been made, when the decree-holder paid such charges."

Whether the application should be one to the Court or whether it would be enough if that was made to the Superintendent of Jail is not made clear in that judgment. But both the Courts in that case seem to have been of the opinion that a payment of maintenance charges would be a step in aid of execution. The first appellate Court did not consider the question whether there was an application at all because the payment in that case was made admittedly three years after the previous application. Therefore I find that that decision does not render much help for deciding this case. It is argued that the payment of maintenance charges should be to the Court and since it was not made into the Court, it cannot be said that there was any request made to the Court to take a step in aid of execution. Under O. 21, R. 39, Cl. (4), Civil P. C., the first payment in connexion with the arrest of the judgment-debtor is to be made to the Court and the subsequent payments should be made to the officer in charge of the civil prison. So if an application was made to the Court on a subsequent occasion to receive the subsistence charges, that application would not be application in accordance with the provisions of O. 21, R. 39 (4); the application should be made according to the provisions of the Code to the Superintendent of Jail who is constituted by the Code as the proper officer, to receive the application. In my opinion an application made to him should in the circumstances be considered to be an application made to the Court under Art. 182 (5), Lim. Act. The next question is whether it can be said that there was an application in this case. It is argued that there was no such application. The facts show that the amounts were sent by money order. In the circumstances of the case I am inclined to accept the despatch by money order of the Jail Superintendent as amounting to an ap-

plication. For the above reasons I am of opinion that the remittance made by the decree-holder on 25th June 1923 in the present case is a step in aid of execution and therefore the present application is not barred by limitation. In the result the orders of the lower Courts are set aside, and the petition will be taken on file and disposed of according to the merits by the District Munsif. The appellant will get his costs throughout.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 85

ANANTAKRISHNA AYYAR, J.

Nagalingam Pillai—Petitioner.

v.

Sivachidambara Sabapathy Deekshitar—Opposite Party.

Civil Revn. Petn. No. 132 of 1929, Decided on 11th May 1932, against order of Dist. Munsif, Chidambaram, D/- 15th August 1928.

Limitation Act (1908), (as amended by Act 9 of 1927), Art. 182—Right of execution not barred when amending Act came into force—Subsequent application will be governed by amended Act.

If the right of a decree-holder to execute the decree had not become barred and extinguished by limitation on the date on which the new Act 9 of 1927 came into force, then any application for execution which he might make after that date would be governed by the provisions of the new amended Act.

An application for execution was made on 9th January 1925. Final order was passed on it on 23rd March 1925. The new Act came into force on 1st January 1928. The subsequent application was filed on 23rd March 1928.

Held: that the latter application was within time: 34 C W N 733 and A I R 1930 Pat. 207, *Foll.* [P 85 C 2]

S. Jagadisa Iyer—for Petitioner.

Judgment.—The learned District Munsif of Chidambaram dismissed the execution petition filed by the assignee decree-holder in Small Cause Suit No. 682 of 1923 on the ground that the same was barred by limitation under Art. 182, Lim. Act. The assignee decree-holder has preferred this revision petition. The facts are these. The decree in Small Cause Suit No. 682 of 1923 was passed on 20th June 1923. On 9th January 1925 an application for execution was filed, which however was dismissed on 23rd March 1925. On 1st January 1928 the Limitation Act—amendment Act 9 of 1927 amending Art. 182, Lim. Act—came into force. On

23rd March 1928 the assignee-decree-holder filed another application for execution which also was subsequently dismissed for default of prosecution. The present execution petition was filed on 25th April 1928 and it is with reference to that petition that the learned District Munsif observed that it was barred by limitation.

Judged by the provisions of the old Art. 182 before it was amended in 1927 it is clear that the learned District Munsif's decision was right. But as the amended Act came into force on 1st January 1928, we have to consider whether the right of the decree-holder to execute the decree had become barred by limitation on that date, i.e. on the date on which the new Act came into force. If his right had not become barred and extinguished on that date, then any application for execution which he might make after that date would be governed by the provisions of the new amended Act. Now the decree having been passed on 20th June 1923, the application made on 9th January 1925 for execution was clearly within time. The decree-holder will have time till 9th January 1928 for filing a petition for executing his decree, and some eight days prior to that, i.e., on 1st January 1928, the new Act came into force. It being therefore clear that when the new Act came into force, the right of the decree-holder to execute this decree was not barred by limitation any subsequent application made by him to execute the decree would be governed by the provisions of the amended Act. The application made on 23rd March 1928 was therefore in my opinion in time, the same having been made within three years from 23rd March 1925, the date of order passed on the prior execution petition. Applying therefore the general principles that should govern a case when a new Limitation Act is passed, I think I must allow this revision petition.

I find that both the Calcutta High Court as well as the Patna High Court had to consider this very question. In *Kanai Lal v. Purna Chandra* (1) Mullick, J., of the Calcutta High Court had to consider substantially a similar point. The learned Judge observed that the law of limitation applicable to a suit or proceeding is the law in force at

the date of the institution of the suit or proceeding unless there be a distinct provision to the contrary in the Act. On facts similar to the facts of the present case the learned Judge held that if execution of the decree be not barred when the new Act of 1927 came into force, any subsequent execution application would be in time if it should fulfil the conditions prescribed by the new Act. To the same effect is the decision by a Bench of the Patna High Court in the case reported in *Sapani Patra v. Damodar Kar*, A. I. R. 1930 Pat. 207. As observed in that case, an amending Act will not disturb the vested rights. If at the time an amending Act came into force the decree-holder's right to execute the decree had not become barred by limitation, the learned Judges held that the subsequent application for execution would be in time if filed within three years from the date of the orders passed on the prior execution petition.

For the above reasons I am clear that the learned District Munsif was in error in his view regarding limitation in the present case. I reverse the order of the learned District Munsif and remand the execution petition for fresh disposal in accordance with law. The petitioner will be entitled to his costs of this revision petition.

P.R.S./M.N.

*Petition allowed.***A. I. R. 1933 Madras 86**

MADHAVAN NAIR, J.

Abdul Razak Saheb—Defendant—Appellant.

v.

Zainab Bi—Plaintiff—Respondent.

Second Appeal No. 756 of 1930, decided on 3rd August 1932, against decree of Sub-Judge, Vellore, in A. S. No. 200 of 1929.

Mahomedan Law—Gift — Immovable property — Transfer of possession necessary—Mother gifting property to son and continuing to live with him — Proof of delivery of possession necessary—Intention as constituting delivery—Subsequent conduct of donee is material — Mere registered deed is not enough.

A gift of immovable property under Mahomedan law is invalid in the absence of delivery of possession by the donor, but where the donor and the donee who are mother and son respectively live together at the time of the gift in the gifted property and continue to live so after the gift, there must be some evidence, to show that possession was transferred by the donor. A

mere registered deed evidencing the gift will not be evidence of such transfer, but if the deed shows that possession was intended to be transferred and that the donee has been put in possession also, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. In such a case it is not necessary for the donor to do any overt act to complete the gift: 9 Bom 146; A I R 1930 Bom 135; A I R 1925 Lah 501; 29 All 147; A I R 1923 Pat 481; 30 Mad 305; A I R 1927 Mad 572 and A I R 1930 Mad 593, Rel. on.; 19 Mad 343; A I R 1915 Mad 1; A I R 1928 P C 108 and A I R 1919 Cal 741, Dist.

[P 91 C 2]

Where the taxes of the property gifted are paid by the donee after the gift, it may constitute a sufficient intention to transfer possession even if the donee was paying them before the gift if the deed itself expresses such intention. No overt act or formal departure or entry is necessary in such case. [P 92 C 1]

A. Viswanatha Ayyar and *A. Ramaswami Ayyar*—for Appellant.

B. Somayya and *P. Krishnamachari*—for Respondent.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff, his mother, for the possession of a house on the ground that she was driven out of it by him and that the gift deed executed by her in respect of it in his favour is not valid and binding. The subject-matter of the gift is a dwelling house which the plaintiff, the donor, got from her second husband. The appellant, the donee, is her son by her first husband. Some time after the death of the appellant's father, the respondent was married by her second husband. He also died. The appellant lived with his mother in the suit house before the date of the gift. At the time of the gift and subsequently also they lived in the same house. On account of differences between her and her daughter-in-law the plaintiff was forced to leave the house. In the pleadings and as shown by the issues, her case was that the suit document was brought about by fraud and undue influence, but it was also urged during the course of the trial, as may be seen from para. 15 of the Munsif's judgment:

"that it had not been proved that possession had been duly given to the defendant at the time of the gift and that therefore the transaction has become incomplete and is void."

On both the points the learned District Munsif found against the plaintiff and dismissed her suit. On appeal the learned Subordinate Judge first dealt with the question: "Is the gift invalid

for non-delivery of possession"? and as on this point he found in favour of the plaintiff he did not consider the other question arising in the suit and consequently allowed the appeal and gave her a decree. The learned Judge based his decision on *Sher Ahmad v. Ibrahim* (1), in which Newbould, J., of the Calcutta High Court stated that:

"in cases where the donor and the donee reside on the property a gift of the property under the Mahomedan law may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject-matter of the gift."

In this case the learned Judge pointed out that there was no overt act to indicate that the plaintiff has transferred possession of the property to the donee. The facts relating to the transfer of possession which are borne out by the evidence are these: In the gift deed there is a recital to the effect that the property has been delivered to the donee. At the time the deed of gift was executed the plaintiff is said to have stated that the donee was already in possession. The learned Judge stated that these facts do not show that there was a change of possession as the donee and the donor lived together in the house at the time of the gift. Subsequent to the gift the house-tax was being paid by the appellant. The learned Judge held that this fact also was of no importance as even before the gift he used to pay the tax and as nothing was produced by the appellant to show there was mutation of names in the house tax register subsequent to the date of the gift to indicate that possession has been delivered over to the donee.

On behalf of the appellant it is argued that, having regard to the relationship of the parties, the mere residence of the donor with the donee does not show that there was no transfer of possession, considering the fact that the gift had been made by means of a registered deed which recited that possession had been given to the donee and that all that could be done under the circumstances that was possible to show transfer of control of the house had been done in the case, and that therefore no overt act such as actual delivery of possession or mutation of names in the Municipal register, etc., was necessary to make the

gift a valid one. On behalf of the respondent it is contended that the joint residence shows that there has been no complete abandonment of possession by the donor and that, even if no actual delivery need be proved, there must be evidence to show that complete relinquishment of possession was made by the donor; and that the circumstances of the case do not show that there has been such complete relinquishment. A large number of cases was cited on either side in support of the respective contentions. I shall discuss these cases as it is clear that the question involved in this case cannot be dealt with as a pure question of fact; indeed it has not been so dealt with in any of the cases brought to my notice and the counsel for the respondent has also not asked me to deal with it in that way.

It is well settled that under the Mahomedan law delivery of possession is necessary to make a gift of immovable property valid but this does not mean—and this is not disputed by the learned counsel for the respondent—that physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. Ordinarily cases of this kind do not present much difficulty as clear evidence will be forthcoming to show that there has been a transfer, such as, mutation of names in favour of the donee in the revenue or other registers, or management and enjoyment of the property by the donee. Similarly there may be evidence of management of the property by the donor despite the gift to show that there has been no transfer. The difficulty arises only in cases where such evidence, one way or the other, is absent and these have to be scrutinised carefully especially so, when the point is not taken either in the pleadings or in the issues. The gift deed, Ex. A, which is a registered document runs as follows:

"Gift executed in favour of Abdul Razak Saheb by Zinubi Ammal The house described hereunder I have to-day given by way of gift and to-day I have put you in possession of the said house. Therefore you can happily enjoy the said house worth Rs. 500 from generation to generation with powers of gift, sale, etc., and all right to water, etc. Hereafter to the said house myself or my heirs shall have no manner of right or claimed."

In the document the donor states clearly that on the date of the gift "I

1. A I R 1919 Cal 741=52 I C 314.

have put you (donee) in possession of the said house" and that the donor has no right or claim to it thereafter and that the donee may enjoy it for ever with all the rights of an owner. This is a solemn declaration made by the donor. There can be no doubt, so far as can be gathered from the document, that the donor's intention to transfer possession of the house to the donee is clear and that she has also stated in the document expressly that she has put the donee in possession thus effectuating her intention. In such a case, even though the donor and the donee lived together on the property at the time of the gift, can it be deduced from the decisions of Courts that there is sufficient delivery of possession in law and that actual transfer of physical possession is not necessary to complete the gift? This is the question I have to decide in this case. I shall now examine the cases and first, deal with the decisions of our Court. In *Bava Saib v. Mahomed* (2):

"where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house, it was held that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exception allowed by Muhammadan law, these exceptions being, where the house gifted is given by a husband to a wife or by a father or guardian to his minor child or ward."

This decision is very much relied on by the respondent but two things must be noticed, namely, that the gift being an oral one, nothing could be inferred regarding the delivery of possession from the mere fact that there was a gift, and that in a subsequent decision in *Kandath Veetil v. Veetil Pakankutti* (3), "the language of the Court" was stated to be "somewhat wide" and it was also stated that

"the learned Judges only intended to suggest that the donor's possession after the alleged gift would be evidence that the gift was incomplete."

No doubt in the latter case, the Court upheld the gift only because there was sufficient evidence to show there was transfer of possession, but it must be remarked that no inference regarding the transfer of possession could be made in this case also as the records show (see District Munsif's judgment) that there was no document to evidence the stree-

dhanam grant. The decision in *Bava Saib v. Mahomed* (2) was not followed in *Allapichai Tharaganar v. Mahomed Moiddeen* (4) also. As already observed both in *Bava Saib v. Mahomed* (2) and in *Kandath Veetil v. Veetil Pakankutti* (3), though there the gifts were proved, obviously nothing could be inferred regarding the intention of the donor or of the transfer of possession; but the same cannot be said about the case before us, the gift having been made by a registered document which shows the intention of the donor and says pointedly that the donee was put in possession. That in such a case actual transfer of physical possession is not necessary to complete the gift when the donor and the donee are living together on the property forming the subject-matter of the gift follows from the decision in *Hamera Bibi v. Najumunnissa Bibi* (5) which is accepted as laying down the correct law by this Court in *Kandath Veetil v. Veetil Pakankutti* (3) which I have referred to.

In that decision the learned Judges, after referring to *Hamera Bibi v. Najumunnissa Bibi* (5) stated that "we agree with the view therein adopted." The decision in *Hamera Bibi v. Najumunnissa Bibi* (5) has been strongly relied on by the appellant. In that case a gift was made of some property by an aunt to her nephew. Both lived together in the house included in the gift deed at the time of the gift. In the document it was stated that the donor not merely made a gift of the property to the donee but also put him in proprietary possession of it. It also contained a further statement that the donee had accepted the gift and taken possession of the property. In addition to these statements in the document there was evidence to show that mutation of names was effected in favour of the donee. The validity of the gift was questioned 13 or 14 years after the gift, and there were other circumstances and evidence regarding plaintiff's conduct. No doubt there are strong circumstances which distinguish that case from the present one but, so far as the gift deeds are concerned both the cases are alike except in this, that the gift deed in that case contained a statement that the donee had taken pos-

2. (1896) 19 Mad 343.

3. (1907) 30 Mad 307.

4. A I R 1914 Mad 688=23 I O 520.

5. (1906) 28 All 147=2 A L J 778=(1906) A W N 222.

session of the property also. In these circumstances it was argued that, there being no transfer of possession of the house in which the parties resided as is necessary to satisfy the requirements of the Mahomedan law, the gift was invalid. It is true that the decision is based on all the facts of the case but there is sufficient indication in the judgment to show that, apart from the special distinguishing features, the statements in the document, formed the main basis of the learned Judges' decision. For they state as follows:

"We are not prepared to hold that, in a case such as the present, actual physical departure of the donor from a house which is the subject of a gift evidenced by a written instrument is necessary in order to complete the gift by delivery and possession. On the contrary, we think, that, if the parties are present on the premises, it is sufficient that an intention on the part of the donor to transfer the possession has been unequivocally manifested. There can be no doubt in this case that such an intension was unequivocally manifested. In the document itself it is expressly stated that the plaintiff not merely made a gift of the property to Minnat-ullah, but also put him into proprietary possession of it, and a further statement that Minnat-ullah had accepted the gift and taken possession of the property."

After stating thus, they pointed out that in addition to this there was mutation of names, etc. Then they referred to the decision in *Ibrahim v. Suleman* (6) in which the necessity for actual delivery in the case of a gift of a house in which the donor and donee lived at the time of the gift was considered. In that case the subject of the deed of gift was a dwelling house in which the donor was residing at the time of the gift and continued to reside up to the time of his death along with the donee. The District Judge held that no relinquishment on the part of the donor has taken place and that the gift was therefore inoperative. The decision was set aside and the learned Judges observed as follows:

"As to the delivery of the house, the principle is to be borne in mind, that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession An appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner whose intention to transfer has been unequivocally manifested."

After referring to these observations
6. (1885) 9 Bom 146.

in *Ibrahim v. Suleman* (6), the learned Judges in *Hamera Bibi v. Najum Unnissa Bibi* (5) referred to Ameer Ali's book on Mahomedan Law and pointed out that the learned author did not disapprove of that decision. I think the decision in *Ibrahim v. Suleman* (6) strongly supports the appellant. This decision may be said to be impliedly accepted in this Court as it has expressly accepted *Hamera Bibi v. Najamunnissa Bibi* (5) which relies on this decision. Both these cases and *Bava Saib v. Mahomed* (2), have been referred to in *Vahazullah v. Boyapati* (7), but they have not been discussed as a finding was called for "as regards the transmutation of possession." The decision in *Rahaman Bi v. Mahomed Fatima Bibi* (8), is not much helpful as it discusses the question of law only generally as it dealt with the gift of a house by a father to his minor son which involves the application of certain special presumptions under the Mahomedan law. Coming to the recent decisions of this Court in *Ajagar Hazar Saheb v. Annamma*, A. I. R. 1927 Mad. 572, with regard to the argument that, inasmuch as the donor lived with the donee, it must be held that he did not deliver possession to her, Devadoss, J., observed as follows: and those observations in my opinion may well be applied to the present case:

"We have to see what the intention of the donor is. From Ex. B it is quite clear that he divested himself of all his property and that he wanted to be maintained by the plaintiff. That being so can it be reasonably contended that his mere living in the house meant that she had no possession of the house? *When a man makes a gift of property to a near relation who is living with him, the mere fact that he happens to live with him after the gift is made is not a sufficient circumstance to hold that possession did not pass.* (The italics are mine.) Each case would depend upon its circumstances. If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happens to live after the date of the gift with the donee in the house which is the subject of the gift would not by itself entitle the Court to hold that possession had not passed and that possession remained with the donor,"

and then the learned Judge proceeded to consider the evidence which also showed that there must have been effective transfer of possession. The decision in *Muhammad v. Ummanaikani Ammal*, A. I. R. 1930 Mad. 593, strongly sup-

7. (1907) 30 Mad 519=17 M L J 562.

8. A I R 1915 Mad 1=23 I C 651.

ports the appellant. In that case the gifts were of portions of the family dwelling house in which the parties have all along been living. The learned Judge Wallace, J., held that actual divesting by the donor and delivery to the donee was not necessary in this case, such possession as is suitable and possible in the circumstances having been given. In the case of one of the deeds the donee was a minor and this fact was referred to as an additional reason for holding that the intention to give, declared in the deed, was sufficient to hold that there was delivery. This consideration does not affect the present case. This was only an additional reason given in one of the cases. I do not think that the Madras decision compels me to hold that in the case of a gift of a dwelling house in which the donor and the donee who are close relations lived together at the time of gift, it will be necessary for the donee to prove an overt act on the part of the donor to show that there has been a transfer of possession to validate the gift under the Mahomedan law, when the document shows an intention on the part of the donor to divest himself of possession and contains an explicit statement that the donee has been put in possession and nothing to the contrary has been proved by the donor. Each case must be decided with reference to its own circumstances. None of the decisions I have examined is opposed to the appellant's contention, on the other hand one of them: *A. I. R. 1930 Mad. 572*, contains observations directly applicable, to the present case.

Now coming to the decision of the other High Courts, I have already referred to a decision of the Allahabad High Court and to one decision of the Bombay High Court. Two other decisions of the Bombay High Court may also be referred to: *Abdul Majid Khan v. Hussein Bu* (9) and *Musa Miya v. Kadar Bux* (10). The first is relied on by the appellant and the other, which is a Privy Council, decision by the respondent. In *Abdul Majid Khan v. Hussein Bee* (9), the decision in *Ibrahim v. Suleman* (6) was followed; but it was observed that it does not follow in every case necessarily that where two are present, possession must

be deemed to have been transferred. The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case and in that case it was pointed out that the evidence at the trial definitely showed that there was no transfer of possession. In the case before us there being no such evidence, the decision in *Ibrahim v. Suleman* (6) may well be applied. The decision in *Musa Miya v. Kadar Bux* (10), is not helpful as it related to an oral gift and the absence of the delivery of possession was sought to be explained by relying on an exception to the general rule. The donor in that case was the grandfather and the donee, the grandson. It was observed by their Lordships that the general rule of Mahomedan law that a gift is invalid in the absence of delivery of possession is subject to an exception in the case of a gift to a minor by his father, or guardian. But this exception should be strictly construed. It does not extend to a gift by a grandfather to his minor grandsons if their father is alive and has not been deprived of his right and powers as guardian, even though the minors have always lived with the grandfather and have been brought up and maintained by him.

In *Dalpheroo Mian v. Bengali Mali* (11), the Patna High Court while affirming the general rule that in order to complete the gift under Mahomedan law the donor must even if only for a time abandon possession of the property gifted favour of the donee, referred with approval to the decision in *Ibrahim v. Suleman* (6), but in the case before them the learned Judges held that the transfer of possession was not proved because "beyond the written deed of gift there is no such unequivocal intention; on the contrary the donor soon after the deed or gift joined in mortgaging the house,"

which was the subject-matter of the gift. The contents of the document are not mentioned in the judgment but it is clear that they did not give effect to the intention if any was expressed in it because the evidence showed that the donor had acted contrary to such intention. Probably beyond the bare deed there was nothing to support delivery of possession in that case. In the case

9. A I R 1920 Bom 185=55 I C 952.

10. A I R 1928 P C 108=109 I C 81=55 I A 171=52 Bom 916 (P C).

11. A I R 1928 Pat 481=71 I C 897.

before us as I have already said, the document states that the donee was put in possession and there is no evidence on the part of the donor that she acted in a way which will show that she did not part with possession as in the Patna case. The appellant next relied on *Rahmat v. Baulat Bibi*, A. I. R. 1925 Lah. 501, a decision of the Lahore High Court. This decision is very much like the present case. After discussing the case law on the subject it was held that actual transfer of physical possession is not necessary to complete a gift in cases where the donor and the donee live in the gifted house. The fact that

"the donor continued to live in the same house for about a month after the date of the gift which he had made by means of a registered deed, does not show that possession was not given to the donee *where it is so expressly stated in the deed*. (The italics are mine): see the head-note."

Mr. Somayya for the respondent besides relying on those of the above mentioned cases which seem to support him relied also on para 127 of Mulla's Mahomedan Law, para 3, of which dealing with delivery of possession of immovable property *where the donor and the donee both reside in the property* states as follows:

"No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift."

The cases given in support of this proposition are *Ibrahim v. Suleman* (6) and *Abdul Majid Khan v. Hussein Bu* (9). I have examined above, both these cases and have shown that the law stated in one of them regarding the delivery of the house in that case distinctly supports the appellant; in the other case the learned Judges held that it was distinguishable from the decision in *Ibrahim v. Suleman* (6) and that the question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. These cases affirming the general principle that in order to complete a gift some overt act on the part of the donor is necessary, show how in special cases, circumstances may render the general principle inapplicable. The appellant

does not contend against the general propositions of law stated in the book, but what he says is that the law being what is stated therein, in a case like the present, effect should be given to the intention of the donor clearly indicated in the gift deed and to the express statement contained in it that the donee has been put into possession. This contention is supported by abundant authority.

Having regard to the decisions which I have discussed, my conclusions so far as they relate to this case are these: (a) that a gift of immovable property under Mahomedan law is invalid in the absence of delivery of possession by the donor; (b) where the donor and the donee live together at the time of the gift in the gifted property, there must be some evidence, to show that possession was transferred by the donor: (1) a mere registered deed evidencing the gift will not be evidence of such transfer; but (2) if the deed shows that possession was intended to be transferred and that the donee has been put in possession also, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. In such a case it is not necessary for the donor to do any overt act to complete the gift.

These conclusions are supported by the decision in *Ibrahim v. Suleman* (6), *Abdul Majid v. Hussein Bu* (9), A. I. R. 1925 Lah. 501, *Hamera Bibi v. Najum-unnessa Bibi* (5) and *Dalpheroo Mian v. Bengali Mali* (11). I do not think the Madras decisions brought to my notice are opposed to these conclusions; on the other hand two of them clearly support them. I have already referred to the general features of this case, but to one fact I wish specially to draw attention. In my opinion, the learned Judge has not attached sufficient importance to it. The defendant has been paying the Municipal tax for the house after the gift. It is true that he used to pay it even before the gift but it was not right on this ground to ignore the significance of the subsequent payment in the face of the express statement in the document that the defendant has been put in possession of the house. That being so, the right way to construe the subsequent conduct of the defendant is, in the light of that statement. In this case, I think in the light of Ex. A, payment of Municipal

taxes by the defendant subsequent to the gift may be taken as a sufficiently clear indication that transfer of possession has been made by the donor. If so, there is no difficulty in the case at all. Even without relying on this item of evidence, I have already shown that there has been such transfer of possession in this case as would validate the gift under the Mahomedan law. Having regard to the relationship of the parties, the mere residence of the donor with the donee does not show that there was no transfer of possession. In my opinion all that could be done under the circumstances to show there was transfer of possession has been done in this case; and that in a case like the present, an overt act on the part of the donor is not necessary to complete the gift.

The decision relied on by the learned Judge, *Sher Ahmad v. Ibrahim* (1), is distinguishable as we know nothing about the contents of the "Lebanama" in that case; probably it mentioned the bare fact of gift and contained nothing about the intention of the donor, possession by the donee, etc. For the above reasons, I would hold that the learned Judge's decision is wrong on the first point. (The judgment then called for a finding on the point of fraud and having received it in the negative concluded.) I accept the finding of the lower Court. The learned Judge distinctly finds that the executant of the document had independent advice. The result is this second appeal is allowed and the plaintiff's suit is dismissed with costs here and in the Court below.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 92

WALLER AND PANDALAI, JJ.
(*Pena Rina Yena*) *Manickavasagam Chettiar*—Petitioner.

v.

Union Board of Devakottah—Opposite Party.

Civil Revn. Petns. Nos. 382 and 383 of 1932, Decided on 3rd March 1932, to revise decrees of Temporary Sub-Judge, Devakottah, in A. S. Nos. 15 and 22 of 1927.

Madras Local Boards Act (1920), S. 93—Residence of person within area of Board—Money lending outside—He can be taxed for income coming within the Board area, whether taxed elsewhere or not.

Where a person resides within the area of the

Union Board and receives at that place income from the money lending business carried on outside the Board area, he can yet be taxed for this income whether he has been taxed elsewhere or not: *A I R 1932 Mad 509, Foll.* [P 92 C 2]

M. Subbaraya Ayyar and *K. Ramanathan Chettiar*—for Petitioner.

K. Bhashyam Ayyangar—for Opposite Party.

Waller, J.—In this case two second appeals were originally filed. It is obvious that the matter involved was of a small cause nature and therefore the appeals do not lie. Two applications were filed to convert the appeals into civil revision petitions which were allowed. The question involved is as to the collection of profession-tax from the petitioner by the respondent, the Union Board of Devakottah. The petitioner lives within the area of the Union Board, but carries on a money lending business at Madras, Mannargudi and Nellore. His contention is that, as he has already paid the profession-tax on the income from his business in those places, he is not liable to pay again on it at his place of residence. He pleads, in fact, that income cannot be received as income twice over. That is a contention we have rejected in our judgment on *Perianan Chetty v. Taluk Board, Devakottah* (1). We reject it again for the reasons given in our judgment in that case. His next contention is that it is contrary to the policy of the Local Boards Act to tax a man twice over on his income from the same business. That contention we cannot accept. The relevant section of the Act of 1920 is S. 93. The petitioner is a person

"who, within such area . . . is in receipt of an income from money-lending or any source other than houses and lands inside the local limits of the area."

As regards double taxation all that the Act indicates is that an income derived from a source otherwise taxable within the area must not be taxed there twice. If the assessee derives an income from houses and lands within that area, that is otherwise taxable within the area and must not be taxed again. But let his lands and houses be outside the area and it is obvious that his income from them, if it reaches Devakottah, will be taxable there under S. 93 whether it has been taxed elsewhere or not. The only cases in which double taxation is not allowed

1. A I R 1932 Mad 509=198 I. C. 600=Mad 848.

are specified in sub-S. (3) and the petitioner's is not one of those cases. Under the present Act—the Act of 1930—the exceptions are much wider and the petitioner would not be taxable at all at Devakottah. In the result, we must dismiss the civil revision petitions with costs, on the finding that the petitioner is taxable. No question as to the amount of the tax was argued before us.

P.R.S./B.V.

Petition dismissed.

A. I. R. 1933 Madras 93

PANDALAI, J.

Koraga Gowda and another—Plaintiffs—Petitioners.

v.

Somappa Gowda and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 340 of 1929, Decided on 18th August 1932, against order of Sub-Judge, South Kanara, D/- 10th September 1928.

Court-fees Act (1870), S. 7 (4) (c) (as amended in Madras)—Suit for partition, possession and declaration setting aside previous alienation—Plaintiff's share determines valuation—Court-fees Act (1870), S. 7 (4) (c) applies and not S. 7 (4) (a).

A suit for partition and possession of the plaintiff's share and an ancillary relief of declaration setting aside previous alienations has to be valued not on the value of the whole of the family properties involved in the partition or alienation but only on plaintiffs' own share of it. The case is governed by S. 7 (4) (c) as amended in Madras and not S. 7 (4) (a): *A I R 1927 Mad 825, Foll; A I R 1932 Mad 491, Ref.*

[P 94 C 1]

B. Sitarama Rao—for Petitioners.

K. Y. Adiga—for Opposite Parties.

Judgment.—In this suit which was filed early in 1926, 14 issues were framed, but no question of jurisdiction was raised. On 29th March 1927 (two days before the end of the quarter) the case came on and then a new issue (issue 15) was raised: "Whether the suit is beyond the jurisdiction of this Court." It does not appear on whose initiative this question arose. The District Munsif decided it at once by an order dated the same day in which he held that for purposes of jurisdiction the prayers in the plaint which was one for re-partition of family property and (1) to declare the former partition Exs. 1 and (2) to declare certain alienations, including Exs. 25 and 34 made by other members of the family not binding on the plaintiffs so far as their shares are concerned, must be valued on some footing not mentioned by

him. He held without referring to any provision of law on which he acted that the suit was beyond his jurisdiction and ordered the plaint to be returned to the plaintiffs to be presented in the proper Court. On the plaintiffs' appeal the learned Subordinate Judge upheld the order taking the view that the declarations sought about the prior partition and the alienations are not accompanied by any prayer for consequential relief and that the proper value of those declaratory reliefs is the market value of the properties involved in the partition and alienations. Of the alienations Ex. 25 is a simple mortgage for more than Rs. 5,000 and Ex. 34 is a sale-deed for Rs. 4,000. As these amounts which apparently the learned Judge took to be an indication of the market value were above the Munsif's jurisdiction, he upheld the order relying on *Vasireddi Veeramma v. Butchiah* (1).

It seems to me both the lower Courts have fallen into error. In the first place the suit was for possession of plaintiffs' one-eighth share of family property. That was the main prayer. In order to get it the plaintiffs had to get rid, so far as their share was concerned, of certain obstacles, i. e., the prior partition and the alienations. Firstly, in such a case the plaintiffs' suit has not to be valued on the value of the whole of the family properties involved in the partition or alienation but only on plaintiffs' own share of it: see *Govindan Nair v. Madhavi*, *A. I. R.*, 1932 *Mad.* 491. Secondly, in this case the declarations sought were only ancillary to the prayer for possession and such a case is governed by S. 7 (4) (c), Court-fees Act, as to which the Madras Amendment applies, i. e., the valuation for purpose of court-fees is one half of the value of the immovable property affected by the declaration, valued as provided by S. 7 (5). The respondents' learned advocate argued that the declarations fell under S. 7 (4) (a), introduced by the Madras amendment and that in the case the value must be fixed on the market value of the properties. He relied on the case cited by the Subordinate Judge, *Vasireddi Veeramma v. Butchiah* (1), for the general principle that in cases where a statutory method of valuation is not provided, the proper

1. *A I R 1927 Mad 563=101 I C 379=50 Mad 646.*

mode of valuation for jurisdiction under S. 12, Civil Courts Act, is the market value. I do not think this is a case falling under S. 7 (4) (a). Even if it were the decision in *Venkatanarasimha Raju v. Chandrayya* (2) is a decision of a Bench directly in point which held that in such cases the valuation under S. 7 (5) must be adopted. I am not competent, even if I were otherwise prepared, to differ from this ruling. According to S. 8, Suits Valuation Act, the value for court-fees is the same in this case as that for jurisdiction.

It follows that the proper mode of valuation of the declarations was to apply the Madras amendment to S. 7 (4) (c) and value plaintiffs' share of the properties covered by each instrument as ascertained under S. 7 (5). The plaintiffs' prayer for partition must also be properly valued. As there are no materials for ascertaining which Court has jurisdiction on the above footing the order of the lower Court must be set aside and the plaint returned to the District Munsif to carry out the direction above made. The petitioners must have their costs of this proceeding in this and in the lower Courts.

P.R.S./M.N. *Petition allowed.*

2. A I R 1927 Mad 825=105 I C 171.

A. I. R. 1933 Madras 94

PANDALAI, J.

Kolipakam Penchelu Varadappa Rao
—Defendant—Petitioner.

v.

Chitoor Mahadeviah and another—
Opposite Party.

Civil Revn. Petn. No. 552 of 1929,
Decided on 4th August 1932, against
decision of Addl. Sub-Judge, Nellore,
D/- 21st September 1928.

(a) Contract Act (1872), S. 11—No decree
on contract by minor—Representation of
majority is no ground for passing decree.

There can be no decree against a person on a contract made during his minority. And this cannot be avoided either on the ground that the minor having represented himself to be a major is estopped from showing that he was a minor or on the ground that by such representation he was guilty of cheating or fraudulent conduct; (Case law referred.) [P 95 C 1]

(b) Civil P. C. (1908), S. 115—Jurisdiction to decide rightly or wrongly does not mean refusal to follow binding precedents—Glar- ing error—High Court will interfere—Prece- dents.

The lower Court's jurisdiction to decide wrongly as well as rightly does not mean that

after the superior Courts have decided a parti- cular question of law in one way, the subor- dinate Courts are at liberty to discuss the matter over again and having done so go wrong about it. In a glaring case of error the High Court will interfere in revision. [P 95 C 1]

Ch. Raghava Rao and S. Rajaraman —
for Petitioner.

B. Somayya—for Opposite Party.

Judgment.—In this case a decree for money has been passed against the peti- tioner on account of the deficiency left out of a sum borrowed by him on a pledge of jewels after a portion of the debt was paid out of the sale proceeds of the pledge. The defence was that the peti- tioner was at the time of the pledge a minor and that he is not liable on the contract of pledge. It has been found as a fact that the petitioner was a minor and also that he had entered into a number of other transactions with other persons who all like the respondent ap- parently believed either from the peti- tioner's words or conduct that he was a major. The lower appellate Court was so strongly impressed with this aspect of the case that it says that it agrees with the District Munsif's opinion that the petitioner learnt nothing else but to cheat the world at large as soon as he attained years of discretion. Although thus it may be taken that the petitioner made the respondents and others believe that he was a major, there is nothing to show that the petitioner was guilty of any specifically fraudulent conduct either as to his age or otherwise towards the respondents.

It appears from paras. 12 to 14 of the lower appellate Court's judgment that the learned Judge was of the opinion on the question whether there could be a decree against the petitioner on the above facts, that there are as many cases one way as the other; and in the end having said that he was convinced of the justice of the District Munsif's judgment con- firmed the decree. There can be no doubt that the decision of both the lower Courts is wrong on the facts found. The respondents' learned advocate has very properly not sought to support it. The decisions of our own Court *Appasami Aiyangar v. Narayanasami Aiyar* (1) and *Raghavayya v. Subbaya* (2), sup- ported as they are by those of the Privy

1. A I R 1930 Mad 945=129 I C 51=54
Mad 112.

2. (1918) 43 I C 908.

Council *Sadiq Ali Khan v. Jai Kishori* (3), in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (4) and of the English Courts of Appeal in *Leslie Limited v. Sheill* (5), put it beyond dispute that there can be no decree against a person on a contract made during his minority. And this cannot be avoided either on the ground that the minor having represented himself to be a major is estopped from showing that he was a minor or on the ground that by such representation he was guilty of cheating or fraudulent conduct. The decree against the petitioner must therefore be set aside.

But the respondents' advocate has urged that though the lower Court have gone wrong in their decisions, this Court will not interfere as they had jurisdiction to decide wrongly as well as rightly. This assumes that after the superior Courts have decided a particular question of law in one way, the Subordinate Courts are at liberty to discuss the matter over again and having done so go wrong about it. I do not think they have the power to do so. In any case the decision is undoubtedly an illegal or irregular exercise of jurisdiction with which this Court will and should interfere in so glaring a case of error. The decree so far as it is against the petitioner is set aside and the suit dismissed. The parties will suffer their costs in the Courts below. The petitioner will have his costs here.

P.R.S./M.N.

Petition allowed.

3. A I R 1928 P C 152=109 I C 387 (P C).
4. A I R 1916 P C 246=39 I C 401=43 I A 256=2 A C 575.
5. (1914) 3 K B 607=83 L J K B 1145=30 T L R 460=14 L T 106=58 S J 453.

A. I. R. 1933 Madras 95

SUNDARAM CHETTY, J.

S. Subramania Ayyar — Defendant—Appellant.

v.

Al. Ar. Rm. Arunachalam Chettiar—Plaintiff—Respondent.

Second Appeal No. 965 of 1930, Decided on 5th August 1932, against decree of Sub-Judge, Ramnad.

(a) **Madras Local Boards Act (14 of 1920), S. 3 (9)—Landholder.**

The term landholder as defined in Local Boards Act includes the landholder as defined in the Estates Land Act and also other kinds of landholders not contemplated in that Act.

[P 95 C 2]

(b) **Madras Local Boards Act (14 of 1920), S. 88, Prov. 2 — Inamdar holding both warams — Lessee is tenant and not intermediate landholder and comes within Prov. 2 to S. 88.**

Where the inamdar presumably held both the warams in the village at the time of the grant the lessee of such village must be deemed to be more a tenant than an intermediate landholder and as such the lessee will be liable to pay only half the cesses payable by the landholder under Prov. 2 to S. 88. [P 96 C 2].

M. Patanjali Sastri and *A. Nagaswamy Ayyar*—for Appellant.

V. Rajagopala Ayyar and *T. V. Ramiah*—for Respondent.

Judgment.—This second appeal has been preferred by defendant 2 and arises out of a suit brought by plaintiff-respondent 1 for the recovery of Rs. 1,167 from defendants 1 and 2 alleged to be the balance of rent and cesses payable by them for Faslis 1332 to 1336 under a registered lease deed dated 18th July 1922 (Ex. A). Plaintiff and defendants 3 to 6 are the owners of two Dharma-sanam villages called Anjamadai and Kachan. These villages were enfranchised by the Inam Commissioner and comprise 130 pangus. The inams consisted of both warams at the time of the enfranchisement and the present claim by the plaintiff is based upon the lease deed, Ex. A. The main dispute between the plaintiff and defendant 2 is as regards the liability to pay the cesses in respect of the aforesaid inams. On the plaintiff's side, the contention is that the lessee under Ex. A was bound to pay the entire amount of the cesses payable in respect of the villages whereas the contention on behalf of defendant 2 is that the lessee was only bound to pay such portion of the cesses as is recoverable from him under the provisions of S. 88, Madras Local Boards Act. There is no doubt that the plaintiff is a landholder in respect of these villages within the meaning of S. 3, Cl. 9 of the Act. The term landholder as defined in this Act includes the landholder as defined in the Estates Land Act and also other kinds of landholders not contemplated in the Madras Estates Land Act. The dispute in this case is whether the position of the lessee under Ex. A, namely, the father of defendants 1 and 2, was that of an intermediate landholder or a tenant. The term "intermediate landholder" has not been defined in the Madras Local Boards Act, whereas, the word "tenant" is said to include all

persons who, whether personally or by an agent occupy a land under a landholder or an intermediate landholder. As the inamdar presumably held both the warams in these villages at the time of the grant, the lessee of such villages must be deemed to be more a tenant than an intermediate landholder.

Reference was made to Cl. 9 in Ex. A which refers to the existence of some tenants who are in occupation of some portions of these villages; and in view of the existence of such raiyats or tenants, it is argued that the position of the lessee under Ex. A would more appropriately be that of an intermediate landholder. It is not known whether the plots in occupation of such tenants form the bulk of the lands comprised in the villages or only a small fraction thereof. There is no doubt that the inamdars are owners of both the warams in these villages, although the actual extent of the lands in which they hold both the warams is not known: vide also Cl. 15 of Ex. A. Considering the real nature of these inams at the time of the grant, it seems to me that the position of the lessee of such villages under Ex. A would be more appropriately that of a tenant than that of an intermediate landholder. In this view the lessee's liability for the payment of cesses under S. 88, Madras Local Boards Act, would come under Prov. 2 and not under Prov. 1. Both the Courts below have also accepted the position of the lessee under Ex. A as that of a tenant within the meaning of Prov. 2 of the said section. I am in agreement with that view. That being so, the lessee under Ex. A would be legally bound to pay one-half of the cesses payable by the landholder in respect of these villages. (His Lordship then considered the document Ex. A and held). I consider that on a reasonable construction of Cl. 7 in Ex. A, the lessee must be deemed to have stipulated to pay what was legally payable by him to the landholder. (His Lordship then held that it was necessary for the lower appellate Court to decide whether the overpaid cesses could be adjusted and concluded). This appeal is accordingly remanded to the Court of the Subordinate Judge of Ramnad for fresh hearing and disposal in the light of the observations made above. The costs of this appeal will abide the final result and should be provided for in the

revised decree to be passed by the lower appellate Court. The court-fee paid by the appellant on the memorandum of appeal will be refunded to him.

P.R.S./M.N.

Case remanded.

A. I. R. 1933 Madras 96

VENKATASUBBA RAO AND REILLY, JJ.

Naranappier—Appellant.

v.

Chidambaram Pillai and others—Respondents.

Appeal No. 213 of 1931, Decided on 26th July 1932, against order of Sub-Judge, Tiruvarur, D/- 27th April 1931.

Civil P. C. (1908), O. 21, R. 90—Transferee from judgment-debtor after attachment can apply under R. 90—Civil P. C. (1908), S. 64.

A person to whom the judgment-debtor transfers the property subsequent to its attachment is entitled under O. 21, R. 90 to apply to set aside the court sale as he is a person "whose interests are affected by the sale." [P 97 C 1]

T. M. Krishnaswami Ayyar, B. R. Chakravarthi and K. Balasubramania Ayyar—for Appellant.

K. V. Krishnaswami Ayyar, V. Rajagopala Ayyer and T. V. Ramiah—for Respondents.

Venkatasubba Rao, J.—The lower Court has made an order setting aside the sale of certain items under O. 31, R. 90, and the appellant complains against that order. The point of law raised is, that the petitioner before the lower Court has no locus standi under the rule in question; in other words, that he is not a person "whose interests are affected by the sale." The property was sold in parcels and the decree-holder (the appellant before us) purchased lots 3 and 5; another, a stranger, purchased lots 1, 2, 4 and 6 and he has not appealed against the part of the order affecting him. The decree-holder alone has thus preferred this appeal and we are therefore concerned with the sale of only lots 3 and 5. The position of the applicant before the lower Court (whom I shall refer as the respondent) is this. Subsequent to the attachment which preceded the sale, he purchased certain items in lot 3 and certain other items in lot 2 with which we are not concerned. Thus, in regard to lot 3, he claims that he has a right to apply under R. 90, by reason of his purchase, which admittedly was made subsequent to the attachment. In regard to lot 5 the right he claims is a different one with

which it is unnecessary to deal, in the view we have taken to which I shall refer presently.

The point of law argued is this. Is a person to whom the judgment-debtor transfers the property subsequent to its attachment, entitled under R. 90 to apply to set aside the Court sale? That is to say, is he or is he not a person "whose interests are affected by the sale?" The answer is obvious, that the Court sale affects his interests; he is interested in the property fetching as high a price as possible, being the person entitled to any surplus remaining over, after the decree is satisfied. As a matter of fact, the respondent has acquired the entire interest of the judgment-debtor in the property and he is the person that suffers, if there be irregularity or fraud in connexion with the Court sale. But Mr. T. M. Krishnaswami Ayyar for the appellant contends, that the sale to the respondent being subsequent to the attachment confers on him no right at all and that he has therefore no locus standi under R. 90. This argument which is professed to be based upon S. 64, Civil P. C., overlooks its plain effect. In the first place, what the provision renders void, is not every transfer, but a transfer, contrary to the attachment. The words "contrary to such attachment" were substituted in the present Code for words of much wider import "during the continuance of the attachment" in the Code of 1882. The expression in the old Code was too wide comprising as it did, alienations that could not possibly prejudice the rights of an attaching creditor; but under the present section, the question to be considered is, is the transfer, contrary to the attachment? When its effect is not to defeat the attachment but is, on the other hand, subject to it, it cannot possibly be held to offend against the section. Secondly, the section does not provide that the transfer shall be void absolutely or without limitation but only "as against all claims enforceable under the attachment." That means that the purchaser is subject to the same liabilities as the judgment-debtor was and that by reason of the transfer he does not get any higher rights. The transfer is subject to the claims under the attachment, but surely to commit an irregularity or a fraud in the conduct of the sale, is not such a claim. I have not the slightest

hesitation in holding that, so far as lot 3 is concerned, the respondent has made out his right.

Then arises the question of fact, namely was there material irregularity or fraud in regard to the sale of item 3 by reason of which the applicant has sustained substantial injury? (Here his Lordship discussed the evidence and came to the conclusion that there was fraud and irregularity resulting in substantial loss in respect of lot 3 but not in respect of lot 5.) In the result, the appeal is dismissed as to lot 3 and allowed in respect of lot 5. The appellant and respondent 1 here shall pay and receive proportionate costs throughout. In regard to plots 1, 2, 4 and 6, there is, as we have said, no appeal and the lower Court's decision consequently stands.

Reilly, J.—I agree. I do not think there can be any doubt that the petitioner before the Subordinate Judge, Chidambaram Pillai, was a person whose interests were affected by the sale within the meaning of R. 90, O. 21, Civil P. C. It is not now disputed that, after the attachment obtained by the appellant before us, Naranappier, in execution of his decree but before the sale with which this case is concerned, Chidambaram Pillai bought several items in lot 3. What he bought in that way he bought subject to Naranappier's attachment. But that does not mean that his purchase was illegal or illusory. He bought in effect the surplus over any value which might be obtained by Naranappier in execution under his attachment. Mr. T. M. Krishnaswami Ayyar suggested that, even if Chidambaram Pillai was a person whose interests were affected by the sale within the meaning of R. 90, O. 21, nevertheless S. 64 of the Code prevented him from attacking the sale in execution. But what S. 64 of the Code lays down as my learned brother has pointed out, is that such a purchase as that of Chidambaram Pillai is void as against any claim enforceable under the attachment. That I understand to mean that his purchase cannot defeat or affect Naranappier's right as attaching decree-holder to satisfy his decree out of the property attached. But I see no reason why that provision should shut out Chidambaram Pillai from any right as a person interested to show to the Court that by reason of some fraud or irregularity

substantial loss had been caused to him by the property being sold in execution for less than its market value. (The Court then considered the finding as to fraud and irregularity and concurring with the other judgment concluded). I agree with my learned brother that in the circumstances the evidence does not appear to be of sufficient value to justify the finding that substantial loss was caused in regard to lot 5, and therefore I agree that the appeal should be allowed in respect of that lot. I agree also to the order proposed as to costs.

P.R.S./M.N. *Order accordingly.*

A. I. R. 1933 Madras 98

BARDSWELL, J.

Tolladagu Musalayya and others —
Accused—Petitioners.

v.

Mateli Ranga Rao — Complainant—
Opposite Party.

Criminal Revn. Case No. 282 of 1932, and Criminal Revn. Petn. No. 261 of 1932, Decided on 12th August 1932, against order of Sub-Magistrate, Polavaram, D/- 10th March 1932.

Criminal P. C. (1898), S. 403—Mistaken order of acquittal in previous case when discharge alone was possible is no bar to subsequent trial—Criminal P. C. (1898), S. 494.

The accused were previously tried for offences triable as a warrant case on a complaint by the police. Before a charge was framed the case was withdrawn and an order of acquittal was passed. It was obvious that an order of discharge was meant to be passed and would alone be passed, but the order as passed was through an oversight.

Held: that a subsequent trial for the same offences on the same facts on a complaint by a private person was not barred : *A I R 1929 Bom 408 ; A I R 1921 Pat 311, Dist. and A I R 1915 Mad 23, Appl.* [P 99 C 1]

*Appa Rao—*for Petitioners.

K. Bhimasankaran — for Opposite Party.

*Public Prosecutor—*for the Crown.

Order.—The six petitioners are the accused in C. C. No. 206 of 1931 on the file of the Sub-Magistrate of Polavaram. The complaint against them has been brought by a private party who is the respondent to this petition, as to offences punishable under Ss. 147, 323 and 341, I. P. C.

A charge sheet has previously been filed by the police against the petitioners on the same facts of offences punishable under Ss. 147 and 323, I. P. C. The Sub-Magistrate took the case on file

but, before any evidence was taken, the Prosecuting Sub-Inspector withdrew from the prosecution under S. 494, Criminal P. C. The Magistrate then signed an order on a printed form by which the accused were declared to be acquitted. The form used was No. 80 which is intended for withdrawals and acquittals under S. 248, Criminal P. C., the 248 being altered to 494. The petitioners have taken the point before him that the respondent's complaint could not be inquired into under the principle of *autrefois acquit*. The Magistrate however held that the petitioners had in fact only been discharged in the earlier case. Against his decision as to that the petitioners have now come up on revision.

There is no doubt but that the petitioners should have been discharged and not acquitted in the earlier case. It was one that was triable as a warrant case and as no charge had been framed, Cl. (a), S. 494, was applicable and not Cl. (b). It is urged however for the petitioners that as the Magistrate, however mistakenly or unintentionally, had recorded an order of acquittal, they must be deemed to have been acquitted. Attention is called to *Shankar Dattatraya v. Dattatraya Sadashiv* (1). Therein there is cited with approval a Patna case *Ram Mahato v. Emperor* (2), in which it was held that S. 403, Criminal P. C., makes no distinction between acquittals after trial and acquittals under Ss. 247, 345 and 494 of the Code and that, as long as an order of acquittal under S. 247 stands, S. 403 bars a second trial on the same charge, no matter whether the order of acquittal is good or bad, legal or illegal. What however was actually decided in that case was that an acquittal under S. 247 was a bar to a second trial. The only order that could have been passed under that section was one of acquittal and the point taken was that it should not have been applied before the accused had even been served with summons. That the Magistrate intended to acquit is beyond doubt. Here however the case is very different. The only legal order that the Magistrate could pass on allowing the withdrawal was one of discharge;

1. *A I R 1929 Bom 408*=(1929) Cr O 436=126 I C 321=53 Bom 693.

2. *A I R 1921 Pat 311*=61 I C 59=22 Cr L J 331.

and that he meant to pass such an order is shown by the note of the docket in his own writing and over his initials, that the accused were discharged. It has been held in *Sriramulu v. Veerasalingam* (3), that an order of discharge has to be taken as an order of acquittal when, in the circumstances, an order of acquittal was the only one that could legally be passed. Conversely I am of opinion that an order that purports to be one of acquittal has to be regarded as one of discharge when, under the provision of law that was applied, only a discharge order could be passed, and especially when the Magistrate had expressly shown that it was his intention to pass such an order by the note which he made on the docket and when the word "acquitted" was printed in a printed form, which he no doubt signed inadvertently thinking that it was in accordance with his note on the docket.

It has been argued, that, as the case has now been found to fall under S. 341, I. P. C., it was only a summons case and so Cl. (b), S. 494, was applicable and the order of acquittal was correct. What however has to be looked to is not what view can be taken of the case now but how it was treated at the time of the withdrawal. Further I gather that the Magistrate does not propose to deal with the case only under S. 341, I. P. C., but rather intends to add that section to S. 147 and S. 323.

I think that there might be a printed form for withdrawals under S. 494, Criminal P. C., containing both the words "acquitted" and "discharged," the one written over the other, so as to allow of the scoring out of whichever of the two words is, in the circumstances, unsuitable. The petition is dismissed.

P.R.S./M.N. *Petition dismissed.*

3. A I R 1915 Mad 23=25 I C 1001=15 Cr L J 673=38 Mad 585.

A. I. R. 1933 Madras 99

BURN, J.

Narayana Iyer—Accused—Petitioner,
In re.

Criminal Revn. Case No. 355 of 1932, and Criminal Revn. Petn. No. 327 of 1932, Decided on 13th September 1932, against order of 1st Class Bench Magistrate, Coimbatore, in Summary Trial No. 1706 of 1931.

(a) **Madras Prevention of Adulteration Act (1918), S. 5 (1) (b) and (d)—Cl. (d) not in force—Cl. (b) is not made ineffectual by Cl. (d).**

It is reasonable to say that where a standard of purity for milk has been prescribed under S. 5 (1) (d), a person cannot be guilty both under S. 5 (1) (b) and under S. 5 (1) (d). S. 5 (1) (b) has however not been made of no effect as far as milk is concerned by the enactment of S. 5 (1) (d), when S. 5 (1) (d) is not in force in that locality.

[P 100 C 1]

(b) **Madras Prevention of Adulteration Act (1918), S. 5 (1) (b)—Selling mixture of water and milk is offence under Cl. (b).**

To sell as milk a mixture of milk and water is to sell as food a substance which is partly food and partly not food and which is therefore not of the nature, substance or quality which it purports to be. To sell as milk a substance which is 40 per cent. water and only 60 per cent milk is without any doubt a breach of S. 5 (1) (b). [P 100 C 2]

(c) **Madras Prevention of Adulteration Act (1918), S. 20—Rules framed before extension of Act do not apply to that area.**

Where certain rules under S. 20 (d) and (e) were framed and published in 1926, but the Act itself was not extended to a particular Municipality till 1929, the rules cannot be deemed to be in force within that Municipality from 1929, notwithstanding the provisions of S. 6, Madras General Clauses Act: *Cr Rev 73 of 1931, Foll.*

[P 100 C 2]

K. S. Jayarama Ayyar and *G. Gopala-swami*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been convicted of an offence under S. 5, sub-S. 1 (b) and (d) and S. 20 (d), Madras Prevention of Adulteration Act 3 of 1918 and fined Rs. 50. There is no dispute about the facts. The petitioner is the proprietor of a Coffee Club in Coimbatore. On 23rd October 1931, the Sanitary Inspector, P. W. 1, bought from him one measure of milk. On analysis the milk was found to contain 40 per cent. of added water. The Bench held that this was a sale of food not of the nature, substance or quality which it purported to be [S. 5 (1) (b) 7]. By rules framed under S. 20 (e) of the Act the Local Government prescribed a standard of purity for milk. The milk sold by the petitioner was certainly not up to the standard of purity fixed by the Government and hence the Bench held that the petitioner had committed an offence under S. 5 (1) (d) of the Act. By rules framed under S. 20 (d) of the Act the Local Government prescribed the manner in which the notice of addition, admixture or deficiency should be given to the purchaser of any article of food. It was alleged for the petitioner that he had put a notice to the effect that there was an admixture of water with

the milk. But it was not contended that he had given such a notice as is prescribed by the Local Government in this behalf and hence the Bench held that the petitioner was guilty also of a breach of S. 20 (d) of the Act. Mr. Jayarama Iyer for the petitioner contends that since "milk" is provided for in S. 5 (1) (d) the petitioner cannot be held to be guilty under S. 5 (1) (b) which deals with food in general. Milk no doubt falls within the definition, or rather the interpretation, of the term food which is given in S. 2 of the Act as follows:

"Food includes every article (other than drugs or water) used by man for food or drink, and all materials used or admixed in the composition or preparation of such article, and shall also include flavouring matter and condiments."

From this it would follow that any person who sells milk which is not of the nature, substance or quality which it purports to be, would be guilty of a violation of S. 5 (1) (b). But in S. 5 (1) (d) special provision is made for the offence of selling milk which is not up to the standard of purity prescribed by the Local Government. Hence it is argued that the offence of selling adulterated milk cannot fall under S. 5 (1) (b). Mr. Jayarama Iyer relies on Maxwell on the Interpretation of Statutes, p. 527. I cannot however agree that this principle is applicable to this case. As will be seen in a moment, Mr. Jayarama Iyer is contending that the rules prescribing a standard of purity for milk have never been applied to the Coimbatore Municipality. If that is so, nobody in Coimbatore can commit any offence under S. 5 (1) (d). There is no doubt that the Act is in force in Coimbatore since 1929, and therefore S. 5 is in force. But if Mr. Jayarama Iyer's contention is correct S. 5 (1) (b) is a mere dead letter as far as milk is concerned, and anyone may sell in Coimbatore anything whatever instead of milk. This is quite impossible. It might be reasonable to say that where a standard of purity for milk has been prescribed under S. 5 (1) (d), a person could not be guilty both under S. 5 (1) (b) and under S. 5 (1) (d). It is in my opinion quite unreasonable to argue that S. 5 (1) (b) has been made of no effect as far as milk is concerned by the enactment of S. 5 (1) (d), when it is at the same time contended that S. 5 (1) (d) is not in force.

Milk is food, water is not food. To

sell as milk a substance which is 40 per cent. water and only 60 per cent. milk is without any doubt a breach of S. 5 (1) (b). Mr. Jayaram Iyer says that the petitioner never pretended to be selling pure milk, and he was in fact selling milk though with water added. This is to neglect the words of the Act. Milk as defined in the Act does not permit the addition of any water. To sell as milk a mixture of milk and water is to sell as food a substance which is partly food and partly not food, and which is therefore not of the nature, substance or quality which it purports to be. The Bench was therefore right in convicting the petitioner of an offence under S. 5 (1) (b). The propriety of the conviction under S. (1) (d) and S. 20 (d) depends on the answer to the question whether the rules framed by the Local Government under S. 20 (d) and (e) are or are not in force in the Coimbatore Municipality. These rules were published in the Fort St. George Gazette on 24th August 1926, Part 1-A, p. 319. But the Act itself was not applied to the Coimbatore Municipality till 1st July 1929: vide Fort St. George Gazette dated 11th June 1929, Part 1-A, p. 330. S. 20 of the Act which gives power to make rules begins as follows:

"The Local Government may, after previous publication, make rules consistent with this Act for the whole or any part of the area to which this Act may have been extended."

Mr. Jayarama Iyer contends, and as I think with considerable force, that the rules framed in the exercise of this power can only be applied to any particular area after the Act has been brought into force in that area. That is in my opinion the natural meaning of the words. The learned Public Prosecutor refers to S. 6, Madras General Clauses Act. But that only provides that rules may in certain cases be framed before the Act comes into force, but shall not take effect until the Act itself is put into force. I respectfully agree with the opinion of Jackson, J., in *Criminal Revision Case No. 73 of 1931* that S. 6, General Clauses Act, does not provide for the application to one area of rules framed for another area. In the Prevention of Adulteration Act, there is no provision, as in some other Acts, for example, the Factories Act and Motor Vehicles Act, that rules when framed shall take effect "as if enacted in

the Act itself." S. 20 appears to contemplate the possibility of different rules for different areas. As Jackson, J., observed in the case already referred to: "rules applicable to one part of this Presidency are not necessarily applicable to another part."

This principle is expressly recognized in S. 1 of the Act itself. For these reasons I hold that the petitioner is not guilty of any offence under S. 5 (1)(d) or S. 20 (d) of the Act. The convictions under those sections are set aside. One fine was imposed for all the three offences of which the petitioner was convicted. I reduce it to a fine of Rs. 40. The balance if paid must be refunded.

P.R.S./R.K.

Fine reduced.

A. I. R. 1933 Madras 101

JACKSON AND MOCKETT, JJ.

R. Shanmuga Rajeswara Sethupathy
—Plaintiff—Appellant.

v.

Perumal Moopan and others—Defendants—Respondents.

Second Appeals Nos. 37 to 44, 46 to 57 and 59 to 69 of 1929, Decided on 15th August 1932, against decrees of Dist. Judge, Ramnad.

Evidence Act (1872), Ss. 101 to 103—Landlord entitled to rent—Exemption on special plea must be proved by person raising it—Facts of plea within tenant's knowledge—Onus is on tenant—Evidence Act (1872), S. 106—Madras Estates Lands Act (1908), S. 4.

The person who sets up a special plea with a view to claim exemption from statutory liability has to prove the existence of special circumstances which bring his case under the exception. [P 101 C 2]

In a suit for rent of waste lands the landlord being prima facie entitled to rent for all raiyoti lands it is incumbent on the tenant to establish any custom on which he relies to excuse him and the facts which make that custom a shield. [P 101 C 1]

Where the tenant pleads a custom of non-liability, if lands remain waste not on account of his wilful default or personal liability, he has to prove the custom and the facts being peculiarly within his knowledge, the onus is on the tenant: 44 I C 663, *Rel on.* and 50 I C 892, *Dist.*

[P 101 C 1]

Advocate-General—for Appellant.

Mockett, J.—These appeals arise out of decrees in a number of suits brought by the Rajah of Ramnad (the appellant) and the tenants (the respondents) against each other under S. 77, Madras Estates Land Act. The Advocate-General for the appellant has argued that the findings of the District Court are erroneous broadly speaking under two headings: (1) that

the rates awarded in respect of various crops are inadequate; and (2) that the learned District Judge has put the burden of proving that waste lands were uncultivated through no fault of the tenant on the landlord whereas it was for the tenant to adduce this evidence. We have after hearing the Advocate-General on point 1 indicated that in our view questions of the adequacy or inadequacy of rates (matters which have been most thoroughly investigated on evidence in the Courts below) do not call for an interference in second appeal being largely questions of fact and so far as this topic is concerned we dismiss the relevant appeals. The second point however is a question of law and is clearly a matter of importance between landlord and tenant. The matter arose out of a claim for rent for certain waste lands by the appellant. In reply to this claim the respondents in para. 6 of their written statement put in an involved plea the effect of which is agreed to be that the tenants are by custom not liable for rent for lands left waste "not on account of wilful default or personal liability." It is at least clear that the parties went to trial on this basis for issue 4 reads as follows:

"Are the lands left waste in the several suits due to causes beyond the control of the ryots and is plaintiff not entitled to rent?"

This issue imposes the onus upon the defendants. It is not quite clear whether there was a dispute as to onus in the first Court but the Special Deputy Collector ruled that it was on the raiyats and in the absence of any evidence by them to sustain it allowed the appellant's claim in respect of waste lands, at the same time stating the law as follows:

"The person who sets up a special plea with a view to claim exemption from statutory liability has to prove the existence of special circumstances which bring his case under the exception."

This is a succinct and accurate statement of the rule of evidence applicable, which is to be found in Ss. 101 to 103, Evidence Act, which state the English Common law rules as built up by numerous cases. There is a direct authority in Madras in *Ramaswami Servai-garan v. Athivarah Chariar* (1) on this exact question of onus as between landlord and tenant though there does not appear to have been much or any discus-

1. (1918) 44 I C 663.

sion on that point, the judgment being directed mostly to the question of whether the landlord can claim rent for waste lands at all. As to this, the Court held that as under S. 4, Estates Land Act, the landlord is prima facie entitled to rent for all raiyati lands it is incumbent on the tenant to establish any custom on which he relies to excuse him and the facts which make that custom a shield. We consider that this decision exactly applies to the present case. The case in *Rajah of Ramnad v. Meerasa Marakkayar* (2), which it has been suggested is contrary to *Ramaswamy Servaigaran v. Athivarahachariar* (1), is not in fact so, as the former case was decided on a special finding in favour of the raiyats and it is to be observed that the Court (Phillips and Kumaraswami Sastri, JJ.), did not express dissent from *Ramaswami Servaigaran v. Athivarahachariar* (1) although it was cited. The learned District Judge has however reversed the decision of the first Court on the question of onus. He says

"the Deputy Collector wrongly threw the onus on the raiyats to show that it was not due to their default the land lay waste, the onus really being on the landholder."

He gives no reasons for this decision and refers to no authorities and allows the raiyats' appeals because there was "absolutely no evidence that the waste was due to the raiyats' default."

Since the onus had been put upon the raiyats in the first Court this was naturally so. This decision is sought to be supported before us by the somewhat curious argument that the reason why the waste lands could not be cultivated was "peculiarly within the knowledge of the landlord" though why the actual occupant of the land should be unable to say why he cannot cultivate it has never been explained. The tenant whose business and presumably desire it is to cultivate his holding must surely, of all men, be in possession of the facts to which he can ascribe his inability to carry out the object for which he holds the lands. The present case cannot possibly be brought within S. 106, Evidence Act, as the respondents' advocate presumably seeks to do. For the above reasons we think the Deputy Collector was right and the District Judge wrong on the issue as to onus. In the result S. A. Nos. 37 to 44 and 46 to 57/29 which refer to the ques-

tion of rates are dismissed and S. A. Nos. 59 to 69 of 29 which refer to the question of onus are allowed. No costs.

Jackson, J.—I agree. The question agitated in these appeals, what is the proper rate for plantains grown upon dry lands, is a new one, for which, on this estate, there is no guidance to be obtained from precedent. Fixing the fair rate therefore becomes a matter of judicial discretion, and there is no reason for holding that the learned Judge in the exercise of his discretion has in any way erred.

P.R.S./M.N. *Order accordingly.*

A. I. R. 1933 Madras 102 Full Bench

COUTTS-TROTTER, C. J., BEASLEY
AND WALSH, JJ.

Rammammal—Petitioner.

v.

Vijayaraghavalu Naidu and another
—Opposite Parties.

Criminal Misc. Petn. No. 471 of 1928,
Decided on 23rd August 1928.

Criminal P. C. (1898), S. 491—Costs.

High Court has no jurisdiction to award costs in an application for issuing a writ of habeas corpus. [P 102 C 2]

K. S. Desikan—for Petitioner.

V. V. Srinivasa Ayyangar and *C. Sarangaraja Ayyangar*—for Opposite Parties.

Order. — This petition [petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of habeas corpus to the respondents herein to produce the body of the petitioner's unmarried minor son, Thiruvengadaswami, in Court and also to issue an injunction restraining the said respondents from celebrating the marriage of the said minor on 24th June 1928 or any other day pending this petition] is withdrawn. We very much regret to come to the conclusion that we have no power to grant costs proprio motu. In some ways perhaps it is to be regretted that we have not because a lot of these applications are so thoroughly frivolous—I do not say anything about this one—that I think the losers ought to be penalised for vexatious proceedings. However, costs are a creature of Statute or statutory rules and in the absence of either in this case we must hold that we have no jurisdiction to award costs.

P.R.S./R.K. *Order accordingly.*

A. I. R. 1933 Madras 103

REILLY, J.

T. Balaji Rao Naidu Garu — Petitioner, In re.

Civil Misc. Petn. No. 4043 of 1932,
Decided on 30th August 1932.

Elections — Injunction to restrain should not be ordinarily granted—Civil P. C. (1908), O. 39, R. 1.

Though a candidate for election to a Local Board like anyone else has a right to pursue his legal remedies, whatever they may be, save in exceptional circumstances, it is an abuse for a candidate who for some reason is shut out, to make his pursuit of his remedies in the civil Courts a weapon for dislocating the electoral machinery and stopping an election. In the absence of any special reasons an order for injunction for that purpose should not be granted: *A I R 1923 Mad 475, Dist.* [P 103 C 2]

Y. Suryanarayana—for Petitioner.

Order.—This is an application that the production of printed judgments may be excused in order that a second appeal may be admitted out of its turn with the further purpose that an injunction may then be obtained preventing a District Board election from being held on 3rd September 1932, in which election the appellant, whose nomination has been rejected, wishes to be a candidate. The appellant after the rejection of his nomination filed a suit in the District Munsif's Court and obtained a declaration that he had been validly nominated for election and an injunction restraining the Election Officer from holding the election without the appellant as a candidate. On appeal the District Judge dismissed the suit, and the second appeal is against that dismissal.

I do not think it proper that I should help the appellant by making any special order in his favour. If this second appeal is eventually admitted, it may be considerable time before it is heard, and at any rate it could not be heard until after the day fixed for polling. The appellant, anxious to pursue his own remedies, as he is quite entitled to do, wants to get an injunction staying the election, regardless of the fact that he would be putting the other candidates and the electors to great inconvenience and that, if for any reason his appeal was not heard with extraordinary promptness, the injunction would in effect temporarily disfranchise the constituency. The appellant perhaps exaggerates his importance to the public. At any rate it is on his own right to be a candidate that he in-

sists. But his right will be vindicated if he succeeds in his appeal and gets the declaration for which he has prayed; and if in due course he takes proper steps to object to the election of any other candidate, he will have another chance of being elected for the constituency without throwing the electoral machinery out of gear at this very late date and temporarily disfranchising the constituency. I have been referred to *Sarvothama Rao v. Chairman, Municipal Council, Saidapat* (1), as an instance where an injunction was made stopping an election. That is an interesting case, but of less value as a precedent than it would otherwise be, because it is a very extreme case—so extreme indeed that Schwabe, C. J., in spite of the fact that a suit was pending before a District Munsif, felt justified in expressing an opinion that the suit could only have one result. And he cited, it may be remarked, two English cases, not election cases of this kind, *Aslatt v. Southampton Corporation* (2) and *Richardson v. Methley School Board* (3), in which the learned Judges felt equally sure of their ground, though in those cases they did not have to go to the extremely unusual length of prejudging a suit pending in another Court. This is a very different case, and it certainly cannot be said that the result of the second appeal, if it is admitted, is a foregone conclusion.

In my opinion, though a candidate for election to a Local Board like anyone else has a right to pursue his legal remedies, whatever they may be, save in exceptional circumstances it is an abuse for a candidate, who for some reason is shut out, to make his pursuit of his remedies in the civil Courts, a weapon for dislocating the electoral machinery and stopping an election. This is an abuse which appears to be on the increase in this presidency and is in my opinion very much against the public interest, and I am not prepared to assist the appellant in any attempt to apply it in this case. The petition is dismissed.

P.R.S./M.N. *Petition dismissed.*

1. A I R 1923 Mad 475=47 Mad 585=73 I C 619.
2. (1881) 16 Ch D 143=50 L J Ch 31=29 W R 117=43 L T 464.
3. (1893) 3 Ch 510=62 L J Ch 943=42 W R 27=69 L T 303=3 R 701.

A. I. R. 1933 Madras 104

MADHAVAN NAIR, J.

T. K. Peramanayagam Pillai—Judgment-debtor—Appellant.

v.

Raman Chettiar — Decree-holder — Respondent.

Appeal No. 234 of 1927, Decided on 19th September 1932, against order of Dist. Judge, Tinnevely, D/- 24th February 1927, in A. S. No. 5 of 1927.

(a) Limitation Act (1908), S. 19 (2)—Document containing acknowledgment — Date scored out — Document can be treated as undated.

Where the date of the document containing the acknowledgment has been scored out, then for the purposes of Cl. 2, S. 19, it may be held that the writing containing the acknowledgment is undated, and then evidence may be given as to the correct date of the acknowledgment. Though a document with a date stroked out by the party may be said to bear a date strictly speaking, and therefore not to be undated, having regard to the obvious fact that the parties by striking it out have shown that it is not to be the date of the document, it can hardly be correct to calculate the time of acknowledgment from that date as the true date: 26 *Bom* 128, *not Foll.* [P 105 C 1]

(b) Limitation Act (1908), S. 19 (2) — Undated acknowledgment contained in document filed in Court—Date of filing is date of making acknowledgment.

In the absence of the proof of the date of an undated acknowledgment contained in the schedule of creditors filed before the receiver it is justifiable to presume that the acknowledgment was made when the document was filed.

[P 105 C 2]

K. V. Venkata Subramaniam Ayyar—for Appellant.

E. Vinayaka Rao—for Respondent.

Judgment.—The judgment-debtor is the appellant. This Civil Miscellaneous Second Appeal arises out of an application filed by the decree-holder under O. 21, R. 38, Civil P. C., to execute the decree in O. S. No. 175 of 1916 (District Munsif's Court, Tinnevely) by arrest of the appellant. The question for decision is whether the decree sought to be executed is barred by limitation. The date of the decree is 11th December 1917. The application for execution previous to the present application (Ex. E) was made on 12th April 1922. That was in time when it was filed. The present application, E. P. No. 257 of 1926, was made on 21st April 1926. Prima facie it is barred by limitation as having been made more than three years from the date of the last application. But the respondent decree-holder contended that it was

saved from the bar of limitation under S. 19, Lim. Act, by an acknowledgment made by the judgment-debtor within three years from the date of the last execution application and that the present execution application has been filed within three years from the date of the acknowledgment; and that it is therefore within time. This plea was accepted by both the lower Courts.

The facts relating to the acknowledgment are these: The judgment-debtor became an insolvent. He filed a schedule of assets and liabilities before the Official Receiver. This schedule is Ex. 3. It is not disputed that this contains an acknowledgment of liability. The question is when was this acknowledgment made. The date, 30th March 1923, appears on Ex. 3, but this has been stroked out. If this is the date of the acknowledgment then the present application, dated 21st April 1926, as having been made more than three years from that date, is clearly barred by limitation. We are not able to say why the date appearing on Ex. 3 was stroked out. The document does not show when it was actually filed before the Official Receiver as it does not bear the stamp of his office. It must have been filed before him either on 31st July 1923 or some time after that date. This is inferred from Ex. 5, a petition made by the insolvent to the Official Receiver promising to file the list in a week. Ex. 5 is dated 31st July 1923. The District Munsif held that the respondent has admitted the present decree debt either on 31st July 1923 or on some day after that date and that the present application is not barred as it has been made within three years from that date. This decision was upheld by the learned District Judge.

In this second appeal Mr. Venkata-subramaniam for the appellant argues that the acknowledgment should be considered to have been made on 30th March 1923 though that date has been stroked out, that when once the document bears a date it is not open to the parties to show by oral evidence that it was not written on that date having regard to the prohibition contained in Cl. 2, S. 19, Lim. Act, and that in any event the lower Courts are wrong in calculating the period for the present application from the date of "filing" of the acknowledgment petition, as under law the time

from which they should calculate it is the time when it was made and not the time when the petition containing it was filed; or in other words, that the filing of the petition has nothing to do with the time when the acknowledgment was made. The first two arguments are supported by a decision in *Sayad Gulamali v. Miyabhai* (1), which is to this effect:

"Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible under S. 19, para. 2, Lim. Act, 1877."

Logically it must follow from this decision that if by mistake a wrong date is inserted in a document, oral evidence is inadmissible to prove the mistake. An interpretation of Cl. 2, S. 19, leading to this position seems to me hardly justifiable. Having regard to the fact that the date of the document containing the acknowledgment has been scored out, I think that for the purposes of Cl. 2, S. 19 we may hold that the writing containing the acknowledgment is undated, and then evidence may be given as to the correct date of the acknowledgment. Though a document with a date stroked out by the party may be said to bear a date strictly speaking, and therefore not be undated, having regard to the obvious fact that the parties by striking it out have shown that it is not to be the date of the document, I think it can hardly be correct to calculate the time of acknowledgment from that date as the true date. In this case, as pointed out by Mr. Vinayaka Rao for the respondent, it is not quite clear whether the lower Court's conclusion regarding the time of acknowledgment is based so much on the oral evidence as on an inference from Ex. 5. Though oral evidence was adduced in the case, the conclusion that Ex. 3 must be considered to have been filed on or after 31st July 1923 is solely based on the inference from Ex. 5. If this view can be held to be correct as I think it may well be, then the occasion for the application of *Sayad Gulamali v. Miyabhai* (1) does not arise as the true date can be proved by other than oral evidence. However it is not necessary to discuss this aspect of the question any further.

The last argument of Mr. Venkatsubramaniam will be found to be without any substance if the finding of the lower

Courts is properly understood. It is true that the learned Judges have calculated the period of limitation for the present application from the date of the filing of Ex. 3. But they have done so not because that the date of the filing has anything to do with the question under S. 19, Lim. Act, but because they consider that acknowledgment in the absence of other evidence must be held to have been made when the document was filed; that is all. This is clear from the words used by the District Munsif. He says:

"It is clear from Ex. 3 that the respondent has admitted the present decree debt either on 31st July 1923 or on some day after that date." (The italics are mine):

and the learned District Judge has confirmed this opinion of the learned District Munsif. There is therefore no reason for calling for a fresh finding as to the time when the decree debt was acknowledged by the judgment-debtor. For the above reasons, this Civil Miscellaneous Second Appeal is dismissed with costs.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 105

PANDALAI, J.

K. Ramaswami Naicker and another — Defendants—Petitioners.

v.

Secy. of State — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 508 of 1931, Decided on 1st September 1932, against decision of Dist. Munsif, Madura, D/- 28th February 1931.

(a) Civil P. C. (1908), S. 2 (17)—Receiver to manage property and collect rent on commission is public officer—Civil P. C. (1908), S. 80.

Receiver appointed to collect rents, to manage the property, to make certain disbursements and pay the remaining amount to the Court and remunerated by fees or commission is public officer: 136 I C 777 and A I R 1931 Cal 503, Rel. on. [P 106 C 2]

(b) Civil P. C. (1908), S. 80—Document, if valid notice, must be determined with common sense, and after understanding it in sense intended by writer and understood by receiver.

In determining whether a particular document satisfies the requisites of a valid notice under S. 80, the Court is bound to use common sense and must look at the document and understand it in a fair and reasonable sense in the way in which the writer meant and the addressee understood it. [P 107 C 1]

Where a Collector gave a notice to a public officer requiring him to do certain acts within

1. (1902) 26 Bom 128=3 om L R 574.

a specified time and notified his intention to file a suit otherwise and signed it as a Collector but not on behalf of the Secretary of State.

Held: that there was sufficient compliance with S. 80: *A I R 1927 P C 176, Expl.*; 24 *Mad 279* and *A I R 1926 Mad 408, Ref.*

[P 108 C 1]

K. Rajah Ayyar and *N. R. Govindachariar*—for Petitioners.

P. V. Rajamannar for Govt. Pleader—*for Opposite Party.*

Judgment.—This is a petition by the defendants in a suit brought by the Secretary of State in the Court of the District Munsif of Madura in which the petitioners took the preliminary objection that they were public officers within the meaning of S. 80, Civil P. C., and were entitled to notice under that section of the suit but that they had received no such notice and so the suit was incompetent. The District Munsif rejected this contention holding that though the defendants are public officers, the notices marked Exs. A and B were sufficient compliance with the section and also, though rather hesitatingly, that the suit did not embrace official acts and therefore might be maintained even though no notice was sent. It is not necessary to deal with the second half of the above opinion if the Munsif's order can be supported on the first. The defendants are respectively the zamindar of Ammayanaickanur (defendant 1) who was himself appointed a receiver to collect the rents and other incomes of the zamindari, and a wakil of the Court (defendant 2) who was afterwards appointed additional receiver for the same purpose apparently because defendant 1's sole receivership was not functioning satisfactorily. These two receivers were receiving rents and profits of the zamindari for the purpose of satisfying certain creditors who had taken out execution of decrees obtained against the zamindar. The order of appointment of defendant 2 empowered him to be in entire charge of the management of the zamindari and to be responsible for the due collection of all other incomes of the zamindari, to keep proper accounts, to pay out of the income Rs. 1,000 to the zamindari-receiver as his monthly allowance and to pay the balance into Court for payment of the decree-holders.

The first point is whether these two defendants are public officers and on this there can be no serious dispute in view

of the language of S. 2, Cl. 17, sub-Cls. (d) and (h), Civil P. C. In the words of sub-Cl. (d) they are persons especially authorised by a Court of justice to perform the duty of taking charge and disposing of property. In the words of sub-Cl. (h) they are (at least defendant 2 is) officers remunerated by fees or commission for the performance of the public duty of execution of the Court's decree, in this case by taking charge of the debtor's property and disposing of it according to the orders of the Court. In *Krishnaswami Sastri v. Syed Ahmed* (1), the question whether receivers appointed under O. 40, R. 1 were public officers was not disputed and in my opinion rightly so. To the same effect is *Jagadischandra Deo v. Debendraprasad* (2). I therefore think that the District Munsif was right on this point.

The only remaining point is whether the notices, Exs. A and B, sufficiently comply with the requirements of S. 80. The language of the judgment of their Lordships of the Privy Council in *Bagchand Dagadusa v. Secy. of State* (3), was prayed in aid in the lower Court and has been to a certain extent relied upon in this for the proposition that the section is express, explicit, and mandatory, and admits of no implications or exceptions and that therefore the examination whether it has been complied with must be strictly carried out. The passage in which the words referred to occur is where their Lordships are summarising the view of other High Courts than Bombay. It is a summary of the reasoning on which those High Courts held that S. 80 applies to all kinds of suits including those for injunction. No doubt their Lordships later on say that the reasoning which they had summarised in the previous passage is right; but to use the words mentioned as containing a clue to the method of determining whether the elements necessary to constitute good notice under S. 80 exist in a particular document would be doing violence not only to the language but to the intention of their Lordships. I consider myself at liberty notwithstanding the words imputed to their Lordships to determine

1. (1931) 136 I C 777.

2. *A I R 1931 Cal 503*=132 I C 634=58 Cal 850.

3. *A I R 1927 P C 176*=104 I C 257=54 I A 338=51 Bom 725 (P C).

the question in the light of decisions germane to the subject. There are several of them, but it is sufficient to refer to decisions of our own Court such as *Secy. of State v. Perumal Pillai* (4) and *Venkata Ramakrishna Ayyar v. Secy. of State* (5). The substance of it all is that in determining whether a particular document satisfies the requisites of S. 80 we are not bound to abandon all common sense, but on the contrary we must look at the document and understand it in a fair and reasonable sense in the way in which the writer meant and the addressee understood it. The correspondence on the subject of this case has been referred to by the Munsif and it is not necessary for me to refer to it again. For many years the Mattapparai tank in the Ammayanaickanur zamindari was in the opinion of the Local Government authorities a source of danger to the Periyar main canal owing to its being kept in a breached condition causing, I suppose, floods and inundations into the canal. The Collector had been pressing the zamindar to put the tank in good order and the suit was brought after years of correspondence when the zamindari happened to be in charge of the zamindar and a lawyer as receivers because the necessary steps were not taken. Of the two documents Exs. A and B, which are put forward as constituting sufficient notices, Ex. A is dated 2nd February 1926, which says :

"Please take notice that you are requested to execute the repairs mentioned in the estimate within a period of six months as repairs are necessary to prevent all reasonable risk of danger to the Periyar main canal failing which legal proceedings will be taken against you,"

Then follows the list of repairs to be executed to the Mattapparai tank to prevent danger to the Periyar main canal and four items of works are mentioned. The document is addressed to the zamindar, defendant 1 when he was sole receiver and is signed on behalf of the Collector of Madura. The original which must be with defendant 1, was not produced by him, Ex. A, being the office copy. Ex. B is addressed to both defendants 1 and 2 described respectively as zamindar and Receiver and Additional Receiver. The document is headed :

"Tanks, Private—Nilakottai Taluk Zamin Mattapparai village—Mattapparai Taluk—Conservancy—suit filing of."

This part of official correspondence, as is familiar to those conversant with it, is a precis of the subject-matter of the communication which follows. The body of the letter reads :

"A copy of the plan and estimate showing the nature of repairs to be carried out to the Mattapparai tank of Zamin Mattapparai village attached to Ammayanaickanur zamindari is herewith sent."

"2. Please take notice that you are requested to execute the repairs mentioned in the estimate within a period of six months as repairs are necessary to prevent all reasonable risk of danger to the Periyar main canal failing which legal proceedings will be taken against you. It is signed "E. B. Cobbald, 28th July 1929, Collector."

It is objected that this notice does not comply with S. 80 because it does not mention the three matters to be mentioned in it, viz. (1) cause of action, (2) name, description and place of residence of the plaintiff, and (3) relief. As to the cause of action, in both the documents it is in my opinion sufficiently stated as the necessity for repairs to the Mattapparai tank to prevent reasonable risk of danger to the Periyar main canal. As to the name, description and residence of the plaintiff the objection that the plaintiff is the Secretary of State and that that official is not mentioned at all not to speak of his residence being omitted, is, though literally plausible, not of substantial weight. It must not be forgotten that S. 80 is drawn as it had necessarily to be drawn so as to suit the vast majority of cases that arise under it, viz., suits by non-officials aggrieved by the action of Government or by officers against the latter for redress and it is reasonable in such cases where the plaintiff is a private party that his name, his description and place of residence should be known and stated. It is not that there is an exception in favour of the Secretary of State as to the contents of the statutory notice where he is suing as plaintiff. But the point is only how we are to understand whether a particular document said to be sent in the name of or on behalf of the Secretary of State was really so sent and says so with sufficient clearness to give notice to the defendants. It was in a case about the address of the plaintiff that Chief Baron Pollock said in *Jones v. Nicholla* (6) that "we must import a little common sense into notices of this kind," and that was with reference to a private individual.

6. (1822) 1 New Sess Cas 524=13 M & W 361.

4. (1901) 24 Mad 279=11 M L J 117,

5. A I R 1926 Mad 408=91 I C 368.

I think we might import a little common sense in determining whether Exs. A and B do really convey the name, description and place of residence of this plaintiff. In my opinion they do and it is noteworthy that this particular objection was not pointedly taken before the Munsif and as this is a question in revision I have no hesitation in taking the view which the lower Court did.

Then as regards the relief, there seemed at first sight a little more ground for the complaint that Ex. B does not mention the relief at all. But when Ex. B is read as a whole it becomes clear that the legal proceedings mentioned as intended was a suit, and also reading paras. 1 and 2 together that the relief for which the suit was intended to be brought was to get the repairs carried out as mentioned in the plan and the estimates which were enclosed with Ex. B. As a matter of fact para. 7 of the plaint contains as relief the enumeration of the very repairs which the defendants were called upon to execute in Ex. B. That being so I am unable to say that the District Munsif erred in saying that Exs. A and B are, and B especially is, sufficient notice of suit. The petition therefore fails and must be dismissed with costs.

P.R.S./M.N. *Petition dismissed.*

A. I. R. 1933 Madras 108

ANANTAKRISHNA AYYAR, J.

Palaniappan Chettiar and others — Defendants—Petitioners.

v.

Settichi and others—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 518 of 1931, Decided on 29th March 1932, against order of Dist. Judge, Madura, D/- 14th October 1930.

Court-fees Act (1870), Sch. 2, Art. 17 (a)—Reversioner's suit for declaring alienation by widow not binding on them decreed — Transferee held entitled to certain sum from ultimate reversioners — Receiver ordered to be appointed on happening of contingent event— Transferee appealing against whole decree and claiming larger sum— Court-fees payable are under Art. 17 (a) for all reliefs.

A suit by a reversioner for a declaration that a release deed executed by the widow was not binding on him was decreed with a condition that the ultimate reversioner will have to pay a certain sum to the transferees under the release deed for their improvements. The transferees appealed impugning the whole of the declaratory decree and claiming in the alternative a larger amount than was awarded to them. The decree

had also directed the appointment of receiver on the happening of a contingent event. This was also challenged.

Held : that the proper court-fee payable was under Art. 17 (A) and not on the amount claimed in appeal and a separate court-fee for relief against the appointment of receiver was also payable under Art. 17 (A) : 3 I C 459 ; A I R 1928 Mad 929, Appl ; A I R 1926 Mad 678, Rel on. [P 110 C 1]

A. Nagaswami Ayyar and P. N. Appuswami Ayyar—for Petitioners.

V. Ramaswami Ayyar for *K. Rajah Ayyar*—for Opposite Parties.

Judgment.—In O. S. No. 436 of 1927 on the file of the District Munsif's Court of Melur the plaintiff sued for a declaration that a release deed executed by the widow, defendant 5, in favour of the reversioners, defendants 1 to 4, was not valid, for the appointment of a receiver of the estate of the last male holder inherited by his widow, defendant 5, and subsequently said to be in the possession of defendants 1 to 4, and also for directions to defendants 1 to 4 to rebuild a house belonging to the estate, alleged to have been damaged or pulled down by defendants 1 to 4. The plaintiff is the daughter of defendant 5 and is the sister of defendant 6. Defendants 1 to 4 are said to be the gnatis of the husband of defendant 5. The learned District Munsif passed a decree declaring that the ultimate reversioners would not be bound by the release deed executed by defendant 5 in favour of defendants 1 to 4 but that they would be bound to pay the defendants 1 to 4 the sum of Rs. 1,188-4-0 which defendants 1 to 4 were found to have spent to the benefit of the last male holder's estate. The decree also stated that the plaintiff would be entitled to apply for the appointment of a receiver in the event of the dismissal by the Court of Suit No. 627 of 1929 instituted by defendant 5 against defendants 1 to 4 for certain reliefs concerning the release deed executed by her. Defendants 1 to 4 appealed to the District Court against the decree passed by the District Munsif. The question arose in the appellate Court as to the proper court-fee payable on the Memorandum of Appeal. The learned District Judge, as I understand his order, found that in respect of the relief granted by the District Munsif concerning the appointment of a receiver, a court-fee of Rs. 15 has to be paid under Art. 17 (a), Sch. 2, Court-fees Act. As regards another prayer in the appeal Memo, which

the learned District Judge calls "the counter claim of the appellants," he directed as follows :

"Appellants will pay court-fee on the amount awarded in the lower Court (Rs. 1,188-4-0) and on the amount in excess claimed (Rs. 909-12-0)."

Defendants 1 to 3, appellants in the lower appellate Court, have filed the present revision petition against the order passed by the District Judge. It was argued by the learned advocate for the petitioners that the learned District Judge was in error in directing the appellants to pay court-fee on the amount awarded to them by the trial Court (Rs. 1,188-4-0), and on the amount in excess claimed by them in appeal Rupees 909-12-0. As the learned District Judge has not fully discussed that aspect of the question, I am inclined to think that what he probably intended to order was that the appellants should pay court-fee only on the difference between the amount claimed by them in the first Court and the amount awarded to them by the decree of the District Munsif; but I must admit that on the face of the order of the learned District Judge, it would seem as if he directed the petitioners to pay the court-fee both on Rs. 1,188-4-0 and Rs. 909-12-0. In my opinion the learned District Judge was clearly in error in directing the court-fee to be paid on both the amounts. I fail to see how defendants 1 to 4 could be directed to pay court-fee in respect of Rs. 1,188-4-0 for which they had already got a decree in the first Court. However having regard to the view I take about that main declaration claimed by the plaintiff, I think that defendants 1 to 4 need not pay court-fee on either of the two amounts mentioned in the order of the learned District Judge.

As already mentioned the suit was one for a declaration that a release deed executed by defendant 5 in favour of defendants 1 to 4 would not be binding on the ultimate reversioners. On such a plaint the court-fee payable is Rs. 15 under Art. 17, Court-fees Act, seeing that the suit was filed in the District Munsif's Court. No doubt the decree granted by the District Munsif gave a declaration (though a qualified one) in favour of the plaintiff. As I understand the appeal memorandum filed by defendants 1 to 4 they impugn the whole of the declaratory decree granted by the trial Court.

That being so, the court-fee payable in respect of this portion of the claim could be only that payable in respect of a declaratory relief, under Art. 17, Cl. (a), Sch. 2, Court-fees Act. It is no doubt true that the defendants raised an alternative ground of appeal, namely, that even in case the Court should hold that the plaintiff would be entitled to a declaration, the declaration should not be entirely unconditional but should be one subject to a condition that the ultimate reversioners should pay the defendants a certain sum of money. In such a case I think, the principle applicable is one similar to the rule laid down in *Sekharan v. Eacharan* (1) and *Pathumma Umma v. A. Mohideen*, A. I. R. 1928 Mad. 929. Cases from Malabar have come before this Court where the plaintiffs seek relief in ejectment, and the defendants in possession not only raise pleas against the right of the plaintiff to eject but also claim compensation for improvements in case the Court should direct the ejectment. In such cases it has been held that when the defendant prefers an appeal against the decree in ejectment passed by the trial Court, which also directs the plaintiff to pay a certain amount of money as compensation for improvements or otherwise due to the defendants, the court-fee payable on the appeal should be calculated on the basis of the plaint in an ejectment suit as the defendant in appeal has raised objection to the decree in ejectment altogether.

The circumstance that he also raised a ground claiming a larger amount for compensation due to him, has been held not to alter the real nature of the suit or the appeal. In fact in *Sekharan v. Eacharan* (1) the defendant preferred an appeal and contended that the whole suit should be dismissed, though he also claimed a very large amount as due to him for value of improvements in case the decree in ejectment was ultimately confirmed. This Court has held that notwithstanding the subsidiary prayer which will arise only in the alternative when his contention as regards the ejectment is overruled, the proper amount of court-fee payable is that leviable in a suit in ejectment and that the defendant-appellant need not pay any court-fee calculated on the value of the improvements relating to which he has taken a ground

of appeal. When however the plaintiff who has obtained a decree in ejectment prefers an appeal questioning only the amount that has been directed to be paid by him to the defendant, then there are some cases which were cited to me which hold that in such cases the plaintiff-appellant should value the appeal according to the amount to which he has raised a dispute. But the present case is one where defendants 1 to 4 oppose the grant of any declaratory decree at all; and that being so, I think the principle of the cases I have mentioned applies to the present case; and I am of opinion that appellants 1 to 4 were bound to pay court-fee of Rs. 15 only under Art. 17 (a), Sch. 2, Court-fees Act, and that they need not pay any additional court-fee in respect of any portion of what the learned Judge calls "the counter claim of the defendants." This disposes of the main question that was argued before me. The learned advocate for the petitioner raised another question as to the amount of court-fee payable in respect of the relief by way of the appointment of a receiver mentioned in the decree of the District Munsif.

It was argued that the appointment of a receiver is a consequential relief, and that the same need not be separately valued, and that the learned District Judge was in error in directing the appellants to pay the court-fee of Rs. 15 in respect of that relief claimed by the defendants. On reading the decree of the trial Court in this case, I find that the Court has not in fact directed the appointment of a receiver. As I read the decree, the Court would seem to have in substance declared that a receiver will be appointed in case another Suit No. 627 of 1929, which is pending between the defendants to this litigation, was decided in a particular way. I think that, having regard to the decree passed in this particular case and the allegations in the plaint, the learned District Judge was right in directing the appellant to pay court-fee of Rs. 15 in respect of this relief. The decision of Venkatasubba Rao, J., in *Karappana Tevar v. Angammal* (2), also, in my view, supports the decision of the learned District Judge on this point. No doubt it is possible, as the learned Judge observed in *Karappana Tevar v. Angammal* (2), that in particular cases the appointment of a receiver

may be a consequential relief; but for disposing of the case before me I need not go into that question in detail, because, reading the decree passed by the District Munsif in the present case, there is, in substance, only a declaratory decree granted by him, so far as the prayer relating to the appointment of a receiver is concerned. It therefore seems to me that the second contention raised by the learned advocate for the petitioners before me should fail and the court-fee of Rs. 15 fixed by the lower appellate Court with reference to that relief will stand.

The result then is that in respect of the first point argued before me, I modify the order passed by the learned District Judge, and I hold that the petitioners need not pay any court-fee in respect of any portion of the claim covered by what is called "counter claim" by the defendants, and that the court-fee of Rs. 15 paid under Art. 17 (a), Sch. 2, Court-fees Act, is enough for that purpose. With regard to the court-fee in respect of the relief claimed for the appointment of a receiver, the lower appellate Court's order is hereby confirmed. In the circumstances I pass no order as to costs in the High Court.

It is mentioned to me that the appellants in the lower appellate Court have, in obedience to that Court's order, paid the court-fee as ordered by the learned District Judge. If they have already paid any excess court-fee, then they will be entitled to apply to that Court for a refund of the excess court-fee.

P.R.S./M.N. *Order accordingly.*

A. I. R. 1933 Madras 110

VENKATASUBBA RAO AND REILLY, JJ.

(Thadapalli) *Pedda Subba Rao*—Appellant.

v.

Lavu Ankamma and another—Respondents.

Appeal No. 173 of 1930, Decided on 2nd September 1932, against order of Sub-Judge, Negapatam, D/- 18th November 1929.

Civil P. C. (1908), O. 21, R. 16—Decree assigned after transfer to another Court—Application under R. 16 can be entertained by original Court before certificate or record is received—Civil P. C. (1908), Ss. 39 and 41.

Where a decree is transferred for execution to another Court and is subsequently assigned and the assignee applies to the original Court for

recognition of his assignment, there is no necessity that the original Court should after entertaining the assignee decree-holder's application, as must be done, stay its hand until certificates have been received from the transferee Courts or the records have been returned: *A I R 1922 Bom. 359*; *A I R 1914 Mad 435* and *A I R 1926 Mad 431, Dist.* [P 112 C 1, 2]

C. S. Venkatachariar and *H. Suryanarayana*—for Appellant.

N. Rama Rao and *Watrap S. Subramania Ayyar*—for Respondents.

Venkatasubba Rao, J.—Mr. Venkatachari for the appellant contends that the execution petition should not have been treated by the lower Court, as one that satisfied the requirements of the law. The petition was filed by the assignee decree-holder. It was in the form prescribed by the Code and prayed first, that the petitioner should be recognised as the assignee decree-holder; secondly, that the fact of his being so recognised should be communicated to the Kistna District Court and the Bapatla Sub-Court where the execution of the decree was being carried on; and thirdly, that concurrent execution, which had already been ordered, should be allowed to be proceeded with. Mr. Venkatachari's contention is that, when once a decree is transmitted under S. 39 of the Code to another Court for execution, no execution application can be made to the Court which passed the decree, until the certificate prescribed by S. 41 has been received by that Court. I am unable to follow this argument, for in principle I find it difficult to understand why the original Court is incompetent to entertain an application in the absence of the certificate under S. 41. Mr. Venkatachari says that without the certificate the Court will not be in a position to find out what the amount due to the petitioner is. He forgets that the execution application gives the necessary information and the Courts usually act on such material as is placed before them. Apart from the reason of the thing, the learned counsel has not been able to point to any provision, which forbids the Court to entertain such an application. The cases relied upon by him do not support him in the least. I am not concerned with the correctness or otherwise of the decision in *Rangaswami v. Seshappa* (1).

1. *A I R 1922 Bom 359=47 Bom 56=68 I C 506.*

The petitioner before us is not the decree-holder as in that case but the decree-holder's assignee, and under O. 21, R. 16, the only Court to which he is entitled to apply for execution, is the original Court: in other words, the Court which passed the decree. In *Maharaja of Bobbili v. Narasaraju Pedda* (2), after the decree had been transmitted to the Parvatipur District Munsif's Court, and certain properties had been attached by that Court, the decree-holder applied to the District Court, without asking for concurrent execution, for the sale of the properties already attached by the other Court. That course was held to be irregular, and I fail to see how the decision has any bearing upon the point we have to decide. From *Maharaja of Bobbili v. Narasaraju Pedda* (2) an appeal was taken to the Privy Council and its judgment is reported in *Maharaja of Bobbili v. Narasaraju Bahadur* (3). All that their Lordships held was that, as the property concerned was within the local limits of the jurisdiction of the Munsif's Court and as that property had already been attached by that Court, the District Court was not the proper Court to execute the decree by sale of that property and that the proper Court to which the application should have been made was the Munsif's Court. This case again has nothing to do with the point now raised. The judgment of Devadoss, J., in *Ayyavu Pillai v. Varadaraja Pillai* (4) has also no bearing on the question to be decided. That case held that an application to the transferee Court by the assignee decree-holder, to send back the decree to the original Court, is a step in aid of execution. I fail to see how that case is in the least relevant to the point we have to decide. We have here nothing to do with the powers of the transferee Court, the only question being:

“is the execution application made to the original Court competent or not?”

I am satisfied that Mr. Venkatachari's contention is not only opposed to principle but does not receive the slightest support from the provisions of the Code. The appeal is dismissed with costs of the assignee decree-holder.

2. *A I R 1914 Mad 435=37 Mad 231=15 I C 738.*

3. *A I R 1916 P C 16=43 I A 238=39 Mad. 640=36 I C 682 (P C).*

4. *A I R 1926 Mad 431=92 I C 770.*

Reilly, J.—I agree. Mr. Venkatachariar for the judgment-debtor set out in this appeal to satisfy us that the Subordinate Judge of Negapatam, that is, the Judge of the Court which made the decree, had no jurisdiction to entertain this application of the assignee decree-holder. The learned Subordinate Judge has disposed of that contention very neatly and effectively in para. 19 of his judgment, in which he says :

" In this application the petitioner is not praying for any relief which the Court cannot grant. He is asking for a relief which only this Court can grant."

In the end Mr. Venkatachariar, as I understand him, does not deny that the only Court to which the assignee decree-holder could go for the recognition of his assignment was the Court of the Subordinate Judge of Negapatam. But, being unable eventually to dispute that, he has tried to persuade us that, although the Subordinate Judge of Negapatam could properly entertain the assignee decree-holder's application, he could not grant the assignee decree-holder's prayers in that application until the transferee Courts, the District Court of Kistna and the Court of the Subordinate Judge of Bapatla, to which the decree had been previously transferred for execution, had reported either that no satisfaction had been obtained in their Courts or that complete satisfaction had not been obtained. His eventual contention appears to be that the Subordinate Judge of Negapatam should have stayed his hand until the records had come back from those Courts—or at any rate until certificates had been received from those Courts that satisfaction had not been completely obtained.

There is no provision in the Code to that effect, and, so far as I can see, no reported decision which goes to that length. Even the decision of Devadoss, J., in 50 *M. L. J.* 116 (4), to which we have been referred, does not go so far as that ; nor was that the point which the learned Judge immediately had to decide. And there appears to be no necessity nor reason why the Subordinate Judge of Negapatam should stay his hand until he got such certificates from the transferee Courts. Notice of the assignee decree-holder's application for recognition of his assignment had to be given to the judgment-debtors, and it was open to them

to represent to the Subordinate Judge of Negapatam that the decree had been completely satisfied or partly satisfied, if that was so. They were quite sufficiently protected by the procedure required by the Code that notice should be given to them. In my opinion Mr. Venkatachariar has not been successful in making out either that the law requires or that there is any necessity that the original Court in such a case should after entertaining the assignee decree-holder's application, as it is now admitted must be done, stay its hand until certificates have been received from the transferee Courts or the records have been returned. In my opinion the learned Subordinate Judge's order was right and I agree that this appeal should be dismissed with costs.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 112

VENKATASUBBA RAO AND REILLY, JJ.

K. N. Guruswami and others — Appellants.

v.

Muhammad Khan Sahib — Respondent.

Appeal No. 536 of 1928, Decided on 9th August 1932, against order of Dist. Judge, Coimbatore, D/- 28th June 1928.

(a) **Civil P. C. (1908), S. 13—Ex parte foreign decree in personam against British subject not residing there at date of action will not be executed by British Courts—Civil P. C. (1908), S. 44.**

The British Courts will not recognize the judgments of the Courts of a foreign country passed in an action in personam against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court. [P 113 C 1]

(b) **Civil P. C. (1908), S. 13—Entering into partnership in foreign country is not submission to its jurisdiction in matters connected with partnership.**

By the fact of entering into a partnership in a foreign country a person does not bind himself to submit to the jurisdiction of the Courts of that country, in regard to matters arising in connexion with that partnership : *Emanuel v. Symon* (1908), 1 *K B* 302, *Foll*; 22 *Cal* 222 (P C) and 20 *Mad* 112, *Rel on*. [P 113 C 2]

*B. Somayya—*for Appellants.

*B. Sitarama Rao—*for Respondent.

Venkatasubba Rao, J.—This appeal raises a question as to the effect of an ex parte judgment passed by a foreign Court against an absent foreigner. The facts may be briefly stated. The appellants are subjects of the Mysore State

and they filed a suit in the District Court of Bangalore against three defendants the last of whom is the respondent before us. The suit was based upon a promissory note alleged to have been executed by them and also upon a contract, which they were stated to have entered into. Defendant 3 (the respondent) was a British subject and was residing at the time of the suit in the District of Coimbatore, where (the appellants allege, though this fact is denied) he was served with the summons in the suit. He however did not appear, but a judgment was passed by the Bangalore Court against him also. This foreign decree the appellants sought to execute in the lower Court, but the learned Judge refused their application under S. 13, Civil P. C., holding that it was passed without jurisdiction. The appellants question in this appeal the correctness of the order made. It is settled law, that the British Courts will not recognize the judgments of the Courts of a foreign country passed in action in personam against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court.

But Mr. Somayya, the appellants' learned counsel, asks us to assume certain facts and for the purpose of this judgment, those facts may be assumed. Mr. Somayya's complaint is that the lower Court has not given him an opportunity of proving those facts; but in the view we take, even assuming that the facts alleged are true, the learned counsel's contention cannot prevail. The facts alleged by him are these: the three defendants were a firm of partners carrying on business within the State of Mysore, that the partnership was subsisting on the date of the action and that the suit related to certain dealings with that firm. On these facts, it is contended that defendant 3 must be deemed to have submitted to the jurisdiction of the Bangalore Court.

The question to decide is: can the inference be drawn from the facts alleged, that defendant 3 agreed to submit to the jurisdiction of the foreign Court? In *Nallakaruppa Chettiar v. Muhammad Iburam Saheb* (1) a somewhat similar contention was raised. The argument there was twofold: that the defendant, by car-

rying on business through his partners at Kandy, should first be regarded as constructively resident there; and secondly, as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was being carried on. The second contention shows that the dealings to which the suit related were not with the defendant individually, but with the partnership of which he was a member. But a later case, to which I shall presently refer, puts it beyond doubt that this makes no difference. The contentions were overruled and it was held that the Court at Kandy had no jurisdiction over the defendant. The point now raised has been more fully considered by the Court of appeal in England in *Emanuel v. Symon* (2). There it was argued that by the fact of entering into a partnership in a foreign country, the defendant bound himself to submit to the jurisdiction of the Courts of that country, in regard to matters arising in connexion with that partnership. The Court negatived that argument and explained the case of *Copin v. Adamson* (3), Lord Alverston, C. J., thus observes:

"The judgment in that case went in favour of the plaintiff because the defendant had expressly agreed to submit to the jurisdiction of the foreign Court. And in the Court of appeal the judgment of Lord Cairns proceeded on that footing and he refrained from deciding the question whether the mere fact of becoming a shareholder in a French Company conferred jurisdiction upon the Courts of France."

Kennedy, L. J., points out that the effect of the decision of the Judicial Committee in *Gurudayal Singh v. The Rajah of Faridkote* (4) is that the mere fact that a person enters into a contract in a foreign country, does not lead to the inference that he agrees to be bound by the decisions of the Courts of that country. Having said so, he goes on to say that in this respect, there is no distinction between entering into an ordinary contract and contract of partnership.

"It is contended," says Kennedy, L. J., "that there may be some difference between a contract to be fulfilled for the immediate benefit of the promisee, e. g., a contract for the sale of goods, and the contract contained in articles of partnership; but I can see no true line of distinction between the two cases."

2. (1908) 1 K B 302=77 L J K B 180=98 L T 304=24 T L R 85.

3. (1874) 9 Ex 345=43 L J Ex 161=31 L T 242=22 W R 658.

4. (1894) 22 Cal 222=21 I A 171=6 Sar 503=(1894) A C 670 (P C).

1. (1897) 20 Mad 112=7 M L J 76.

In the opinion of Kennedy, L. J., also *Copin v. Adamson* (3) is not an authority for the proposition that a person, by the mere fact of becoming a shareholder in a foreign company, agrees to be bound by the decision of the foreign Court. These authorities very clearly show that the appellants' contention cannot prevail and this appeal must be dismissed with costs.

Reilly, J.—I agree. In my opinion the matter is concluded by *Gurudayal Singh v. Rajah of Faridkote* (4) and *Nalla Karuppan Chettiar v. Muhammad Ibrahim Sahib* (1).

P.R.S. M.N.

Appeal dismissed.

A. I. R. 1933 Madras 114

VENKATASUBBA RAO AND REILLY, JJ.

P. Rama Naidu and others—Plaintiffs
—Appellants.

v.

Rangayya Naidu and others — Defendants—Respondents.

Appeal No. 294 of 1928, Decided on 19th August 1932.

(a) **Succession Act (1925), S. 222—Application for probate by executor—Any beneficiary can intervene—Proceedings are in representative character—Death of executor—Beneficiaries can continue proceedings—Civil P. C. (1908), O. 1, R. 8 and O. 22, R. 3.**

An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fails in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. Hence, if in the course of the proceedings in original Court or in appeal the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed: 36 Cal. 799; 45 Cal. 862, *Not Foll.*; A. I. R. 1915 P. C. 124, *Appl. Case law referred.* [P 117 C 2]

(b) **Evidence Act (1872), S. 41—Queare.**

Queare.—Whether a judgment refusing probate of a will is a judgment in rem [P 116 C 2]

Advocate-General and M. Venkata Subbiah—for Appellants.

S. Varadachariar and R. Rajagopala Ayyangar—for Respondents.

Venkatasubba Rao, J. — One Rama Naidu applied in the lower Court for probate of the will of the deceased. Certain persons entered a caveat and the proceeding became a contentious one. The lower Court, holding that the will has not been proved to be genuine, re-

fused probate and Rama Naidu filed the present appeal and died before the hearing. His sons have been brought on the record and an objection has been taken as to their legal competence to prosecute the appeal, and that is the first question we have to decide.

Rama Naidu besides being the executor is also the residuary legatee. We cannot as a Court of probate decide questions of construction; but it is not disputed that, in any view, Rama Naidu's sons would be beneficiaries. If the estate taken by the deceased was an absolute one, his sons, on his death, became entitled to the legacy as his heirs; if, on the other hand, the bequest is to be construed as conferring on him only a life estate, the sons, by reason of the words "his male descendants," would take the legacy in their own right. In either case, the sons of Rama Naidu are persons entitled to a benefit under the will. The decision on the point raised depends upon the view the Court takes of the true nature of the sons' application. Is that to be regarded as an application under O. 22, Civil P. C.? It is necessary for the sons to make out that the right to sue in such a proceeding survives and that they are their father's legal representatives? An applicant under O. 22, R. 3, must establish these two positions: first, that the right to sue survives; secondly, that he is the plaintiff's legal representative. If the original plaintiff in filing the petition in his character as executor represented the estate of the deceased testator, then, on his death, his right may fairly be said to have devolved upon his sons. This follows from the construction which the Judicial Committee was disposed to place in *Venkatanarayana Pillai v. Subbammal* (1), upon the expression "legal representative," when a contingent reversioner applied to be substituted in appeal in the place of the deceased presumptive reversioner. But, in my opinion, this is an inquiry which need not be pursued, for the applicant's right stands independent of O. 22, and this position, if realized, will clear the way of much irrelevant discussion.

The question is not—have the applicants a right to be substituted?; but is much more fundamental: have they a

1. A I R 1915 P C 124=29 I C 298=42 I A 125=38 Mad 406 (P. C.).

right to intervene at any stage of the proceedings? If they can come in at any time, the fact that the original petitioner has died can be of no consequence. Nor does it in principle make any difference whether they seek to intervene before or after the judgment was rendered by the first Court. The question then resolves itself into this: Is a proceeding for the grant of probate (or letters of administration with a copy of the will annexed) a representative one; in other words, is the person who has commenced it to be regarded as having done so in his representative or merely individual character? In considering this question there are two distinct matters which must not be confused. The right which a petitioner in such a proceeding asserts is in one sense an individual or a personal right. But because he asserts a personal right, the proceeding does not become one for his personal benefit. An executor applies for probate, for instance, on the strength of his special right, which he derives from his appointment under the will. But is the proceeding on that account to be regarded as having been initiated by him in his individual character? He may often possess no beneficial interest and his right may rest on no more than a bare legal title.

The proper view to take is that his object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others, that the will propounded is genuine and valid. In inviting the Court to pronounce in favour of the will, the executor is acting in a representative capacity, that is to say, for the benefit of the whole class of persons, including himself, interested in having it established. The position of a petitioner for probate is not dissimilar to that of a plaintiff under O. 1, R. 8, Civil P. C. What that rule contemplates is a common interest and in the case of a petition for probate there is an identity of interest on the part of the whole body of persons claiming under the will. One of the necessary incidents of a representative suit is that any person for whose benefit it is instituted may intervene and ask to be made a party: O. 1, R. 8, Cl. 2. If a petition for probate stands on a footing similar to that of a representative suit, it is right in principle to

extend the analogy and hold that any legatee or beneficiary may, on a proper case being made out, intervene at any stage and claim to come on the record. True, an executor when applying for probate does not purport to act under O. 1, R. 8. This remark applies equally to a presumptive reversioner who brings a suit in the lifetime of a Hindu widow for getting rid of an adoption or an alienation made by her. Nevertheless, the Judicial Committee has held in the case relied upon by the learned Advocate-General, *Venkatanarayana Pillai v. Subbammal* (1), that on the death of the presumptive reversioner, the person next entitled to the reversion can be substituted in his place, on the ground that the presumptive reversioner's suit must be deemed to be a representative one. In that case, the Judicial Committee refrained from deciding whether or not the adjudication in such a suit would operate as *res judicata* against the contingent reversioners not parties 'eo nomine' to the action. But in a later case, *Kesho Prasad Singh v. Sheo Prakash* (2), they point out that from the view taken by them in the earlier case, *Venkatanarayana Pillai v. Subbammal* (1), the conclusion necessarily follows that the judgment in the presumptive reversioner's suit is binding even as between the persons not directly parties to the previous suit.

The two questions, the right to intervene and the binding character of the judgment as *res judicata*, are, as Mr. Varadachari rightly points out, interdependent. Are the legatees entitled to intervene? If they are, the judgment given in their absence, would be binding upon them as *res judicata*. Does the adjudication operate as *res judicata*? If it does, surely, they would have a right to intervene, for it would be unjust to hold that they would be bound by the judgment and yet deny to them the right of intervention. Expl. 6, S. 11, Civil P. C., recognizes this principle and provides that judgments in representative actions bind also persons who are constructively parties.

Mr. Varadachari, for the respondent, relies principally upon two cases of the Calcutta High Court. In *Sarat Chendra v. Mani Mohan* (3), the application for

2. A I R 1924 P C 247=82 I C 962=51 I A 381=46 All 831 (P C).

3. (1909) 36 Cal 799=3 I C 995.

the grant was made by the residuary legatee who died pending the suit. On his death, his widow applied for being substituted. In refusing her request, Harrington, J., observes that the right to represent the estate has not devolved upon her. This case was followed by Greaves, J., in *Haribhushan v. Manmathanath* (4). It was the son of the original applicant, the residuary legatee, that applied to be made a party, and his application was similarly rejected. In these two cases, the question was not presented to the learned Judges in the form in which we are now considering it. The only contention put forward was, that the applicants were entitled to be substituted under O. 22, R. 3. It was not argued that they had a larger right flowing from the nature of the proceeding, namely, a right to intervene at any stage. *Mt. Phakni v. Mt. Menki* (5), on which the applicants rely, supports their contention. The facts in that case were similar to those in the present, and it was held that the heir could be substituted. The conclusion, although based on a ground different from what we are adopting, seems, in my opinion, sound. This remark applies to another case relied on by the applicants, *Chandramani v. Bipin Behari* (6), where also, on the death of the legatee who applied for probate, her representatives were substituted. Apart from authority, I am satisfied on principle that the sons of Rama Naidu have been properly brought on the record. In the course of the argument, my learned brother drew attention to a passage in Williams on Executors, which most clearly and unequivocally supports my view. I shall extract that passage:

"A legatee cannot set up a will after it has been litigated between the executor and next of kin, or between the executor and the executor of another will, and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion. But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit, but apparently not after the hearing; *Williams on Executors* Edn. 12, Vol. 1, p. 213."

A further question was raised and argued, whether a judgment of a probate Court, if against a will, amounts or not to a judgment in rem under S. 41, Evidence Act. On this point, several cases

such as *Chinnasami v. Harihar Chandra* (7), *Kalyan Chand Lal Chand v. Sitabai* (8), *Saroda Kanto Das v. Gohindo Mohan Das* (9), and *Ramani Debi v. Kumud Bandhu Mukerji* (10), have been cited at the Bar, but in the view I have taken, it becomes unnecessary to deal with that question and I therefore refrain from dealing with it. In the result, I have come to the conclusion that Rama Naidu's sons have been rightly brought on the record and are entitled to prosecute the appeal. I shall now deal with the appeal on the merits. (Here his Lordship considered the evidence and came to the conclusion that the will was genuine). In the result, the appeal is allowed with costs throughout. The District Judge is accordingly directed to issue under the provisions of the Succession Act letters of administration with a copy of the will annexed to the appellants (the sons of Rama Naidu) or any of them as the District Judge may in his discretion think fit.

Reilly, J.—I agree with my learned brother that it is unnecessary on this occasion to express an opinion on the question whether a judgment refusing probate of a will is a judgment in rem, though that question was argued before us at some length. On that question there is a conflict between the view expressed in this Court and the Calcutta High Court on the one hand and that of the Bombay High Court on the other. If Rama Naidu, the plaintiff, when he sought to prove the will in his suit for probate, was not only asserting his claim to be recognized as executor but can be regarded as seeking to establish the will as representing all the beneficiaries under it, then on his death any other beneficiary represented by him or any person succeeding to a benefit under it through his death could continue the proceedings either in the original Court or on appeal, though the prayer for probate would in those circumstances necessarily be changed to one for letters of administration with the will annexed. Representative suits in this country, in which those who are by name on the record fight the

4. (1918) 45 Cal 862=51 I C 76.

5. A I R 1930 Pat 618=128 I C 128=9 Pat 693.

6. A I R 1932 Cal 206=136 I C 543.

7. (1893) 16 Mad 380=3 M L J 121.

8. A I R 1914 Bom 8=23 I C 325=38 Bom 309 (F B).

9. (1910) 6 I C 912.

10. (1910) 7 I C 126.

battles and represent the interests, not only of themselves, but also of others, who are in effect, though not in name, parties to the suits from the beginning, are not confined to suits in which permission to represent other persons has been obtained under R.8, O.1, Civil P.C. That was recognized by their Lordships of the Privy Council in regard to Hindu reversioners in *Venkatanarayana Pillai v. Subbammal* (1), *Janakiammal v. Narayanasami Iyer* (11) and *Kesho Prasad Singh v. Sheo Prakash Ojha* (2); in regard to members of the public interested in a public trust of a religious and charitable nature in *Raja Ananda Rao v. Ram Das Daduram* (12), and in regard to worshippers in a temple in *Sankaralinga Nadan v. Rajeswara Dorai* (13). In England that principle was long ago applied to probate proceedings. In *Bittleston v. Clark* (14) Sir George Lee said:

"A legatee cannot set up a will after it has been litigated between the executor and the next of kin and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion, and so the delegates held in *Lewis v. Bulkeley* (15), but a legatee, if he is afraid the executor will not do justice, may intervene in his own interest,"

which is in effect quoted in the passage taken by my learned brother from Williams on Executors. In *Hayle v. Hastad* (16), Sir Herbert Jenner described executors who prayed for probate of a will and codicil as

"in effect representing and protecting the interests of all the parties benefited under those instruments."

Mr. Varadachariar contended that, when an executor prays for probate, he prays for something which is personal to himself, as no one but an executor can get probate. That is to look at the mere form of the proceedings and to ignore their real effect. As Sir Herbert Jenner said in the same case,

"the executors in the former will represent and are the protectors of the legatees under it, being specially entrusted by the deceased with the care and management of her property and to see her intentions carried into effect;"

and again :

"the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate and which they must be taken to have considered as containing the last will of their testator and which as much it was their duty to see carried into effect ; for it is not the interest of the executors but the intention of the testator which is to be attended to."

It cannot be denied that the passage I have quoted represents the law in England today. An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fails in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed. There is no reason to doubt that the position is the same in this country. This aspect of the matter, I think it is clear, was overlooked in *Sarat Chandra v. Nani Mohan Banerjee* (3) and *Haribhushan v. Manmathanath* (4), on which Mr. Varadachariar relies, where the petitions before the Court were dealt with as if the only question arising was how O. 22 of the Code applied to them. I agree that Rama Naidu's sons are entitled to prosecute his appeal against the dismissal of his suit to establish the will. On the facts I agree with my learned brother.

P.R.S./M.N.

Appeal allowed.

* A. I. R. 1933 Madras 117

PANDALAI, J.

Alapati Achutaramana — Plaintiff—
Petitioner.

v.

Vasireddi Jagannadham and another
— Defendants—Opposite Parties.

Civil Revn. Petn. No. 1098 of 1929,
Decided on 16th September 1932, against
decree of Dist. Judge, West Godavari,
in A. S. No. 180 of 1928.

11. A I R 1916 P C 117 = 37 I C 161 = 48 I A 207=39 Mad 634 (P C).

12. A I R 1921 P C 123 = 62 I C 737 = 48 I C 12=48 Cal 493 (P C).

13. (1908) 31 Mad 236=35 I A 176 (P C).

14. (1755) 2 Lee 248.

15. (1732) 1 Lee 513 n.

16. (1836) 1 Curt. 236.

* Evidence Act (1872), Ss. 58 and 91—Pro-note insufficiently stamped—Execution and loan admitted in written statement—Decree on note cannot be passed—Loan if independent of pro-note decree can be given on admission but otherwise mere admission does not give plaintiff cause of action—In latter case S. 58 does not cure defect—Stamp Act (1899), S. 35—Contract Act (1872), S. 62—Promissory note.

In spite of waiver of proof by an admission under S. 58, Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it; *A I R 1914 Mad 657, Diss. from.*; *A I R 1932 Mad 693, Rel. on.* [P 118 C 2]

But where there is a cause of action complete in itself before the giving of the promissory note and independently of it, the plaintiff would be able to prove it and in such a case the admission of the loan in the written statement is under S. 58, Evidence Act, sufficient to waive the requirements of further proof and to enable the plaintiff to succeed thereon. But if there is no such cause of action, the mere admission of the fact by the defendant cannot give him a cause of action, and that is not a matter cured by S. 58 or any other section of the Evidence Act: *23 Cal 851, Rel. on.* and *7 Cal. 256, Ref.* [P 119 C 2]

K. Venkatarama Raju — for Petitioner.

V. Govindarajachari — for Opposite Parties.

Judgment.—The petitioner's suit for Rs. 400 and interest thereon was dismissed by the learned District Judge of West Godavari on the ground that the promissory note sued on was inadmissible in evidence as it bore only one anna stamp instead of two annas stamp and that the plaintiff's case which he attempted to make by amendment of the plaint, that the loan was given some eight days before the note, was not in fact true. Consequently, according to the learned Judge, the loan and the note being contemporaneous, the suit for the loan was not maintainable because the note was inadmissible: vide *Muthu Sas-trigal v. Viswanatha Pandara Sannadhi* (1).

In this Court it is contended for the petitioner that the learned Judge failed to see that both the note and the loan were admitted by the respondent-defendant in his written statement and that consequently by S. 58, Evidence Act, it was not necessary for the plaintiff-petitioner to prove either the note or the loan. The written statement of the defendant does contain an express admission of the

execution of the promissory note as well as an implied admission of the receipt of the loan. The petitioner's contention is that in such cases no question of admissibility of evidence arises because evidence is dispensed with of facts admitted in the pleadings. For the application of that doctrine to this class of cases reliance is placed upon the decision of Anantakrishna Ayyar, J., in *Ali-mane Sahiba v. K. Subbarayudu* (2) at p. 308 (of 63 M. L. J.). In that case in a suit on a promissory note the defendant in his pleadings admitted execution of the note but pleaded discharge of the note. The note was produced in evidence and marked apparently without question, but later on the defendant discovered that the stamp on the note had not been cancelled and he then raised the question that the note was invalid by S. 12, Stamp Act. The learned Judge on those facts held that S. 58, Evidence Act, applied, and therefore no question of admissibility of the note arose at all.

In that sense the note sued on in this case was admitted and no question of admissibility therefore arose. But it is answered that the learned Judge in *Ali-mane Sahiba v. K. Subbarayudu* (2) did not consider the effect of the language of S. 35, Stamp Act, which says not merely that unstamped instruments must not be received in evidence but that they must not be acted upon. It was urged that on the latter part of this language it has been held in *Chenbasappa v. Lakshman Ramachandra* (3), following the decisions of the Calcutta High Court, that in spite of waiver of proof by an admission under S. 58, Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it. I have not been referred to anything to contradict this and I must therefore hold that so far as admission of the inadmissible note is concerned, S. 58, Evidence Act, does not avail the petitioner, for, in respect of it no decree can be given on the note as to do so would be acting upon the note.

But the petitioner has still another string to his bow, and that is, the admission of the loan. It is said that by reason of that admission, to which no

1. *A I R 1914 Mad 657=21 1 C 861=38 Mad 660.*

2. *A I R 1932 Mad 693=139 1 C 486=63 M L J 808.*

3. (1894) 18 Bom 369.

prohibition under the Stamp Act can apply, proof by the plaintiff of the fact of the loan being waived, he is entitled to a decree because the decision in *Muthu Sastrigal v. Viswanatha Pandara Sannadhi* (1) relied upon by the lower Court for refusing to give a decree for the loan is based upon the inadmissibility of the proof of a loan which is contemporaneous with an inadmissible note by S. 91, Evidence Act. Where therefore there is no question of proof, S. 91 does not come into play at all. To this the respondent's answer is that the prohibition of a decree on a loan which is contemporaneous with an inadmissible note is not due merely to the difficulty of proof created by S. 91, Evidence Act, but something more fundamental namely, absence of any cause of action independent of the note. In brief, the respondent's answer is that where there is a loan and a contemporaneous promissory note which is inadmissible for want of proper stamp there is no cause of action for the loan independently of the note. I am not able to say, though there are stray expressions in the judgment of Sadasiva Ayyar, J., in *Muthu Sastrigal v. Viswanadha Pandara Sannadhi* (1) capable of that meaning, that this was the real ground of his decision. On the contrary, he does expressly refer at p. 663 (of 38 *Mad.*) to the ground of his decision in these words :

"To import the doctrines laid down in English cases about vague obligations, to pay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify S. 91, Evidence Act."

And Spencer, J., says practically the same thing. In the decision which was relied upon in that case, *Pothi Reddi v. Velayuda Sivan* (4) the matter is put in similar language at p. 97. There money had been paid in the morning and in the evening a document which was held to be a promissory note and not properly stamped was exchanged. It being held that the instrument was a promissory note, the question arose whether the plaintiff might be permitted to prove and succeed on the loan. The learned Judges say:

"We cannot assent to such a doctrine and to

do so would entirely nullify the provisions of S. 91, Evidence Act."

And later:

"It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing and to hold when such a contract has been reduced to writing that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of S. 91, Evidence Act."

In this case also, the Court founded its decision on S. 91, Evidence Act, and did not purport to lay down that where there is a cause of action complete in itself before the giving of the promissory note and independently of it, the plaintiff would not be able to prove it. The question then is, whether this is a case where substantively the petitioner has an independent cause of action apart from the note. If he has, the admission of the loan in the written statement is under S. 58, Evidence Act, sufficient to waive the requirements of further proof and to enable the petitioner to succeed thereon. But if there is no such cause of action, the mere admission of the fact by the defendant could not give him a cause of action and that is not a matter cured by S. 58 or any other section of the Evidence Act. On this point, two decisions of the Calcutta High Court have been cited, one in *Sheikh Akbar v. Sheik Khan* (5) and the other in *Pramatha Nath Sandal v. Dwarka Nath Dey* (6). In the earlier case, Garth, C. J., described the two classes of cases, the first in which the plaintiff has a cause of action independently of the inadmissible instrument and the second where there is no such cause of action. In the case before him he held that there was no such independent cause of action. In *Pramatha Nath Sandal v. Dwarka Nath Dey* (6) Sir Comer Petheram, C. J., and another learned Judge had a case very like the present. The plaintiff had lent Rs. 200 to the defendant and taken a hatchitta which was held to be a promissory note which should have been stamped with a two anna stamp, but only bore one anna receipt stamp. The Judge of the Small Cause Court came to the conclusion that the plaintiff had no cause of action independently of the document and the document itself being inadmissible dismissed

5. (1881) 7 Cal 256=8 C L R 528.

6. (1896) 23 Cal 351.

4. (1887) 10 Mad 94.

the suit. It was held that this dismissal was wrong. The learned Chief Justice said:

"The defendant by his written statement admitted that he borrowed Rs. 200 from the plaintiff, and there can be no doubt that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it."

Referring to *Sheik Akbar v. Sheik Khan* (5) which was cited for the defendant and after setting out a passage from p. 260 thereof, the learned Chief Justice proceeded:

"These words, taken alone, may seem to indicate that when a bill or note is taken for a debt the action must be brought upon the bill or note; and that if for any reason the document is excluded, the action must fail; but a reference to the earlier portion of the judgment shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is lent and a bill or note given for the loan which is not paid on maturity, the creditor may disregard the note and sue on the original consideration."

I very respectfully adopt these words and think that there is nothing to show that that case is not applicable to the present or similar cases. This view is as far as I know not against any decision of this Court to which my attention has been drawn and it is in keeping with the English decisions upon the point and is certainly in consonance with the requirements of substantial justice. For though the defendant contested the suit on the ground that the note was inadmissible in evidence, he not only admitted the loan in his pleading, but had a month before the suit provided for its payment by executing a mortgage and leaving money with the mortgagee to pay the plaintiff. Holding therefore that the loan sued for was admitted by the defendant in his pleadings and that therefore no further proof was required, the plaintiff-petitioner was entitled to a decree. The decree of the learned District Judge is set aside and that of the District Munsif restored. The petitioner will have his costs here and in the District Court.

P.R.S./R.K.

Decree set aside.

A. I. R. 1933 Madras 120

PANDALAI, J.

Katamreddi Ramireddi—Petitioner.

v.

(*Paderala*) *Sreeramulu Reddi* and others—Opposite Party.

Civil Revn. Petn. No. 1371 of 1928, Decided on 9th September 1932, against order of Dist. Judge, Nellore, D/- 26th January 1928.

(a) **Madras Religious Endowments Act (1927). Ss. 51 (4) and 78—Persons in office prior to Act—Suit by them under S. 78 is maintainable—Non-appointment by committee is irrelevant.**

Persons who were holding office when the Act came into force must under S. 51 (4) of the Act be deemed to have been appointed under it on the date the Act came into force, and such persons are competent to maintain the petition. The fact that they were not again appointed by an order of the Committee is irrelevant, the statute having given them the authority of persons who are so appointed. [P 121 C 1]

(b) **Interpretation of Statutes—Objects and reasons—Court cannot refer to them to determine proper construction of particular sections.**

A Court is not entitled to refer to objects and reasons to determine the proper construction of the section. It must be determined on the words as they stand, having regard to the general scope and object of the legislation as determined by the provisions contained in it. [P 121 C 2]

(c) **Interpretation of Statutes—Preamble—Words clear—Section should be given effect to irrespective of preamble.**

The words of operative sections of an Act must be given effect to irrespective of inferences to be drawn from a preamble if the words themselves are clear and capable of only one meaning. [P 122 C 1]

(d) **Interpretation of Statutes—Words.**

By mere construction words which limit the operation of the general language of the section should not be added. [P 122 C 2]

(e) **Madras Religious Endowments Act (1927), S. 78—Court can inquire into claims against strangers—Interference is however discretionary—If difficult questions of title arise or prolonged investigation is involved Court will order separate suit.**

There is nothing in S. 78 itself which debars the jurisdiction of the Court to which an application is made under it from trying any question which may be appropriate as between a religious endowment and strangers, provided the question be relevant to the possession of the mutt or temple or its endowments or title-deeds or documents, that is, the immediate right to possess the same. The section however only confers a discretion and the Court is not bound to make an order under S. 78 in circumstances in which a difficult question of title may arise and prolonged investigation be involved, the Court will order a separate suit where the dispute is between a temple and a third party who has a genuine and hostile claim. [P 122 C 2]

B. Somayya and P. Chandra Reddi—for Petitioner.

P. Srikantam and P. Venkatarama Rao—for Opposite Party.

Judgment.—This petition arises out of an order passed under S. 78, Hindu Religious Endowments Act 2 of 1927 by the learned District Judge of Nellore. The petitioners before him were the non-hereditary trustees of the temple of Sri Kothandaramaswami at Kovur which is under the superintendence of the District Temple Committee, Nellore. They were holding office when the Act came into force, and are therefore persons who must under S. 51 (4) of the Act be deemed to have been appointed under it on the date the Act came into force. The petition was directed against persons holding certain lands of the temple under two leases executed by members of the archaka family for one-half of the lands each. One lease was for 15 years from 20th October 1919, and the other was for 11 years from 22nd March 1919, and the rent reserved was 10 tooms of grain per acre per year. The trustees stated that the archakas had no authority to lease the temple lands as the lands were given to them for enjoyment as remuneration for services rendered by them as archakas. They stated that other arrangements had been made to remunerate the archakas for their services, that the archakas had accepted those arrangements and consented to the temple taking possession of the lands and executed a karar or agreement to that effect on 14th July 1927; but that the counter-petitioners, the lessees, refused to give up the lands, and therefore they, the petitioners, were directed by the Temple Committee to take steps under S. 78 of the Act to get possession.

The learned Judge dismissed the petition on two grounds. The first ground is that the petitioners are incompetent to maintain the petition, as they are not trustees appointed by the Committee to whom alone S. 78 applies. In his opinion although the petitioners are declared by S. 51 (4) to be deemed to have been appointed under the Act on the date the Act came into force, still as they were not in fact appointed by the Committee they do not come within the section. In my opinion this was not a sound distinction. The effect of S. 51 (4) is to make the petitioners for the purposes of the

Act in all respects the same as if they had been appointed by the Committee on the date when the Act came into force. In the face of this express provision, the fact that they were not again appointed by an order of the Committee is irrelevant, the statute having given them the authority of persons who are so appointed. The learned advocate for the counter-petitioners here drew attention to the fact that S. 78 requires production of the order of the Board or Committee appointing the petitioners and urged that as these petitioners cannot produce an order of appointment they are not competent to apply. The answer to this is that S. 51 (4) dispenses with a separate order of appointment. No other order need be produced when the statute has made a declaration which gives the petitioners the status and privileges of persons in fact appointed by the Committee. The other ground on which the learned Judge thought the petition incompetent was that S. 78 is not applicable to proceedings against third parties holding adversely to a temple or other religious endowment but only to proceedings against trustees, temple servants or others holding for and on behalf of the endowment. For this opinion the learned Judge refers to the objects and reasons of the original Bill of 1922, and to a note on Cl. 24 of that Bill corresponding to the present S. 78 to the effect that that clause is intended to operate against dismissed trustees and others who prove refractory.

The learned Judge was not entitled to refer to this document to determine the proper construction of the section. It must be determined on the words as they stand, having regard to the general scope and object of the legislation as determined by this and the other provisions contained in it. The advocate for the respondents referred to the preamble of the Act as to the scope and object of the legislation. It says that it is expedient to provide for the better administration and governance of certain Hindu religious endowments, and from this he argued that powers could not have been intended to be given to the Board, Committee and Trustees under the Act to proceed against those who were not concerned with the administration, or governance of the endowment but with third parties. There is some force in the argument. But the

words of operative sections of an Act must be given effect to irrespective of inferences to be drawn from a preamble if the words themselves are clear and capable of only one meaning. Reference was also made to S. 73 of the Act which abolishes the use of S. 92, Civil P. C., and substitutes a new procedure for suits which fall within S. 92, and it was argued that as such suits relate only to internal matters, S. 78 also must be directed against persons concerned with the internal management of a temple. S. 73 of the Act of 1919 has, in my opinion, no connexion with the present point, as it is only concerned with suits for which S. 92, Civil P. C., had provided. The meaning of S. 78 must be determined without any analogy to be drawn from the class of suits to which S. 73 refers.

The principal point is the language of the section itself. It says that where a Committee has appointed persons as non-hereditary trustees of a temple or where the Board or a Committee has appointed a person to discharge the functions of a hereditary trustee and such person is resisted in or prevented from obtaining possession of the mutt or temple or of the endowment connected therewith or of any title-deeds or other documents relating thereto, the Court may on application by the person so appointed and on production of the order of the Board or Committee appointing him, order the delivery to such persons of the possession of such property as may be specified therein.

It will be noticed that nothing is said as to who are the persons against whom the application is to be directed. It is certainly the case that in the vast majority of cases the application will be directed against ex-trustees or temple servants or other refractory persons connected with the administration who refuse to give up the property of the temple into the hands of the newly appointed trustees. But there is nothing in the section itself which limits the application to such persons; and it is impossible by mere inference and as a matter of construction to read into the section some such words as 'from any person who is not holding the same under any title or claim adversely to the institution.' If that was intended, it was perfectly open to the legislature to say

so. They have not done so; and it is impossible by mere construction to add words which limit the operation of the general language of the section. Reference was made to S. 41, English Charitable Trusts Act of 1853, which limits the power of a Judge when acting under S. 28, and prohibits him from trying or determining title to any property or interest therein as between any charity or trustee thereof, and any person holding or claiming such property or interest adversely to such charity. It was urged that S. 78 must be read as if that was expressed in it. But construction by analogy is totally inadmissible and I am bound to give effect to the words of the Indian enactment as they stand. I therefore come to the conclusion that there is nothing in the section itself which debars the jurisdiction of the Court to which an application is made under it from trying any question which may be appropriate as between a religious endowment and strangers provided the question be relevant to the possession of the mutt or temple or its endowments or title-deeds or documents, that is, the immediate right to possess the same.

But the section only confers a discretion, because the words are "the Court may" which show that the Court is not bound to make an order under the section in circumstances in which a difficult question of title may arise and prolonged investigation be involved. The scheme of the section would appear to be much like S. 4, Provincial Insolvency Act, which confers wide jurisdiction on the Court but makes it discretionary in cases which are not obvious. I myself am of opinion that the Court will order a separate suit where the dispute is between a temple and a third party who has a genuine and hostile claim.

That leads to the only other point, namely, that in this case, the learned Judge has in the exercise of his discretion stated that he would not, even if he had the power, make the order. This was an exercise of jurisdiction with which I do not see any ground to interfere. The respondents are persons who had been on the date of the petition lessees of property from the then apparent managers although they were only archakas for eight years. Whether the original lease was or was not prudent and binding on the temple was

a question which the Court under S. 78 might justifiably leave for determination in a separate suit. The learned Judge having decided so to leave it, I am not prepared to question that discretion. The petition therefore must be dismissed and with costs.

P.R.S./R.K.

Petition dismissed.

A. I. R. 1933 Madras 123

BURN, J.

M. K. Panduranga Mudali—Accused—Petitioner, In re.

Criminal Revn. Case No. 403 of 1932, and Criminal Revn. Petn. No. 372 of 1932, Decided on 26th September 1932, against decision of Fourth Presidency Magistrate, Egmore, Madras, in Calendar Case No. 9526 of 1932.

(a) Penal Code (1860), S. 114 — Abettor present — He can be charged for actual offence.

If the act of the principal offender committed in consequence of the abetment and in the presence of the abettor amounts to the offences charged, the abettor also must be deemed to have committed the same offences and there is no illegality in the charge against the abettor for actual offences. [P 123 C 2]

(b) Press (Emergency Powers) Act (23 of 1931), Ss. 2 (6) and 18 — Painting "Boycott British Goods" on road is not making news sheet—Painter is not guilty under S. 18.

Though painting the words "Boycott British Goods" on the road way does amount to making a document, it does not amount to making an unauthorized news sheet as defined in S. 2 (6) and the painter cannot be held to be guilty of an offence under S. 18 (1) of that Act. [P 124 C 1]

(c) Criminal Law Amendment Act (1908), S. 17 (1) — Congress is unlawful association and can be taken judicial notice of (Obiter).

Any Court may take judicial notice of the facts that the Congress is an unlawful association and that one of its operations consists in incitement to boycott British Goods. (Obiter). [P 124 C 2]

(d) Criminal Law Amendment Act (1908), S. 17 (1)—"Assists" means intentionally assists.

Section 17 (1) is not designed to punish persons who, acting quite innocently, happen by accident to do something which furthers the operation of an unlawful association. "Assists" in that section must mean "intentionally assists," i. e., does something which assists with the intention of assisting. [P 124 C 2; P 125 C 1]

K. S. Jayarama Ayyar for *T. S. Venkataraman*—for Petitioner.

T. S. Anantaraman—for the Crown.

Order.—The petitioner was the first accused in the case tried by the learned Fourth Presidency Magistrate, Madras. The case against him was that at 4 a. m. on 5th April 1932, he instigated accused 2

to paint on the surface of the road the words "Boycott British Goods." In consequence of his abetment, and in his presence, accused 2 painted the word "Boycott" on the road, and then was arrested by a Head Constable of the C. I. D. He has been convicted of offences punishable under S. 17 (1), Criminal Law Amendment Act (14 of 1908), and under S. 18 (1), Press (Emergency Powers) Act (23 of 1931), and has been sentenced for each offence to six months' rigorous imprisonment and a fine of Rs. 100, the sentences to run concurrently.

It is contended in the first place that on the facts found, the petitioner could only have been found guilty of abetment of the offences if any committed by accused 2. He was not charged with abetment, but with the actual offences. Hence, it is contended the convictions cannot be maintained. This argument is unsound. S. 114, I. P. C., provides that whenever any person who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act of offence. It follows that if the act of accused 2, committed in consequence of the abetment of the petitioner, amounts to the offences charged, the petitioner also must be deemed to have committed the same offences. There is therefore no illegality in the charge, and the convictions cannot be set aside on this ground. The next contention is that the facts found proved do not amount to an offence under S. 18 (1), Press (Emergency Powers) Act. That section reads as follows (omitting the words which are unimportant in this case) :

"Whoever makes any unauthorized news-sheet shall be punishable with imprisonment which may extend to six months, or with fine, or with both."

The learned Presidency Magistrate has held that painting the words "Boycott British Goods" on the surface of a public road amounts to the making of an unauthorized news-sheet. News-sheet is defined in S. 2 (6) as meaning "any document other than a newspaper containing public news or comments on public news or any matter described in sub-S. (1), S. 4."

"Documents" in S. 2 (2) is said to include also "any painting, drawing or photograph or other visible representation." It follows quite clearly that

painting words on the road is making a "document." The further question is whether the words "Boycott British Goods" are matter described in sub-S. (1), S. 4. The offensive matter against which S. 4 (1) is directed is

"words . . . which (a) incite to or encourage, or tend to incite or to encourage, the commission of any offence of murder or any cognizable offence involving violence".

It cannot of course be said that the words "Boycott British Goods" incite to the commission of murder, but the learned Presidency Magistrate holds that they incite the public to commit the offence of molestation as defined in S. 3 (b), Ordinance 5 of 1932, as amended by Ordinance 7 of 1932. That section declares that a person is said to molest another person who,

"with a view to cause loss or knowing that loss is likely to be caused to such other person, loiters at or near the place where such person carries on business and dissuades or attempts to dissuade by words or gestures or otherwise any person from entering or approaching or dealing at such place."

This appears to me to be altogether too far fetched. Molestation can only be committed by somebody who loiters with a view to cause loss to a person carrying on business. I do not see how the words "Boycott British Goods" can be supposed to incite the public to entertain the "view to cause loss" which is the essence of the offence of molestation. The words can be held to inculcate a hatred of British goods, but I do not see that they necessarily inculcate a hatred of the people who deal in them, or a desire to do harm and cause loss to the people who deal in them. I am of opinion therefore that though painting the words "Boycott British Goods" on the roadway does amount to making a document, it does not amount to making an unauthorized news sheet as defined in S. 2 (6), Press (Emergency Powers) Act. It follows that the petitioner cannot be held to be guilty of an offence under S. 18 (1) of that Act. It is contended on his behalf that he is not guilty under S. 17 (1), Criminal Law Amendment Act, either. That section reads as follows:

"Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with

imprisonment for a term which may extend to six months, or with fine, or with both".

The learned Presidency Magistrate has held that by painting the words "Boycott British Goods" on the roadway, the petitioner and the other who was convicted with him, assisted the operations of the Working Committee of the Indian National Congress, which is an unlawful association. Mr. Jayarama Ayyar for the petitioner argues that it has not been properly proved (i) that the Working Committee of the Congress is an unlawful association, (ii) that one of the operations of the Working Committee consists in inciting people to boycott British goods or (iii) that the petitioner has assisted such an operation. I cannot accept these contentions. If it were necessary I would be prepared to hold that any Court may take judicial notice of the facts that the Congress is an unlawful association and that one of its operations consists in incitement to boycott British goods. In this case it is not necessary. There is the evidence of the Sub-inspector (P.W. 5) that the Working Committee of the Indian National Congress has been declared an unlawful association, and that the boycott of all foreign cloth whether British or from other countries is enjoined by the Working Committee as one of the means of furthering the Civil Disobedience Movement. The Sub-Inspector produced Ex. D, but I do not read his evidence as meaning that he derived his knowledge of these matters from Ex. D. He has also said that this boycott programme is being carried on by writing on walls and roads appealing to people to boycott British and foreign goods. He has said that the items of the programme of the Working Committee are being carried on by the Madras District Congress Committee, that the petitioner was a member of the Madras District Congress Committee Tamil Nadu and that he was a Congress worker. This evidence if believed was in my opinion quite sufficient to justify the learned Magistrate's finding that the petitioner was "assisting the operations of an unlawful association" within the meaning of S. 17 (1), Criminal Law Amendment Act of 1908. I do not overlook the principle that in S. 17 (1) the word "assists" must be construed in a reasonable way. That section is obviously not designed to

punish persons who, acting quite innocently, happen by accident to do something which furthers the operation of an unlawful association. "Assists" in that section must, I think, mean "intentionally assists," i.e., does something which assists with the intention of assisting. Construing the word in that liberal way I hold that there was before the learned Magistrate enough evidence to justify the finding that the petitioner assisted the operations of an unlawful association.

I decline to entertain the contention that as no more than the word "boycott" had been painted, the petitioner and accused 2 had not passed the stage of "preparation" to commit an offence. It is of course possible to argue that the accused, after completing the word boycott, might have changed their minds and gone on to add prostitution, gambling, drunkenness, or any other vice. But such an argument could not in this case be advanced seriously; by way of a joke it was quite amusing. The result is that the conviction and sentence for an offence under S. 18 (1), Press (Emergency Powers) Act, are set aside; the fine if collected must be refunded. I find no ground for interference with the conviction and sentence under S. 17 (1), Criminal Law Amendment Act.

P.R.S./R.K.

Order accordingly.

A. I. R. 1933 Madras 125

BURN, J.

Maromma and others—Appellants, In re.

v.

Emperor—Opposite Party.

Criminal Appeal No. 246 of 1932, Decided on 8th August 1932, against order of Sess. Judge, Bellary, D/- 17th February 1932.

(a) Criminal P. C. (1898), S. 164 — Statements recorded by Magistrate under S. 164 are evidence in judicial proceeding within Penal Code (1860), S. 193, Expl. (2).

Statements recorded by a Magistrate in the course of a police investigation under S. 164, Criminal P. C., are evidence in a stage of a judicial proceeding within the meaning of Expl. (2), S. 193, Penal Code : *A I R 1921 Bom 3 (F B)*, not *Foll.* ; 16 *Mad* 421 and 29 *Mad* 89, *Rel on.* [P 125 C 2]

(b) Criminal P. C. (1898), Ss. 476 and 164 — Statements under S. 164 — Offence triable exclusively by Sessions — Sessions Court can file complaint — Sanction asked by Public

Prosecutor — Complaint can be filed even after six months.

Statements made during the course of an investigation under S. 164 into an offence of murder, which is triable only by a Sessions Court, must be held to be in relation to the trial in that Court and a complaint can be made even after six months where the sanction is applied for, by Public Prosecutor and not by a private person. [P 126 C 1]

(c) Penal Code (1860), S. 193 — False evidence given—Person should be tried — Age, relationship and other circumstances are to be considered by trying Magistrate—Criminal P. C. (1898), S. 476.

Prima facie persons who give false evidence which may result in the conviction of an innocent person for murder ought to be tried for the offence they have committed. Their relationship to the accused, their age, the circumstances under which they came to give false evidence are matters to be considered by the Magistrate before whom they will appear. [P 126 C 1]

(d) Criminal P. C. (1898), Ss. 476 and 476-A—Several complaints by one order — Several accused must file separate appeals.

Where several complaints are made under S. 476 against different persons but by a single order the persons complained against must prefer separate appeal under S. 476-B : *A I R 1928 Bom 64, Dist.* [P 126 C 1]

T. M. Venugopal Mudaliar — for Appellants.

The Public Prosecutor—for the Crown.

Judgment.—It is contended by Mr. T. M. Venugopal Mudaliar, for the appellants that the statement made an oath by the appellants under S. 164, Criminal P. C., were not "in relation to a proceeding" in the Court of Session and that therefore the learned Sessions Judge had no jurisdiction to prefer complaints against the appellants. It is also contended that statements recorded by a Magistrate in the course of a police investigation under S. 164, Criminal P. C., are not evidence in a stage of a judicial proceeding within the meaning of Expl. (2), S. 193, I. P. C. In support of the latter contention Mr. T. M. Venugopal Mudaliar quotes the case of *Emperor v. Purushottam Ishwar Amin* (1). In citing this case I think Mr. T. M. Venugopal Mudaliar has either not perused the report of it himself, or else he has hoped that I should be satisfied with a perusal of the headnote. For I find that Pratt, J., (vide pp. 858 and 859 of 45 *Bom.*) has expressly stated that, in taking the view he did, he was differing from the view taken in two cases in this Court, *Queen-*

Empress v. Alagu Kone (2) and *Suppa Tevan v. Emperor* (3). Such citations as this are, at best, a sheer waste of the time of this Court.

On the other point no authorities are cited and I need not say more than that I agree with the learned Sessions Judge. Statements made during the course of an investigation under S. 164, Criminal P. C., into an offence of murder, which is triable only by a Sessions Court, must be held to be "in relation to" the trial in that Court. It is also contended that the learned Sessions Judge had no jurisdiction to order the prosecution of the appellants because his order was passed nearly six months after the conclusion of the Sessions trial. The authorities cited for this proposition are all cases which were decided prior to the amendment of the Criminal Procedure Code in 1923, and have no application to the present provisions of S. 476. This is not a case of private person applying for sanction; it is a case of the Public Prosecutor of Bellary moving the Sessions Court to prosecute. Mr. T. M. Venugopal Mudaliar for the appellants finally contends that the learned Sessions Judge ought not to have held it expedient in the interests of justice to prosecute the appellants because of their personal relationship to the accused in the Sessions case. This contention is unacceptable to me. Prima facie persons who give false evidence which may result in the conviction of an innocent person for murder ought to be tried for the offence they have committed. Their relationship to the accused, their age, the circumstances under which they came to give false evidence, are, as the learned Sessions Judge says, matters to be considered by the Magistrate before whom they will appear. This appeal is accordingly dismissed.

The learned Public Prosecutor has raised a question, whether each of these appellants ought not to have preferred a separate appeal. He points out that under S. 476-B an appeal may be preferred by "any person against whom a complaint has been made." It is not stated that an appeal lies from an order directing a complaint to be made. It seems to me that the learned Public Prosecutor's contention is correct. In

these particular cases, four separate Criminal Miscellaneous Petitions were filed by the Public Prosecutor of Bellary against the four appellants; the learned Sessions Judge's order is one order disposing of the four petitions. None of the appellants had any right of appeal under S. 476-B until a complaint was actually preferred. The complaints against the four appellants are quite separate and distinct; the appellants will have to be tried separately and they may have each his or her separate defence to raise. Therefore it appears to me they ought each to have preferred a separate appeal. Mr. T. M. Venugopal Mudaliar relies on the case of *Emperor v. Daga Devji Patel* (4) for the proposition that the appeal is really against the order and not against the complaint. That case does not however touch the point raised by the learned Public Prosecutor because there was only one person concerned and not several. I need not discuss this question further since the appeal has been admitted and has been dealt with as one appeal, and virtually it has been argued as if it was one appeal.

P.R.S./R.K.

Appeal dismissed.

4. A I R 1928 Bom 64=108 I C 26=29 Cr L J 315=52 Bom 164.

A. I. R. 1933 Madras 126

PANDALAI, J.

Thillaikannu Achi—Plaintiff—Petitioner.

v.

Sheik Abdul Kadir Rowther—Defendant—Opposite Party.

Civil Revn. Petn. No. 826 of 1929, Decided on 14th September 1932, against decree of Sub-Judge, Tiruvarur, in S.C.S. No. 38 of 1928.

Limitation Act (1908), Arts. 116, 97 and 62.—Vendor delivering part of property—Suit as to rest against stranger and vendor dismissed—Subsequent suit for damages for breach of covenant of title is governed by Art. 116 and not by Arts. 97 or 62—Time runs from dismissal of suit for possession and not from date of sale.

Where a vendor out of possession sells his lands to another and delivers possession only of a part of the property and the vendee's suit for possession against the vendor and a third person is dismissed, a suit for damages by the vendee for breach of the implied covenant of title is governed by Art. 116 and not by Arts. 97 or 62 and the time begins to run from the date of the dismissal of the suit for possession and not from

2. (1893) 16 Mad 421=1 Weir 175.

3. (1906) 29 Mad 89=3 Cr L J 370.

the sale-deed: *A I R* 1915 *Mad* 227, *Dist*; *A I R* 1915 *Mad* 742, *Appl*; *A I R* 1926 *Mad* 255 and *A I R* 1918 *P C* 151, *Rel on*. [P 127 C 2; P 128 C 2]

S. Nagaraja Ayyar and *G. Gopala-swami*—for Petitioner.

N. Muthuswami Ayyar—for Opposite Party.

Order.—The plaintiff-petitioner's suit brought for damages for breach of the implied covenant of title contained in a sale to her by the defendant (Ex. A) dated 8th December 1916, has been dismissed by the learned Judge on the ground of limitation. There is no question that if this opinion is not correct the petitioner is entitled to a decree. By the sale (Ex. A) the defendant purported to sell to the petitioner (plaintiff) $4\frac{1}{2}$ cents of land of which from the previous litigation it appears that he gave possession of $1\frac{1}{2}$ cents. For the other 3 cents there were disputes between herself and her vendor on the one hand and one Subbia Pillai, the holder of an adjacent land, who claimed it under another title, on the other. In 1920 two suits were brought, one by Subbia Pillai against the petitioner's sons (since tried as O. S. No. 29 of 1921 in the Court of the District Munsif, Tiruvarur) in which Subbia Pillai sued to remove the petitioner's sons from their admitted occupation of a shed (saipu) and to recover one cent of land on which it stood on the ground that they were mere licenses; and the other brought by this petitioner against Subbia Pillai and her vendor (subsequently tried as O. S. No. 168 of 1921 in the same Court) in which the petitioner sought to recover the 3 cents of land of which she alleged she had been given possession by her vendor but on which Subbia Pillai had trespassed. The two plots were apparently near each other.

In the result both suits were dismissed on the finding in Subbia Pillai's suit that the petitioner and her sons had been occupying the shed and the land on which it stood in their own right for a long time; and in the petitioner's suit that Subbia Pillai had likewise been in occupation of the 3 cents of land along with some neighbouring land in his own right for a long time. This decision of the District Munsif against the petitioner was pronounced on 23rd December 1921 and the decision in appeal confirming it by the learned District Judge of Naga-patam on 29th January 1923. This suit

was filed on 4th January 1918 when the Court re-opened after Christmas, that is, the last day on which the suit could be brought if the proper period of limitation is six years and the starting point is taken as 23rd December 1921. The learned Judge has held that the suit is barred by limitation on the ground that it falls within the first of the three classes of such suits mentioned by Seshagiri Ayyar, J., in *Subbaroya v. Rajagopala* (1). He has held that the Article properly applicable is 116. But he has held that the period of limitation begins to run in this case on the date of the sale-deed (Ex. A) and not as contended by the plaintiff on the date of the decision in O. S. No. 168 of 1921, namely, 23rd December 1921.

As a result of a series of decisions of this Court of which it is sufficient to refer to *Arunachala Aiyar v. Ramasami Aiyar* (2), *Patrachariar v. Alamelu-mangai Ammal* (3), and *Singamani Pandithan v. Munibadra Nainar* (4) it cannot be doubted that the provision of the Limitation Act applicable is Art. 116. It was contended that the proper Article is Art. 62 or 97, and the decision in *Subbaroya v. Rajagopala* (1) was relied upon. The facts of this case were different and the grounds of decision of Seshagiri Ayyar, J., who decided it in the first instance and of the Appeal Bench who confirmed his decision are also not identical. Whereas Seshagiri Ayyer, J., took the view that Art. 116 was applicable to the case, the Bench who heard the appeal confirmed his decision on the ground stated by Miller J., in *Ramanatha Ayyar v. O. P. Ramanambudripad* (5) that the proper Article to be applied was 97. That was perhaps appropriate to the facts there which were that the plaintiff got possession under a sale-deed and remained in possession until evicted in 1911 and the want of title was established by litigation which ended in 1918. In those circumstances it was held that the case can be properly described as one for money paid on an existing consideration which afterwards

1. *A I R* 1915 *Mad* 227 = 23 *I C* 570 = 38 *Mad* 887.
2. *A I R* 1915 *Mad* 742 = 25 *I C* 618 = 38 *Mad* 1171.
3. *A I R* 1927 *Mad* 273 = 100 *I C* 40.
4. *A I R* 1926 *Mad* 255 = 91 *I C* 514.
5. *A I R* 1915 *Mad* 766 = 21 *I C* 740.

failed when the litigation ended. In *Arunachala Aiyar v. Ramasami Aiyar* (2) the plaintiff who took a sale-deed in 1904 was unable to get possession at all and brought the suit in 1910, but was unable to get it. The question was whether the plaintiff could recover the money paid. It was held by a Bench after a full examination of the authorities that the proper article to be applied is 116. That decision applies to this case.

The next point is when does the period begin to run. According to the article it begins to run when the contract is broken. As to this in the facts of this case I find it impossible to agree with the learned Judge that this case falls within the first of the three classes mentioned by Seshagiri Ayyar, J., in *Subbaroya v. Rajagopala* (1). If it is necessary to adopt the classification mentioned by the learned Judge it appears to me that this is a case falling within his class (c).

"Where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties."

The first class is where there was no title to convey and the vendee has not been put in possession either. In the present case out of four and a half cents of land the plaintiff did get possession of one and a half cents and had to sue only for the rest, and that appears to be what the learned Judge intended in his class (c). However that may be, there is authority for saying that even in cases where the purchaser is unable to get possession and has to litigate against third parties in order to get it, the contract is broken, not always, and in all cases necessarily, on the date of the sale deed, but at the earliest date when a Court decides that the vendor has no title. It is not uncommon for vendors out of possession to sell their lands and if the parties knowing that immediate possession cannot be given and may have to be obtained by a suit against a third party agreed to these terms, there is no reason to think that the contract is immediately broken if possession is not immediately given. In such a case the contract can reasonably be said to be broken only when it is found as a result of the suit against the stranger known to be in possession that the vendor has no title. *Singamani Pandithar v. Munibodra Nainar* (4) was a case of that character. The plaintiff to whom

the whole of some property was sold, but was not given possession was able to get possession of only one-half of it after a suit and it was held by Devadoss, J., in that case that the article of limitation applicable is Art. 116, and also that the period of limitation begins to run on the date when the Court first held that the vendor had no title to the half of which the plaintiff was refused possession. For this the authority relied upon was the decision of the Privy Council in *Juscurn Boid v. Pirthi Chand Lal* (6). Applying this to the present case it seems to me that the breach should not be held to have occurred on the date of the sale deed as held by the learned Judge.

Apparently both the vendor and the purchaser were in the belief that the 3 cents for which the suit had to be brought were in the hands of Subbia Pillai and would be recovered from him and though the vendor and the purchaser did appear on the opposite side in the Court it cannot be denied that, at any rate as far as the title to the land was concerned, they were both supporting the same case; and it was only when the suit was dismissed that it can reasonably be said, in the facts of this case, that the contract was broken. I therefore think that the better view is that the starting point of limitation in this case must be taken as the date of the decision already mentioned, namely 23rd December 1921. If so, the suit was not barred. In that view the sum of Rs. 100 was clearly due, and there will be a decree for that amount with proportionate costs in both Courts.

P.R.S./R.K.

Claim decreed.

6. A I R 1918 P C 151=50 I C 444=46 I A 52=46 Cal 670 (P C).

A. I. R. 1933 Madras 129

STONE, J.

The Pioneer Mutual Benefit and Friend-in-Need Society, Ltd., Madras—Applicant.

v.

The Assistant Registrar of Joint Stock Companies, Madras—Opposite Party.

Civil Appln. No. 2608 of 1932, Decided on 1st November 1932.

(a) **Companies Act (1913), Ss. 22 and 82—Registrar can refuse to register alteration of articles.**

The Registrar has power to exercise a discretion to refuse to register with regard to the alteration of articles to same extent as he has with regard to articles: *Bowman v. Secular Society Ltd.*, (1917) A C 406, *Rel on.* [P 129 C 2]

(b) **Penal Code (1860), S. 294-A—Scheme held fell within S. 294-A.**

A scheme by which a subscriber is entitled to a benefit (to a loan on personal security) which is obtained by this man or that according as this man or that is fortunate in a draw falls within S. 294-A: *Wallingford v. Mutual Society*, (1880) 5 A C 685 and A I R 1933 Mad 16, *Cons and Rel on.* [P 130 C 1]

B. Satyanarayana—for Applicant.

S. Parthasarathi and V. K. Thiruvengkatachari—for Opposite Party.

Judgment.—In this matter I reserved judgment in order carefully to consider whether the new scheme fell within *Wallingford v. Mutual Society* (1). I had and have no doubt about the other points raised. The first question is whether the Assistant Registrar of Joint Stock Companies has power to decline registration of any part of: (a) a memorandum, or (b) articles of a public company. It is said that in S. 82 (relating to the registration of special and extraordinary resolutions) the words in sub-S. (1) "who shall record the same" are directory and leave the Registrar no option in the matter. But the same may be said of the duties of the Registrar under S. 22 with regard to the registration of the memorandum and articles, yet there can be no doubt that the Registrar of Joint Stock Companies has a discretion to refuse to register a memorandum. As Lord Parker observed in *Bowman v. Secular Society, Ltd.* (2), at p. 439:

"The Registrar fulfils a quasi-judicial function . . . Only by misconduct or great carelessness on the part of the Registrar could a company with objects wholly illegal obtain registration."

But it is said that although that ap-

1. (1880) 5 A C 685=50 L J Q B 49=43 L T 258=29 W R 81.

2. (1917) A C 406=86 L J Ch 565=117 L T 161=33 T L R 376=61 S J 478.

1933 M/17 & 18

plies to a memorandum it does not apply to a resolution altering articles. I entirely fail to see why S. 22 relates to a memorandum and articles and if the Registrar can in the exercise of his quasi-judicial function refuse to register a memorandum I should think it is almost an unarguable proposition that he yet must register articles. If he can exercise his discretion with regard to articles he must obviously be able to exercise a discretion with regard to the alteration of articles. In this case an effort has been made to alter the articles so as to enable this company to carry on, in effect, the business of Universal Mutual Aid and Poor Houses Association, Ltd., which company was compulsorily wound up as constituting a lottery. I will say nothing about that company.

This present company now desires to offer a somewhat different scheme to the public. Under the old scheme subscribers got the certainty of an interest-free loan in time, but the quantum of the loan and of course the time was determined by lot and cash certificates gave an equal chance. Under the present scheme the subscriber is entitled to one loan and the chance does not increase with the number of certificates held. I have carefully considered: *Wallingford v. Mutual Society* (1), at pp. 696-697 in the light of the judgments of the Chief Justice and Cornish, J., in *Universal Mutual Aid and Poor Houses Association Ltd., Madras v. Thoppa Naidu* (3) and in my opinion this scheme offends against S. 294-A, I. P. C., in exactly the same way as did the Universal Mutual Aid scheme. The only difference is that the present scheme offers a prize that is not very valuable, but which will probably be obtained within a reasonable time by most subscribers, whereas the other scheme offered prizes that were very valuable but which would not be drawn by majority within a reasonable time. It is said that there is no prize at all. In my opinion there is; but really the use of the word "prize" is unnecessary. What the Penal Code says is "publish a proposal to do anything for the benefit of any person." It seems to me to be clear that a loan of Rs. 1,000 on personal security is something which a person desiring to borrow would regard as a

3. A I R 1933 Mad 16=1933 Cr C 64=33 Cr L J 792=139 I C 644.

benefit. It is true that the rate of interest is left at large, but that simply means that a trap is or may be prepared for the unwary. The obvious intention is to offer to the public something that is attractive and the attraction is a loan on personal security, that is held up as a benefit and that benefit is obtained by this man or that according as this man or that is 'fortunate in a draw.

If this were straight business whereby a money-lending association were offering to lend money to all of a class it would be quite unnecessary to invoke the machinery of the draw. It is because the lucky person gets something more than he could get under ordinary business conditions that it is necessary to select him by lot. Whether this sort of a scheme is one which should be encouraged or not, whether it is likely to mislead the ignorant anxious to raise money or not is not my concern. Whether this falls within S. 294-A, I. P. C., is the question I have to consider. If it does it is certainly better to stop it at the threshold rather than to allow the company to proceed along these lines and then wind it up as an illegal company after many thousands of people, may be, have entered the scheme. In my opinion it does offend against S. 294-A and the Assistant Registrar of Joint Stock Companies was right in refusing to register the articles as presented to him. The motion is accordingly dismissed with taxed costs.

P.R.S./R.K. *Application dismissed.*

A. I. R. 1933 Madras 130

MADHAVAN NAIR, J.

(Boggavarapu) Bullayya and others—Appellants.

v.

(Garlapati) Subbayya and another—Respondents.

Appeals Nos. 176 and 177 of 1930, Decided on 2nd August 1932, against appellate orders of Sub-Judge, Bapatla, D/- 26th September 1929.

(a) Civil P. C. (1908), S. 11—Execution—Decision in, that land being not service inam was saleable—Collector subsequently deciding land to be service inam—Fresh execution against portion of same survey number—Previous order held operated as *res judicata*—Collector's decision though ordinarily binding did not affect question—Madras Hereditary Village Offices Act (1895), S. 13.

After a portion of an undivided survey number subject to a mortgage was ordered to be sold in execution of the mortgage decrees, the judg-

ment-debtors filed an application under O. 21, R. 90, to set aside the sale on the ground that the suit land formed part of service inam; the Court held that though the land was probably service inam once, it was subsequently enfranchised or resumed and therefore saleable. After this the judgment-debtors filed a suit before the Deputy Collector under S. 13, Act 3 of 1895. The Collector held that the land was service inam. In subsequent proceedings for sale of the remaining portion, the judgment-debtor again objected.

Held: that so long as the first decision remained in force it was not open to the Courts to recognize and give effect to the decision of the Collector even though the Collector's decision would be binding on the civil Courts ordinarily. Identity of the land was immaterial as both the items formed undivided portions of the same survey number and therefore the decision would equally apply to all portions of the same survey number: *A I R 1926 Mad 12, Foll*; *28 Mad 84*; *30 Mad 126*; *30 Mad 320* and *A I R 1927 Mad 433 and 911, Dist.* [P 132 C 1]

(b) Civil P. C. (1908), S. 47—Nature of application is to be determined from substance and not from heading—Pleadings.

In considering whether an application is under S. 47 or not Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant.

[P 132 C 2]

B. T. M. Raghavachari—for Appellants.

K. Kottayya—for Respondents.

Judgment.—In these Civil Miscellaneous Second Appeals the defendants in O. S. Nos. 620 and 621 of 1921 on the file of the Subordinate Judge of Bapatla are the appellants. The decree-holders, who are the same in both the suits, are the respondents. They obtained preliminary decrees against the respondents as the defendants in the two suits on a mortgage given by them in respect of a specific undivided share in a certain land alleged to be the service inam belonging to the defendants. A decree for the sale of the properties was passed. As it was found that the proceeds of the sale were insufficient to meet the decree, a personal decree was passed and in execution of that personal decree the remaining portion of the property which had not been mortgaged was attached. This attached portion of the property and the portion already sold form undivided parts of the same survey number.

When this property was attached the appellants judgment-debtors intervened with a petition under S. 47, Civil P. C., alleging that the land was service inam

and was consequently not liable to attachment and that therefore it should be released from attachment. The respondents contended that the land was not unenfranchised service inam and that the application of the appellants was barred by res judicata by a certain prior order passed in execution of the decree in O. S. Nos. 620 and 621 at an earlier stage. The District Munsif held that the land was unenfranchised service inam and was therefore unattachable, and that the previous order did not operate as res judicata. In the result the attachment was ordered to be raised by the first Court. In appeal this order was set aside by the learned Subordinate Judge. He held on the merits that the land was service inam agreeing with the District Munsif on this point : but he held that the previous order referred to operated as res judicata and therefore it was not open to the judgment-debtors to raise the plea that the land was unattachable. He further held that even if the plea of res judicata cannot be maintained still, though the land was service inam, it was liable to attachment during the lifetime of the mortgagors, relying on a decision in *Venkanna v. Chinna Appalaswami* (1). This decision has been recently considered and dissented from in *Kammara Chinna Nagiah v. Yerraguntla Pullayya* (2), and having regard to this decision the respondents did not seriously argue that the lower appellate Court's decision on this point is correct. The concurrent finding of the lower Courts that the land is service inam, also cannot be questioned in these second appeals. So the position is this : if the previous order relied on as a bar to the present proceedings does not operate as res judicata, then the property is not liable to attachment and the lower Court's order will have to be set aside. Therefore the question for consideration is whether the previous order passed in execution would operate as res judicata in the present proceedings.

The order is Ex. 1 (a) and it was passed in the following circumstances. After the portion of the property subject to the mortgage was ordered to be sold in execution of the mortgage decrees, the judgment-debtors, that is the appellants, filed an application under O. 21,

R. 90 to set aside the sale on the ground of irregularity and fraud and they alleged in the petition that the suit land formed part of service inam. The sale was not attacked seriously on the ground of irregularity and fraud, but the judgment-debtors seem to have stressed the point that the land in question formed part of the service inam. The Munsif held that though the land was probably service inam once, it was subsequently enfranchised or resumed and therefore he dismissed the petitions. It is this order that is now sought to be relied on as constituting res judicata in the present proceedings. After this order of the District Munsif the judgment-debtors filed a suit before the Deputy Collector under S. 13, Act 3 of 1895, with respect to this land for the recovery of the emoluments, the land being a village carpenter's inam. The Deputy Collector held that the land is service inam land thereby differing from the District Munsif who passed the order under O. 21, R. 90. He also held that the melwaram constitutes the emoluments of the office and that the civil Courts should decide whether the kudivaram also constitutes the emoluments. As the suit was one for the recovery of possession of the land he dismissed it, and this decision was confirmed in appeal by the Collector. This decision of the revenue officer is also relied on by the appellants in support of their arguments. The present proceedings originated after this decision.

As I have already stated, the real question in the case is whether the order Ex. 1 (a) is res judicata in the present proceedings. The appellants' arguments are twofold : first that the learned District Munsif who passed the order under O. 21, R. 90 had no jurisdiction in such a proceeding to decide whether the land was service inam or not and that in holding that the land was service inam and therefore saleable, he acted without jurisdiction, and (2) that, whatever be the District Munsif's opinion, the matter being one relating to service inam, under the provisions of Act 3 of 1895, the decision of the Collector was final and is binding on the civil Courts and effect should now be given to it. In support of the latter proposition various decisions were cited by the learned counsel for the appellants, such as *Rajah of Vizianagaram*

1. A I R 1925 Mad 749=86 I C 755.

2. A I R 1931 Mad 610=133 I C 202.

v. *D. Chelliah* (3), *Kesaram Narasimhalu v. Narasimhalu Patnaithu* (4), *B. Seshayya v. B. Subbayya* (5), *Kandappa Achari v. Singarachari* (6) *Rajah of Kalahasti v. Munni Venkatadri Rao Garu* (7), etc., but in the view that I take of the case it is not necessary to consider these cases, for in my opinion the question of res judicata which is the main question involved in those appeals has to be decided apart from those considerations. For the purposes of discussion we may well assume that the arguments of the learned counsel under the second heading are valid. But the point is, can effect be given to those arguments having regard to the previous order Ex. I (a)? Rightly or wrongly the District Munsif passed an order that the land is service inam land and to this order the present judgment-debtors were parties. So long as this order remains in force and is not set aside, how can effect be given to subsequent decisions? It is true that the decision of the Collector under Act 3 of 1895 is final and is binding upon the civil Courts. That would be so, no doubt ordinarily, but if the parties had subjected themselves already to an order the purport of which is opposed to the decision of the Collector, how can they refuse to recognize that order so long as that order remains in force? This is the real question for decision in this case. It is true that the District Munsif has no jurisdiction under O. 21, R. 90 to go behind the decree and decide whether the land is service inam or not.

But as a matter of fact he did decide in this case that the land is service inam land. That decision is without jurisdiction; but that to my mind does not affect the question regarding the binding nature of that decision on those persons who were parties to it. So long as that decision remains in force it is not open to the Courts to recognize and give effect to the decision of the Collector even though the Collector's decision would be binding on the civil Courts ordinarily. The decision in *Rajah of Vizianagaram v. Dentiwada Chelliah* (3) strenuously stressed by the learned counsel for the appellants no doubt says that an execut-

ing Court, even if it has to go beyond the decree in doing so, should recognize the fact that the land is admittedly service inam land and give effect to it. But it must be remembered that in that case there was no question of res judicata and no room for the argument that the proceedings were barred by res judicata, on account of a previous order as in the present case. This, to my mind, is the distinction which distinguishes the present case from all the cases relied on by the learned counsel for the appellants. In this connexion attention may be drawn to the decision in *Somasundaram v. Kondayya* (8). In that case:

"P, the owner of an unenfranchised inam, mortgaged it to the defendant. The inam, which was then unenfranchised, was subsequently sold in execution of a money decree obtained against P, and was purchased by the plaintiff's vendor. The inam was subsequently enfranchised, and, after its enfranchisement was sold by P, to the defendant. In a suit by the plaintiff to redeem the mortgage in favour of the defendant, the latter pleaded that, as the property was inalienable on the date of the Court sale at which the plaintiff's vendor purchased, the plaintiff's vendor and the plaintiff acquired no valid title to the property which entitled the plaintiff to redeem the suit mortgage. P had notice of the execution proceedings which culminated in the Court sale, at which the plaintiff's vendor purchased. It was held that P and his representative, the defendant, were precluded from contending that the property was at the date of the Court sale inalienable, and that the plaintiff acquired no valid title to the property by means of such sale."

Shortly stated, the decision was that the order confirming the sale was an adjudication which operated as res judicata in the subsequent suit. I think the principle of that decision may well be applied to the present case. Though the petition which resulted in Ex. I (a) was under O. 21, R. 90, it is clear that it was created as an application under S. 47, Civil P. C. In considering whether an application is under S. 47, Civil P. C., or not we must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant. It was not seriously contended that the application should not be considered as one falling under S. 47, but it was suggested that the decision of the District Munsif related to the land that formed the subject-matter of the mortgage suit and not to the land which is now sought to be sold in execution of the personal decree.

3. (1905) 28 Mad 84=14 M L J 468.

4. (1907) 30 Mad 126=16 M L J 514 (F B).

5. (1907) 30 Mad 320.

6. A I R 1927 Mad. 433=99 I C 972.

7. A I R 1927 Mad 911=105 I C 248=50 Mad 897.

8. A I R 1926 Mad 12=91 I C 443.

But it must be remembered that both the items formed undivided portions of the same survey number and therefore the decision in Ex. 1 (a) will equally apply to all portions of the same survey number. For the above reasons I am not inclined to accept the arguments of the learned counsel for the appellants. I am of opinion that the order Ex. 1 (a) would operate as res judicata in the present proceedings and therefore the lower Court's order is right. The civil miscellaneous second appeals are dismissed, but the respondents will get costs only in one of them.

P.R.S./S.N. *Appeals dismissed.*

A. I. R. 1933 Madras 133 (1)

JACKSON AND PANDALAI, JJ.

C. R. Venkatarama Ayyar—Appellant.
v.

B. S. Krishnaswami Chettiar and others—Respondents.

Second Appeal No. 335 of 1927, Decided on 9th March 1932, against decree of Dist. Judge, West Tanjore, in A. S. No. 24 of 1926.

Promissory note — Transfer of Property Act, Ss. 130 and 137.

A promissory note can be transferred otherwise than by an endorsement: *A I R 1930 Mad 197, Foll.* [P 133 C 1]

S. Panchapagesa Sastri and S. Venkataraman—for Appellant.

K. Rajah Ayyar—for Respondents.

Jackson, J.—The question for our determination is whether a promissory note can be transferred otherwise than by endorsement. There is considerable clash of judicial opinion, the older case-law inclining to the view that as provided by the Negotiable Instruments Act endorsement is necessary and the later case law to the view that a promissory note can be transferred like any other chose in action: c.f. *A. I. R. 1930 Mad. 197*. We see no reason to differ from the later course of decisions. It is strenuously argued that S. 137 T. P. Act, which exempts certain mercantile documents from the provisions of S. 130, T. P. Act, also denies to such documents the method of S. 130, T. P. Act. We see no reason to accept such an interpretation. S. 137 gives an extended privilege to mercantile documents, and in no way is restrictive. We agree with the lower appellate Court that the transfer in this case is effectively made by the deed. The suit must

accordingly be decreed with costs throughout.

P.R.S./R.K.

Suit decreed.

A. I. R. 1933 Madras 133 (2)

BARDSWELL, J.

M. Shanmuga Mudaliar—Petitioner.
v.

S. Subboraya Mudaliar and another—Opposite Parties.

Civil Misc. Petitions Nos. 4040 and 4335 of 1932, Decided on 15th September 1932.

(a) Madras District Municipalities Act (1920), S. 49 (2) (f)—Disqualification under can be ground for election petition.

A disqualification under S. 49 can be made a ground for a petition before an election Court impugning an election and so the Election Commissioner has the jurisdiction to inquire into the objection of such a nature: *A I R 1929 Mad 727 (FB), Foll.* [P 134 C 1, 2]

(b) Certiorari, writ of—Erroneous decision on law point is no ground for issuing writ when exercised within jurisdiction—Jurisdiction.

When a Court or similar authority gives to itself a jurisdiction which it properly has not got by taking an erroneous view of the law, a writ will be issued, but there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses. *English law referred.*

[P 135 C 1]

(c) Madras District Municipalities Act (1920), Election Rule 11 (2)—Election Commissioner has discretion to declare fresh election or declare another as elected.

Under R. 11 (2) the Election Commissioner has the option if he declares an election of a candidate void, either to declare that any other party to the petition who has under the rules claimed the seat has been elected, or to order a fresh election and there is nothing in the rule to suggest that he is in any way restricted in the exercise of the option: *A I R 1925 Mad. 1119, Expl.* [P 137 C 1]

(d) Madras District Municipalities Act (1920), S. 49—Scope.

Where the Election Commissioner declares an election void on a ground not taken in the petition and declares another candidate elected in his place, the action of the Election Commissioner is one in excess of jurisdiction: *A I R 1923 Mad 192 and A I R 1926 Mad 947, Ref.*

[P 136 C 1]

A. Krishnaswamy Ayyar, D. Krishnaswamy Ayyar, S. Srinivasa Ayyangar, S. Parthasarathy and V. K. Thiruvengkatachari—for Petitioners.

T. M. Krishnaswamy Ayyar and M. S. Venkatarama Ayyar—for Opposite Parties.

Order.—In each of these petitions the issue of a writ of certiorari is prayed for in order to quash an order of the Election Commissioner of Vellore, dated 19th

August 1932, in O. P. Nos. 34 and 35 of 1921. The Election Commissioner is in his ordinary official capacity the Subordinate Judge of Vellore. As Election Commissioner he is a persona designata. For the purposes of this order the petitioner and respondent 1 in C. M. P. No. 4010 will be styled respectively petitioner 1 and respondent 1. The petitioner and respondent 1 in the other petition will be styled respectively petitioner 2, and respondent 2. Respondent 2 in both the petitions is the Election Commissioner, who is only a party pro forma. On 8th October 1931 an election was held for Ward No. 14 of the Thiruvannamalai Municipal Council. The result declared next day was as follows:

Petitioner 1, 215 votes: Petitioner 2, 160 votes: Respondent 2, 64 votes: Respondent 1, 8 votes. There were two other candidates, who got 4 and 5 votes respectively. With these we are not concerned. The two respondents filed respectively O. P. No. 34 and O. P. No. 35 of 1931 before the Election Commissioner. In O. P. No. 34 it was prayed that the election of the two petitioners might be declared void and that respondent 1 might be declared duly elected. In O. P. No. 36 respondent 2 asked for a similar relief for himself on similar grounds. The Election Commissioner has passed one judgment on both the petitions before him and has declared the election of both the petitioners void and, at the same time, has declared the two respondents to be duly elected. Respondent 2, like petitioner 2, is a woman, and her election is for a reserved seat. The order of the Election Commissioner is based upon his interpretation of S. 49 (2) (f), Madras District Municipalities Act, by which a person shall be disqualified for election as a councillor if such person is, at the date of nomination or election, a servant or employer or an official subordinate or official superior to a councillor holding office on the said date. Now it has been established by a Full Bench decision of this Court in *Selvaranga Raju v. Doraiswamy Mudaliar* (1) that a disqualification under S. 49 can be made a ground for a petition before an election Court impugning an election and so the Election Commissioner certainly had the jurisdiction to

inquire into the objections of the present respondents to the election of the petitioners with regard to that section. It has also been held by a Divisional Bench of this Court in *Govindaswamy Pillai v. Ramalingaswamy* (2), that an Election Officer is empowered by the rules to reject a nomination because a candidate is disqualified under S. 49 and that this involves a power and duty of deciding whether, in fact the candidate is so disqualified, and the same case points out that the decision of a tribunal does not become without jurisdiction because it is wrong.

In the present instance it has been urged that the Election Officer's interpretation of S. 49 is incorrect and it is sought, with reference to many English authorities, to show that this incorrect interpretation amounts to an error of jurisdiction. None of the decisions, however, that have been quoted to me justifies my acceptance of this argument. In the face of the decision of this Court, already quoted, in *Govindaswamy Pillai v. Ramalingaswamy* (2) it is unnecessary for me to go into an elaborate discussion of all these decisions. I shall merely mention them with a minimum of comment. They are: *Walsall Overseers v. L. & N. W. Ry.* (3), *Rex v. Electricity Commissioners, London Electricity Joint Committee* (4), *Rex v. Board of Education* (5), *Rex v. Nat Bell Liquors Ltd* (6), *Colonial Bank of Australia v. William* (7), *Rex v. Lincolnshire Justices* (8) and *Rex v. London County Council* (9). Not one of these decisions is an authority for the position that an erroneous decision on a point of law, by a Court acting within the limits of its jurisdiction, can be a ground for issuing a writ of certiorari. The decision in *Colonial Bank of Australia v. William* (7) is very clear as

2. A I R 1932 Mad 321=137 I C 868.

3. (1879) 4 A C 30=48 L J Q B 65=33 LT 453=27 W R 189.

4. (1924) 1 K B 171=93 L J K B 390=88 J P 13=130 L T 164.

5. (1910) 2 K B 165=79 L J K B 595=102 L T 578=74 J P 259=8 L G R 549=26 T L R 422.

6. (1922) A C 128=91 L J P C 146=127 L T 437.

7. (1874) 5 P C 417=43 L J P C 39=30 L T 237=22 W R 516.

8. (1926) 2 K B 192=59 L J K B 827=135 L T 141=90 J P 149=28 Cox C C 178.

9. (1931) 2 K B 215=100 L J K B 760=144 L T 464=95 J P 89=29 L G R 252=75 S J 138=47 T L R 227. •

1. A I R 1929 Mad 727=119 I C 597=52 Mad 732 (F B).

to this when it says that a Court will not quash, except on a ground either of manifest defect of jurisdiction in the tribunal which made it or of manifest fraud in the party procuring it: and again, in *Rex v. Lincolnshire Justices* (8) it has been ruled that if the Lincolnshire Justices were bound to come to some conclusion, right or wrong, then they had jurisdiction and a writ could not be issued because of the wrong conclusion.

The matter has been summed up in Halsbury's Laws of England, Vol. 10, paras. 379 and 381. Para. 379 shows that where in the face of the proceedings themselves it appears that the determination of an inferior Court is wrong in law, certiorari will be granted, but this has to be read with what follows in para. 381 that, where proceedings are regular on their face, and a Court had jurisdiction, the superior Court will not grant the writ of certiorari on the ground that the Court below has misconceived the point of law. Indeed, that para. 379 is not intended to show that a writ can be granted because of an erroneous conclusion on a point of law arrived at in the proper exercise of the Court's jurisdiction, is shown by what that section goes on to say as to in what kind of circumstances such a writ can be granted. It comes to this: that when a Court or similar authority gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law, a writ will be issued, but that there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses. It is true that in *Gould v. Gapper* (10) a writ of prohibition was granted even when the error did not appear on the face of the proceedings but had to be collected from the whole of it; but even in this case the error was one of jurisdiction, it being one arising from the clash of procedure between the Ecclesiastical Courts and the ordinary Courts of Common law. It is unnecessary for me to discuss the matter further when the matter has already been decided by a Division Bench of this Court whose decision I am bound to follow. However much, then, I may think that the interpretation by the Election Commissioner of S. 49 is incorrect, I cannot, 10. 102 E R 1107.

in that he arrived at that interpretation in the exercise of a jurisdiction which he possessed, grant a writ of certiorari because of the decision being erroneous.

There is one more decision of this Court to which I may refer, *Ramaswamy Goundan v. Muthu Velappa Gounden* (11). In this case the point of a wrong interpretation of the law having been given by a Judge in the exercise of his jurisdiction was considered, on an application for revision under S. 115, Civil P. C., and Ss. 106 and 107, Government of India Act. But in that case there was not merely this wrong interpretation of the law, but it further led to acts which amounted to an excess of jurisdiction, one of these being the declaration of a party as having been elected as President when, as far as the record went, it appeared that that was a relief which had not been prayed for, and another being that a person was removed from the post of President on a ground that had not been taken in the petition on which the order as to that was passed. The ultimate order passed in that case, I may note, was that the petition under review was remanded for disposal on its merits according to law. The learned Advocate-General has referred to a finding in *Rex v. Board of Education* (5), that the Board of Education had by answering a question not referred to it and avoiding any answer to the real question, declined jurisdiction. He contends that in this case the Election Commissioner has not addressed himself to the only point that he was qualified to deal with, viz. whether the present petitioners were holding office at the time of their nomination. From the order under review however I cannot find that this position taken by the learned Advocate-General is justified. In the course of the order I find the following passages:

"(1) The words 'holding office on the said date' mean holding office on the date of nomination or election by virtue of which the relationship of being official subordinate or official superior came into existence; (2) the persons in question became councillors and both held office of trustee and dasi respectively on the dates of nomination and election; (3) I therefore hold that the only reasonable meaning of S. 49 (2) (f) is that official superiors or official subordinates holding such office on the date of nomination or election are disqualified from sitting as councillors; (4) 'As I have observed supra Vridhamba Ammal (i.e., respondent 2) is the official subordinate of the

Councillor Shanmuga Mudaliar. She was such a subordinate on the date of nomination and election."

It is impossible to find in the light of these remarks that the Election Commissioner has failed to address himself to the point which he had to consider in coming to a conclusion upon the objections taken with reference to S. 49. It has also been argued with reference to *Rex v. Wandsworth Licensing Justices, Whitbread & Co.* (12), that there is a case for a writ here, in that the Election Commissioner has been influenced by extraneous considerations. The reference is to his view that the words "holding office" need not mean holding office as Municipal Councillor but may refer to the office in respect of which one person is superior or subordinate to another. But though his view as to this may be wrong, it is not one that is based on considerations that were foreign to the case with which he had to deal. Rather it is based on considerations that were very germane thereto. I should note that it is not admitted that the petitioners stand to each other in the relation of superior and subordinate, but the Election Commissioner has found on the evidence that they bear such a relation to each other and there has been no argument before me as to that finding. As far, then, as the objection is taken, that the Election Commissioner has taken a wrong view of S. 49, these petitions must fail.

There is however another point taken, which concerns only the case of petitioner 1. This is that the Election Commissioner has declared his election to be void on a ground not taken in the petition against him. If such is the case, then the action of the Election Commissioner in setting aside his election and declaring respondent 1 elected in his place will be one in excess of jurisdiction, as appears not only from *Ramaswami Goundan v. Muthu Vellappa Gounder* (11), to which I have already referred, but also from *R. S. Naidu v. Ramier* (13), a more recent decision by Jackson, J., sitting alone. As far as the issue as to this matter goes the contention thus put forward for petitioner 1 appears to be correct. This issue as framed in O. P. No. 34 is as follows: "Is

the nomination of respondent 2 as a candidate invalid for the reasons stated in para. 4 (c) of the petition and is this Court entitled to go into the question?;" and there is the same issue in O. S. No. 35, except that there respondent 2 becomes respondent 1, this person being the same as the present petitioner 2, Vrithamba Ammal, and that Cl. 4 (e) becomes Cl. 4 (c). For the respondents it is contended that by some inadvertence this issue 4 has not been made applicable to petitioner 1 also, but a reference to the pleadings shows that this contention is not well founded. The election of the two petitioners was sought to be set aside on a number of grounds, and a number of issues, apart from issue 4, were framed as to them. Some of them applied only to petitioner 1 and some of them applied both to him and to petitioner 2, but none of them was pressed at the inquiry and the matter was argued only with reference to issue 4 which I have already quoted. Issue 4 is based on Cl. (e) in the one case and Cl. (c) in the other of para. 4 in the petitions to the Election Officer. That clause as it appears in O. P. No. 34 runs as follows:

"From the outset the election proceedings have been conducted and held contrary to the provisions of the Act and the rules framed thereunder, in so far as respondent 2, who is a dasi of Sri Arunachelaswarar temple, is the servant and subordinate of respondent 1 who, as stated above, is the executive trustee having full control over respondent 2, and therefore disqualified to stand as a candidate along with respondent 1. Consequently respondent 2's nomination paper which has been improperly received should have been rejected by respondent 6 who is therefore impleaded as a party."

Clause 4 (c) in O. P. No. 35 is to a like effect mutatis mutandis; clearly the objection taken in this clause is only as to the position of the present petitioner 2 and to her nomination paper which, on the grounds stated, is said to have been improperly received. It is true that there is a reference to petitioner 1, but this reference is only to show that petitioner 2 is disqualified to stand as a candidate along with him, in that he is an executive trustee having full control over her. The point taken is that she is disqualified because of him and not at all that he himself was disqualified to stand or should not have been nominated. This, then, is a case in which the Commissioner has not confined himself to an inquiry into the points raised in the

12. (1921) 3 K B 487=90 L J K B 1114=125
L T 540=85 J P 171=87 T L R 619.

13. A I R 1926 Mad. 947=97 I C 450.

petition. I may note that the Election Commissioner himself realized that under this issue he was dealing only with the case against petitioner 2, as his conclusion is thus expressed :

"I therefore find that the lady Councillor should cease to be Councillor under S. 50 (1) (f) also."

From what has gone before, it is clear that what he meant by this was that he was deciding the matter with reference to S. 50 (1) (f) as well as to S. 49 (2) (f). A point has been taken that he should not have brought S. 50 (1) (f) into consideration, but I need not deal with this point as it is sufficient that he had jurisdiction to deal with the matter under S. 49 (2) (f) and has disposed of it thereunder. That is the section with reference to which O. P. Nos. 34 and 35 of 1931 were brought. As to the matter of inadvertence I would observe that, if there has been any, it has been in only pressing the one issue though, for aught I know, that may have been due to quite other causes. The actual reason for pressing only the one issue has not been shown to me. In any case petitioner 1 must have the benefit of the fact that the one issue that was pressed was one that did not tell against him. As I find that the Election Commissioner has acted in excess of his jurisdiction in declaring the election of petitioner 1, i. e., the petitioner in C. M. P. No. 4040, void and in declaring that respondent 1 of that petition had been elected, was passed without jurisdiction, I quash his order as to that, so that the election of the petitioner in C. M. P. No. 4040 will stand. That petition is therefore allowed with costs.

In the case of petitioner 2, i. e. the petitioner in C. M. P. No. 4335 of 1932, the result of the Election Commissioner's order is that a party who received 64 votes has been declared duly elected, thereby disfranchising the 160 voters who have voted for petitioner 2 in ignorance, it would appear, of his disqualification. Under R. 11 (2) the Election Commissioner had the option, if he declared the election of petitioner 2 void, either to declare that any other party to the petition who has under the rules claimed the seat has been elected, or to order a fresh election and there is nothing in the rule to suggest that he is in any way restricted in the exercise of the

option. It might have been better in such a case as this to order a fresh election, but if the Election Officer could in his discretion declare that respondent 2 was duly elected, then he was passing an order which he had jurisdiction to pass and the order cannot be interfered with by means of a writ. A reference has been made in this connexion to *Gopala Iyengar v. Mohamed Ibrahim Rowther* (14). In that case the District Judge, on setting aside the election of a party as Municipal Councillor because of a disqualification, ordered a fresh election. Another party, who had applied for being himself declared duly elected, came up on revision, contending that he was entitled to be so declared. The Full Bench dismissed the revision petition, holding that a candidate who gets the next highest number of votes to the successful candidate who is disqualified is not entitled, as a matter of course, to be declared elected under the then R. 12 which is identical in its terms with the present R. 11. What was decided was that a candidate in such a position was not entitled, in such a case, to be declared elected and not that it was not permissible for the District Judge to pass either of the two orders which the rule allowed. I must find then that the Election Commissioner in declaring respondent 2 elected passed an order which was within his jurisdiction and that I cannot therefore interfere with it.

The result then is that C. M. P. No. 4335 of 1932 has to be and is dismissed with costs. Pleader's fee Rs. 200 on each petition.

P.R.S./K.S.

Order accordingly.

14. A I R 1925 Mad 1119=90 I C 759=48 Mad 509 (F B).

* A. I. R. 1933 Madras 137

BEASLEY, C. J. AND CORNISH, J.

Ammathayarammal—Appellant.

v.

Official Assignee, High Court, Madras—Respondent.

Original Side Appeal No. 47 of 1930, Decided on 3rd March 1932, against decision of Waller, J., D/- 1st May 1930.

*** (a) Evidence Act (1872), S. 154—Court can allow cross-examination of one's own witness without declaring him to be hostile.**

Before the party calling the witness can cross-examine him, it is not necessary that the wit-

ness should first of all be declared to be hostile and questions to cross-examine can be allowed by the Court to be asked even though the witness does not show himself to be hostile: *A I R 1922 P C 409* and *A I R 1931 Cal 401, Rel. on.* [P 139 C 1; P 140 C 2]

*** (b) Evidence Act (1872), S. 154—Court's discretion in allowing cross-examination by party calling him should not be exercised unless necessity appears from examination-in-chief—Permission to cross-examine is necessary—It should not be tacit but should be expressed in some form—S. 142 does not apply to the case—Evidence Act (1872), S. 142.**

Although S. 154 gives the Court an unfettered discretion to allow cross-examination of a witness by the party calling him it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination. That section does not entitle any party for instance to say: "I propose to call my opponent and cross-examine him" and the Court to allow such cross-examination without anything more. Something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. Therefore, it is necessary before the procedure of S. 154 can be adopted either for the permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should not be tacit but should be signified if not in words by some other action of the Court indicating permission. S. 142 does not apply to such a case: *English cases referred* [P 141 C 2]

(c) Evidence Act (1872), S. 154—Discretion should not be interfered with in appeal.

When the Court has exercised its discretion under S. 154 it ought not to be interfered with by the appellate Court. [P 143 C 2]

(d) Evidence Act (1872), S. 154 — Party cross-examining his own witness—Whole evidence need not be rejected—Evidence.

It is not an implication that a party when he cross-examines a witness called by him thereby intends to discredit his evidence in toto; the cross-examination may be directed only to overthrowing certain parts of his evidence; and a Court or a jury is not bound to entirely disbelieve a witness because a portion of his testimony has been discredited in cross-examination: *Paulkner v. Brine*, 1 F & F 254, *Expl.*; *A I R 1931 Cal 401, Rel. on: Case law referred* [P 144 C 2]

(e) Benami—Burden of proof — Evidence Act (1872), Ss. 101 and 114.

There is no presumption in favour of benami and the party alleging it must prove it. [P 145 C 1]

(f) Benami— Person purchasing property in wife's name—Wife is benamidar unless otherwise proved — Evidence Act (1872), Ss. 101 and 114.

Where a conveyance is taken in the name of the wife of the person paying the consideration the presumption is that the wife is the benamidar and the onus is on her if she alleges so to show that the conveyance was paid for by her own money. [P 145 C 2]

T. R. Venkatarama Sastriar and *K. Narasimha Ayyar*—for Appellant.

Nugent Grant for *V. Varadaraja Mudaliar* and *D. R. Venkatesa Ayyar*—for Respondent.

Beasley, C. J.—Defendant 1 in the suit under appeal is an insolvent and defendant 2 is his wife. The Official Assignee claimed in the suit a declaration that three houses, the title-deeds of which stand in the name of the insolvent's wife, defendant 2, were in reality the property of the insolvent who paid for them. The defendants on the other hand contended that the insolvent's wife was the actual buyer and that all the money required came from her pocket with the exception of 1/6th of the price of one of the houses.

It is not necessary at this stage to go into any of the facts of the case because an objection has been taken, which we are dealing with as a preliminary objection to certain procedure adopted at the trial. The Official Assignee called the insolvent, defendant 1 in the suit, in support of his case. Whilst he was under examination-in-chief, Mr. Grant who appeared for the Official Assignee put a number of questions to the witness of a cross-examination nature. Objection is taken that Mr. Grant cross-examined his own witness. This, it is contended by the appellant, he was not entitled to do unless (1) the witness first showed himself to be hostile and (2) leave of the Court to put such questions to him had been obtained. It is objected, first, that the witness did not show himself by his demeanour to be hostile; and, secondly, if he did, the consent of the Court to cross-examine him was never obtained. There is nothing on the record of evidence to show that any submission was ever made to the trial Judge that the witness was hostile and that leave was sought to cross-examine him. Mr. Grant quite fairly says that he has no recollection of having made any such submission. It is equally clear that no objection to the procedure adopted by the learned counsel for the Official Assignee was taken by his opponent. From the concluding passage in the learned trial Judge's judgment it would appear that Mr. Srinivasa Ayyangar who appeared for the defendants in the course of his argument condemned the procedure already referred to. The learned trial Judge

deals with Mr. Srinivasa Ayyangar's argument on this point and states as follows :

" I am aware that, as between two ordinary litigants, such a method of procedure has been strongly condemned by the Judicial Committee. The Official Assignee stands in a different and frequently a very embarrassing position. He represents the estate of the insolvent, who is usually colluding with transferees against his creditors. The insolvent, in such a case, has to be made a party. The Official Assignee must examine him as a witness, for there are certain things that only he can speak to, but it would be absurd to treat him as having been put forward as a witness of truth, by all of whose statements the Official Assignee is bound. In this case the insolvent had to be examined to admit the correctness of his banking account and the fact that all the money for the houses came out of it. Beyond that, everything he wanted to say was in favour of his wife and I can see nothing improper in allowing the Official Assignee to cross-examine him in order to show that his evidence, in other respects, was not to be accepted and to elicit admissions from him that were inconsistent with his support of his wife."

What in my view, is to be understood by these observations is (1) that no objection was taken to Mr. Grant cross-examining his own witness by Mr. Srinivasa Ayyangar whilst the witness was in the witness box, and (2) that the trial Judge did not interfere but allowed the cross-examination to go on. What is quite clear is that, if Mr. Srinivasa Ayyangar had objected to this procedure or Mr. Grant had asked for permission to adopt it, Waller, J., would have disallowed the objection and allowed Mr. Grant to cross-examine the witness for the reasons he has stated. Three questions arise here : (1) Before the party calling the witness can cross-examine him, is it necessary that the witness should first of all be declared to be hostile or can such questions be allowed by the Court to be asked even though the witness does not show himself to be hostile ? (2) Is it necessary that, before they are asked, the leave of the Court should be asked for and obtained. (3) What is the effect of such an examination of the witness on the testimony of that witness; should the whole of his evidence be discarded or is it open to the Court to accept some of it and discard the rest ? The meaning of S. 154, Evidence Act, has to be considered. That provides that :

" the Court may in its discretion permit the person who calls a witness to put any questions

to him which might be put in cross-examination by the adverse party."

For the respondent, the Official Assignee, it is argued that that section gives the Court an unfettered discretion and that the exercise of that discretion is not therefore dependent upon the hostile demeanour of the witness; and furthermore it is argued that it is not necessary that the leave of the Court to put such questions to the witness should be obtained because the words used are "the Court may * * * * permit * * *."

It is argued that this permission need not be expressed in words and that, if no objection is raised by the opposite side and the Court does not interfere with the cross-examination, the permission of the Court is to be implied. It is further argued that the effect of a party cross-examining his own witness is not to cause general discredit to be cast upon the witness and that it is open to the Court to attach such weight to the evidence of the witness so dealt with as it thinks right. With regard to the first question raised, it must be observed that in practically all the cases cited the witness had been shown to be a hostile witness so that no question arose as to the limits of the Court's discretion. There are however two cases which actually do consider this question and one of them is a decision by which we are bound. That is the decision of the Privy Council in *Baikuntha Nath Chatteraj v. Prasannamoyi Debya* (1). The judgment of the Judicial Committee was delivered by Sir Lawrence Jenkins and on p. 701 he says :

" Nagendra Nath Ghouse does not support the proponent's case, for in his examination-in-chief he declared that he did not know whether Mandakini executed any will, and that it was to a blank paper that he put his signature at the request of Ramlal Gosain. An application was therefore made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him. This is a position for which provision is made by S. 154, Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. One of the appeal Court's adverse comments on the trial Judge's conduct of the case is that the cross-examination of the witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have been made without the Court's attention being drawn to that portion of the

1. A I R 1922 P C 409=72 I C 236 (P C).

order sheet in which the District Judge remarks, as the record of the deposition indicates, that the witness was virtually cross-examined, though the Judge in fact did not think he had turned hostile."

It is this case which supports the following view expressed on p. 974 of Edn. 8 of Woodroffe & Ameer Ali on Evidence :

"It can therefore be hardly said in this state of the authorities, especially in India where the words of Ss. 154 and 155 are alone to be considered, that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition; and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court."

The other case is *Praphullakumar Sarkar v. Emperor* (2). This was a decision of a Full Bench of five Judges. The facts of the case are that one of the prosecution witnesses was declared hostile and permission was given to the Public Prosecutor to cross-examine him. In his charge to the jury the Judge said :

"Maniruddin has deposed in favour of the defence story. This witness has been declared 'hostile' and cross-examined by the prosecution. His evidence has therefore to be excluded from your consideration."

I shall refer to this case again when I come to deal with the question whether such testimony has to be excluded from the consideration of the Court. I have referred to this case however because of the observations of the Full Bench upon the meaning of S. 154, Evidence Act. On p. 1424 (of 58 Cal.) Rankin, C. J., says :

"Now it is true that in *Coles v. Coles* (3), and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good definition of a hostile witness and the Evidence Act is most careful in S. 154 not to restrict the right of 'cross-examination' even by committing itself to the word 'hostile.'"

On p. 1433 Buckland, J., says :

"As a practical matter therefore S. 154 refers exclusively to cross-examination of a witness by the party calling him. We are not asked to state the circumstances in which the Court may exercise its discretion in favour of the party seeking to cross-examine, and indeed it would be impossible to formulate any comprehensive rule. One observation however is permissible. The object of calling a witness is to elicit the

facts and if the facts to be elicited are such as ought to be elicited from a witness, and if this cannot be elicited without cross-examining him, it would be difficult to say that the discretion was wrongly exercised."

In this case the judgment of the Judicial Committee in *Baikuntha Nath Chatteraj v. Prasannamoyi Debya* (1) is not referred to, but the same view of the scope of S. 154, Evidence Act, is taken both by Rankin, C. J., and Buckland, J. In England the law is different upon the point. The Common Law Procedure Act of 1854 settled what had been the subject of varying decisions for many years by providing that :

"a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence or by the leave of the Judge, prove that he has made at other times a statement inconsistent with the present testimony; but before such lastmentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

In England therefore the exercise of the discretion of the Court is conditional on the adverse demeanour of the witness, whereas S. 154, Evidence Act, gives an unqualified discretion to the Judge apart from any question of the hostility or otherwise of the witness. In the opinion of the Referring Judges in *Praphullakumar Sarkar v. Emperor* (2) the reason why the Court in India is given a much wider discretion than in England is in all probability to avoid the conflict which had existed in England over the words "hostile" and "adverse." The first question raised must, in my view, be answered in the negative.

I now turn to the consideration of the question as to whether permission of the Court must be asked for. Upon this point there is an entire absence of authority which is not at all surprising. Instances where the procedure apparently adopted in this case, namely, the cross-examination of the party's own witness without the leave of the Court being obtained and without objection made by the opposite party and without the express approval of the Court, must indeed be rare. In every case to which reference has been made upon the questions under consideration, so far as I am able to see, the leave of the Court to cross-examine the witness had either been granted or

2. A I R 1931 Cal 401 = 1931 Cr C 497 = 131 I C 575 = 32 Cr L J 768 = 58 Cal 1404 (F B).

3. (1866) 1 P 70 = 35 L J P 40 = 13 L T 608 = 14 W R 290.

refused. In the case under appeal it would seem that the learned trial Judge assumed from the very nature of the position in which the insolvent stood towards the Official Assignee that the witness was bound to be hostile, a perfectly reasonable assumption; but it is extremely doubtful whether the law in England allows a party to cross-examine a witness for that reason only and indeed there are decisions to the contrary such as *Price v. Manning* (4). In that case it was held that a party to an action who calls an opponent as a witness has no right to cross-examine him however hostile he may be, without the leave of the Judge and that whether the witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by the party calling him. In this case, Cotton, Fry, and Lopes, L. JJ., in effect overruled the decision of Best, C. J., in *Clarke v. Saffery* (5), where Best, C. J., said :

"There is no fixed rule which binds the counsel for calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as a matter of right, cross-examine him."

Reported on p. 737 of the same report there is the case of *Barton v. Carew* (6), where a similar objection was taken, and a cross-examination of an adverse witness allowed. Abbot, C. J., said :

"I mean to decide this and no further, that in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice."

Price v. Manning (4), at any rate states that the rule is that it is a matter of discretion of the presiding Judge whether the witness has shown himself so hostile as to justify his cross-examination by the party calling him. This decision and S. 22, Common Law Procedure Act of 1854, seem to me to show that, even where a party puts his opponent into the witness-box, the Court will only exercise its discretion and allow him to be cross-examined if he shows himself to be hostile. Although S. 154, Evidence

Act, gives the Court an unfettered discretion to allow cross-examination of a witness by the party calling him, in my opinion it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination. That section does not, in my opinion, entitle any party for instance to say: "I propose to call my opponent and cross-examine him" and the Court to allow such cross-examination without anything more. It seems to me that the scheme of the section is that something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. In my opinion therefore it is necessary before the procedure of S. 154 can be adopted either for the permission of the Court to be obtained or for it to be given by the Court without its being sought. In this case, as already stated, it must be taken that no such permission was sought nor was it in words given. But Mr. Grant argues that all that the section requires is tacit permission and that, if the Court does not interfere, it must be taken to have assented to that procedure. He contrasts the word "permit" in S. 154 with the word "consent" in S. 155. His contention is that the two words are used in a different sense and that the consent of the Court required in the latter section must be given as a result of a request made to it whereas the use of the word "permit" in the former section shows that even a tacit consent is intended.

There is much force in this argument because the use of the word "permit" in one section and the word "consent" in the next section makes it probable that it was not intended that these words were to have the same meaning. "Consent" seems to me to imply that it is to be given in consequence of a request made, whereas "permission" need not necessarily follow a request. This however does not entirely solve the difficulty because we have still to consider whether it is necessary for the Court to express its permission in words. In my view, it is intended by S. 154 that such a permission should be signified, if not in words, by some other action of the Court indicating its permission during

4. (1889) 42 Ch D 372=58 L J Ch 649=61 L T 537=37 W R 785.

5. 27 R R 736=R & M 126.

6. 27 R R 737=R & M 127.

the cross-examination of the witness by the party calling him. But there is another section of the Evidence Act to be considered in this connexion and that is S. 142. It is contended by Mr. Grant that, quite apart from S. 154, S. 142 allows a cross-examination by a party of his own witness during that witness's examination-in-chief without the permission of the Court if no objection is taken to it by the adverse party. That section is as follows:

"Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."

In my view, this section is intended to provide for cases different to those contemplated by S. 154. S. 142 refers merely to leading questions; S. 154 refers to questions which might be put in cross-examination by the adverse party. A question put in a leading form is not necessarily tantamount to cross-examination, whereas most questions in cross-examination are leading questions. The distinction between the object of these two sections, to my mind, is that S. 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. S. 142 to my mind clearly does not deal with such a case. It merely deals with leading questions as defined by S. 141, viz. questions suggesting the answer which the person putting them wishes or expects to receive. It cannot be imagined that the legislature had in view any questions to which it is obvious objection must be taken by the adverse party. I do not think that S. 142 assists the respondent's argument. In my opinion the procedure adopted in this case was not warranted by S. 154, Evidence Act, because Waller, J., did not signify his permission at any time during the cross-examination because I do not think that S. 154 means tacit permission. But it is clear that, had permission been formally asked for, he would have granted it and, as no objection was taken to that procedure by the appellant's counsel, and was only taken after all the evidence had been given during the course of the argu-

ment. It is now too late to allow this objection which, had it been taken during the cross-examination, would have been overruled by the learned trial Judge. I have now to consider whether the whole of the evidence of the witness has to be rejected or not. Reliance is placed by the appellant on *Faulkner v. Brine* (7). The head-note of that case is as follows:

"The defendant's counsel stating, after calling and examining a witness, that he had given another and materially different account of the transaction to the defendant's attorney, the Judge allowed the witness to be asked if they were so, and to be dealt with as adverse, under the Common Law Procedure Act of 1854, S. 29, but only with a view to discredit him generally; and this it will not do, if it is not utterly inconsistent with his sworn evidence."

The case was tried by Lord Campbell, C. J., who allowed the question to be put stating:

"It must be understood that it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all."

In *Alexander v. Gibson* (8), Lord Ellen-burg says:

"If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted. In *Lowe v. Jolliff* (9), which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other evidence and the will was established. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated."

Alexander v. Gibson (8) was referred to in *Panchanan Gogai v. Emperor* (10) to support the position that, where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness cannot in part be relied upon and the rest of it discarded or rejected. It is there pointed out that *Alexander v. Gibson* (8) has been followed ever since 1811 and that in only one case, *Bradley v. Richardo* (11), it was not followed. In *Bradley v. Richardo* (11)

7. 1 F & F 254.

8. 2 Camp 556=11 R R 797.

9. 1 W Bl. 365.

10. A I R 1930 Cal 276=1930 Cr C 356=31 Cr L J 1207=127 I C 270=57 Cal 1266.

11. 131 E R 321.

however it was held that where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated by the Judge, and *Alexander v. Gibson* (8) was referred to. The case was heard in the Common Pleas by Tindal, C. J., Gaselee, Bosanquet and Alderson, JJ., whose judgments are very fully set out by the referring Judges in their order of reference to the Full Bench in *Praphullakumar Sarkar v. Emperor* (2), Tindal, C. J., stated:

"The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that when surprised by a statement contrary to the fact, he may not call another witness to show how the fact really is."

In the opinion of Gaselee, J., *Alexander v. Gibson* (8) went too far and he disagreed with Lord Ellenborough. Bosanquet, J., stated that the practice had always been contrary to that adopted in *Alexander v. Gibson* (8), and Alderson, J. dissented from Lord Ellenborough and also stated that the case of *Lowe v. Jolliff* (9) referred to by Lord Ellenborough in his judgment established the contrary of the proposition for which it was cited. I do not think that *Alexander v. Gibson* (8) or *Faulkner v. Brine* (7) can be relied upon by the appellants. With regard to the latter case, as Rankin, C. J., points out in *Praphullakumar Sarkar v. Emperor* (2) (at pp. 1427 and 1428 of 58 Cal.) Lord Campbell is not reported to have told the jury that, because he had allowed the questions to be put, the defendant could not rely at all upon the evidence of the witness nor that the cross-examination of a hostile witness by permission of the Court must always be cross-examination to destroy the general credit of the witness, but that his observation was a common sense observation for the benefit of the jury and as a warning to counsel of the risk he ran. In *Praphullakumar Sarkar v. Emperor* (2) this question has been very fully dealt with by a Full Bench of five Judges of that Court.

I have already referred to this case for another purpose. It was there held that the fact that a witness is dealt with under S. 154, Evidence Act, even when under that section he is cross-examined

as to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence or that the party who called and cross-examined him or any other party can take no advantage from any part of his evidence and that there is no rule of law that, if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. I entirely agree with the decision in this case and with the reasoning in the judgments of Rankin, C. J., and Buckland, J. It is in all cases a question for the jury or for the Judge in a civil case to decide what weight is to be given to the testimony of a witness so dealt with and I cannot accede to the contention put forward by the appellant that a different principle is to be applied in such matters when the testimony is being considered by a Judge alone. In one case the jury are the Judges of fact and in the other the Judge alone is, and it is for the jury in the one case and the Judge in the other to attach such weight as is right to that evidence. In my opinion therefore Waller, J., was entitled to accept or reject such parts of the evidence of defendant 1 as he did, although I do not agree with the procedure allowed by Waller, J., in this case. Whatever may be the reasons for the exercise of its discretion by the Court under S. 154, first of all to obtain the sanction of the Court to cross-examine the witness, is in accordance with the general practice and that practice in my opinion ought always to be followed although S. 154 may not make such procedure imperative, but when the Court has exercised its discretion under S. 154 it ought not to be interfered with by the appellate Court.

Cornish, J.—I am of the same opinion. The learned trial Judge says at the close of his judgment that he allowed the witness to be cross-examined, and he gives as his reason that the witness was endeavouring by his evidence to help the case of his wife, the opposite party. In other words the learned Judge appears to have thought that the witness had shown himself to be adverse to the party who called him. But nowhere does it appear that permission to cross-examine the witness on that ground was actually given. There is no doubt that the correct procedure when a party is desirous of cross-examining his own witness it is for him to

formally ask for and obtain the Court's permission. The expediency at least of this course is clear; for, unless the Court is given the opportunity of considering whether on the material before it the cross-examination should be permitted, how is it to exercise a discretion? And a cross-examination which has taken place without it appearing that the Court had considered whether it should be permitted would be altogether irregular. Mr. Grant has contrasted the word "permit" in S. 154 with the word "consent" in S. 155, and contended that permission means no more than sufferance, so that, it would be sufficient if the Court signified its permission by acquiescence. I do not think it could as a matter of course be assumed simply because it appeared from the record that a witness's examination-in-chief has developed into cross-examination without objection from the Court or opposite party that the Court had exercised its discretion in permitting the cross-examination. It must somehow be shown that the Court did in fact exercise its discretion in the matter. In the present case it appears from the judgment.

A considerable argument was addressed to us on the scope of S. 154. The section differs from the corresponding provision in the English Act, 28 and 29., Vic., C. 18, which makes it a condition for leave to cross-examine that "the witness in the opinion of the Judge prove adverse." As pointed out by their Lordships of the Judicial Committee in *Baikunta Nath Chatteraj v. Prasannamoyi Debya* (1) S. 154 says nothing about a witness being hostile. It seems to me undesirable, as well as unnecessary, to attempt to define the limits within which the Court's discretion can be exercised under S. 154 when the section itself imposes none. But this much may be said with reference to the particular case before us; that a party who chooses to call his opponent as a witness, or who may by force of circumstances be compelled to take this course, as apparently the Official Assignee was here, in order to prove his case, does not on that account become entitled to treat his witness as hostile and to cross-examine him. The Court must in its discretion determine whether cross-examination of the witness shall be permitted. That was the rule laid down by the Court of appeal in *Price v.*

Manning (4), and it is equally applicable to S. 154: see *Lachiram Motilal v. Radha Charan* (12).

The cross-examination of defendant 1 having been permitted by the Court, there remains the question how far is his credit affected. Mr. Venkatarama Sastri's argument, that the cross-examination must be taken to discredit generally the evidence of the witness for the plaintiff, the Official Assignee, is founded upon the observations of Lord Campbell in *Faulkner v. Brine* (7), which have been interpreted in two cases in the Calcutta High Court, *Khijiruddin Sowcar v. Emperor* (13) and *Panchanan Gogai v. Emperor* (10), as authority for the proposition for which the learned advocate has contended. This is not the view accepted in *Emperor v. Jehangir Ardeshircama* (14), and in *Sohrai Sao v. Emperor* (15) (at p. 484 of 9 Pat.) and moreover, in *Praphullakumar Sirkar v. Emperor* (12), (at p. 1427 of 58 Cal.) Rankin, C. J., expressed the opinion that Lord Campbell's words should not be understood as meaning that the cross-examination of a witness as adverse must always destroy the general credit of the witness. This consequence, it is to be observed, does not flow from calling another witness to contradict what the witness has said; vide *Bradley v. Ricards* (16). In that case it was said by Bosanquet, J:

"A party is often compelled to call an adverse witness; and if he, on cross-examination or otherwise, makes statements inconsistent with fact, another witness may be called to contradict him, and there is no instance of a Judge having been called upon in such a case to strike out the rest of his evidence."

There seems to me no reason why different considerations should govern the case of a witness cross-examined by the party who has called him. It is not an implication that a party when he cross-examines a witness thereby intends to discredit his evidence in toto; the cross-examination may be directed only to overthrowing certain parts of his evidence; and a Court or a jury is not bound to entirely disbelieve a witness because

12. A I R 1922 Cal 267=66 I C 15=49 Cal 93.

13. A I R 1926 Cal 139=92 I C 442=27 Cr L J 266=53 Cal 372.

14. A I R 1927 Bom 501=106 I C 100=28 Cr L J 1012.

15. A I R 1930 Pat 247=124 I C 836=31 Cr L J 721=9 Pat 474.

16. S Bing 57.

a portion of his testimony has been discredited in cross-examination. In my opinion therefore the cross-examination of defendant 1 is not to be taken as a total repudiation of his evidence by the Official Assignee who called him as a witness.

Beasley, C. J.—With regard to the facts of this case, the first transaction impeached is that evidenced by a sale deed Ex. B dated 9th October 1911. That was a sale by one C. Ranganatham Naidu to defendant 2 of the site on which subsequently Baktha Lodge was built. Ranganatham Naidu was at that time a debtor to the insolvent to the extent of about Rs. 7,000 and in respect of that debt he had mortgaged the site to the insolvent by Ex. A dated 11th October 1910. The sale deed Ex. B sets out that the purchase money was paid by adjustment of the debt owing by the vendor to the insolvent. The Official Assignee's case is that no money passed, but that the property became the property of defendant 1 by adjustment of this debt. Of course, according to the terms of the deed, it was by way of adjustment only and not by payment of money that the transaction was put through. But the property stands in the name of defendant 2, the insolvent's wife. There is no presumption in favour of benami and it is therefore incumbent upon the Official Assignee to prove that this was a benami transaction. (His Lordship then discussed the evidence and after finding that the money came from the insolvent's banking account and that the defendants had failed to prove that it was defendant 2's money, proceeded.) Under these circumstances, I agree with the finding of the learned trial Judge that the Official Assignee has succeeded in showing that this was a benami transaction; and it must therefore be set aside. The other transactions impeached must also suffer a similar fate because the evidence with regard to them put forward for the defendants in the lower Court was even more vague. (His Lordship discussed the evidence and concluded.) In these circumstances I agree with the learned trial Judge that all the three must be set aside. This appeal must therefore be dismissed with costs. Certificate for two counsel.

Cornish, J.—I am of the same opinion. When once the Official Assignee has

established that the consideration for the acquisition of the Baktha Lodge site was a release of the mortgage debt due by the vendor to the insolvent, the presumption arises that the conveyance of the property in favour of the insolvent's wife was benami for himself. The onus was on the wife therefore to show that she had in fact purchased the property from her husband with her own money. (His Lordship then considered the evidence and concluded.) I agree that defendant 2 has not discharged the burden upon her, and that the appeal fails.

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1933 Madras 145

MADHAVAN NAIR, J.

Palaniswami Goundar—Defendant—Appellant.

v,

English and Scottish Co-operative Wholesale Societies, Ltd.—Plaintiffs—Respondents.

Second Appeal No. 2336 of 1927, Decided on 25th November 1931, against decree of Sub-Judge, Nilgiris, in A.S. No. 2 of 1927.

Contract Act (1872), S. 65—Benefit received under void contract must be restored.

Return of money advanced can be claimed either on the basis of quantum meruit or on the principle of the restoration of benefit under a void contract: 48 Cal 790; A I R 1927 Cal 465; A I R 1930 Mad 600 and A I R 1922 P C 403, Rel. on.; *Young & Co. v. Mayor, etc. of Royal Leamington Spa*, (1883) 8 A C 517, Dist. [P 146 C 1, 2; P 147 C 1]

C. S. Swaminathan—for Appellant.

B. Sitarama Rao—for Respondents.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the English and Scottish Co-operative Wholesale Societies for the recovery of Rs. 1,387-13-7. The plaintiffs alleged that the defendant executed two contracts under Act 1 of 1903, binding himself to work with a hundred coolies in the Mango Range Estate of the plaintiffs and received a consideration of Rs. 1,200 and further advances and way expenses of the coolies. The suit was for the recovery of the amount on the ground that the defendant failed to keep the required number of coolies in the estate. A schedule showing how the plaint amount was arrived at was also filed along with the plaint. The defendant contended amongst other things that the agreements were not supported by consideration, that the

suit contracts were invalid and unenforceable and that the amount claimed in the plaint as due from him was not correct. The last point was covered by issue 8. As the District Munsif found that the contracts were invalid he held that nothing was due to the plaintiffs and therefore dismissed the suit. On appeal the learned Subordinate Judge held that consideration was proved for both the contracts and that the plaintiffs could recover the amount advanced under these contracts. In the result he reversed the decree of the lower Court and allowed the appeal with costs.

In second appeal it was argued that the contracts are invalid inasmuch as they did not comply with the provisions embodied in the rules relating to the execution of contracts under Act 1 of 1903, and that therefore in estimating the amount due from the defendant, Rs. 1,200 advanced under the contracts should not be debited against him; and that in any event the learned Subordinate Judge was wrong in having disposed of the appeal without considering issue 8. As Mr. Sitarama Rao on behalf of the respondents frankly admitted that the contracts were invalid as they were not executed in strict compliance with the rules under the Act, it is not necessary to discuss the rules referred to in this connexion and which are published in the Fort Saint George Gazette. The question is: the contracts being invalid, should not credit be given to the plaintiffs for the sum of Rs. 1,200 found to have been advanced by them to the defendant. In support of the contention that no such credit should be given the appellant strongly relied upon *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1).

In my opinion the present case is distinguishable from the decision in *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1), in as much as the claim made here is not for the enforcement of the invalid contracts but for the restoration of the benefit accrued under the contracts, the contracts having been found invalid. Further the case in *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1), concerned itself with a contract made by a Corporation to which special consideration may be said to be applicable. The claim for the return of the

amount in cases like the present seems to be based on the principle of quantum meruit. In *Mathura Mohan Saha v. Ram Kumar Saha* (2) (at p. 827), it was pointed out that:

"where a Corporation receives money or property under an agreement which turns out to be ultra vires or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons natural or artificial; if one obtains the money or property of others without authority, the law independently of express contract will compel restitution or compensation."

In *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong* (3):

"an agreement the value of which exceeded Rs. 2,500, was executed by the Port Officer of Chittagong, by his proxy, the Port Officer of Moulmein, on behalf of the Commissioners for the Port of Chittagong by which a towing vessel was let out by the Port Commissioners on operations outside the Chittagong Port,"

it was held:

"that the agreement being in contravention of the mandatory provisions of S. 29, Chittagong Port Act, 1914, was not enforceable and that the Commissioners were entitled to recover quantum meruit for the services rendered by them."

Both these decisions refer to the decision in *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1), relied upon by the appellant. The decision in *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong* (3), was followed by this Court in *Municipal Council, Tiruvarur v. Kannuswami Pillai* (4), in which it was held by Kumaraswami Sastri and Pakenham Walsh, JJ., that:

"in spite of the invalidity of the contract a decree for what will be due on the basis of quantum meruit can be given."

In this case also reference is made to *Young & Co. v. Mayor, etc., of Royal Leamington Spa* (1), and to the other relevant cases bearing on the question. On the authority of these decisions it is clear that though the contracts are invalid the plaintiffs in the present case are entitled to the return of Rs. 1,200 advanced under the contracts. Their claim for the return of the amount can also be rested on S. 65, Contract Act, which says that:

"when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

2. (1916) 43 Cal 59=350 I C 305.

3. A I R 1927 Cal 465=103 I C 2=54 Cal 189.

4. A I R 1930 Mad 600=127 I C 120=59 Mad 352.

1. (1889) 8 A C 517.

In this connexion attention may be drawn to the decision of this Court in *Thangammal Aiyar v. Krishnan* (5), which, applying the decision of the Privy Council in *Harnath Kunwar v. Indar Bahadur Singh* (6), held that S. 65, Contract Act, requiring compensation to be paid, or restoration of advantage received, by a party under a contract, would apply to a contract void from its inception. The contention that the amount in question should be returned based on S. 65, Contract Act, seems to be unanswerable. The plaintiffs can thus claim recovery of Rs. 1,200 paid by them under the void contracts either on the basis of quantum meruit or on the principle of the restoration of benefit under a void contract; but this does not dispose of the entire claim made by the plaintiffs. In addition to the money advanced under the contracts they claim from the defendant various other items the correctness and liability to pay which are disputed by the defendant. The defendant also says amongst other things that he has not been allowed the proper amount of commission due to him. The liability to pay the amount claimed by the plaintiffs in the list filed by them along with the plaint has been questioned by the defendant on various grounds. This was the subject-matter of issue 8. In the view that was taken of the case by the District Munsif there was no need to give an express decision on this issue. The learned Subordinate Judge, setting aside the decree of the District Munsif has given a decree to the plaintiffs as prayed for without considering this issue. The Court then called for a finding on issue 8 and after its receipt modified the decree passed.

P.R.S./M.N. Decree modified.

5. A I R 1930 Mad 132=124 I C 502=53 Mad 309.

6. A I R 1929 P C 403=71 I C 629=50 I A 69=45 All 179=26 O C 223 (P C).

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BURN, J.

Pendyala Narasanna and others—
Accused—Petitioners, In re.

Criminal Revn. Case No. 289 of 1932 and Criminal Revn. Petn. No. 268 of 1932, Decided on 30th September 1932, against order of Sess. Judge, West Godavari Division, Ellore, in Criminal Appeals Nos. 3 and 4 of 1932.

Molestation Ordinance (5 of 1932), Ss. 3 (a) and (4)—Gist of offence of molestation laid down.

The gist of an offence of molestation as defined in S. 3 (a) is the doing of certain acts "with a view to cause a person to abstain from doing or to do any act which such other person has a right to do or to abstain from doing." These words govern the whole of S. 3 (a).

A conviction under S. 4 is therefore not maintainable when the acts complained of are not done with a view to prevent the complainant from doing anything which he had a right to do.

[P 147 C 2]

K. S. Jayarama Ayyar, B. T. M. Raghavachari and P. Satyanarayana Raju—for Petitioners.

K. S. Vasudevan for Public Prosecutor—
—for the Crown.

Order.—The conviction under S. 4, Molestation Ordinance (5 of 1932), is not maintainable. As Mr. K. S. Jayarama Ayyar for the petitioners contends, the gist of an offence of molestation, as defined in S. 3 (a) of the Ordinance is the doing of certain acts,

"with a view to cause a person to abstain from doing or to do any act which such other person has a right to do or to abstain from doing . . ."

Those words govern the whole of S. 3 (a). In this case there is no evidence whatever, to show that the complainant had a right even to prepare the faces of the toddy trees for tapping. The trees did not belong to him and he has nowhere said that he had got the permission of the owners to tap them. On the other hand, there is positive evidence that the complainant was committing an offence under S. 55, Madras Abkari Act. He had not obtained a license to tap the trees; he had not even got the trees marked. Yet he was having the trees tapped, as is clear from the evidence of himself, of one of his tappers (P. W. 2), of the Village Munsif (P. W. 5) and of the Excise Sub-Inspector (P. W. 6). In these circumstances it is impossible to hold that the acts attributed to the petitioners were done with a view to prevent the complainant from doing anything which he had a right to do. I therefore set aside the convictions and sentences for offences under S. 4, Molestation Ordinance. (The rest of the judgment is not material for reporting).

P.R.S./R.K.

Order accordingly.

A. I. R. 1933 Madras 148

BARDSWELL, J.

Uppu Satyanarayana — Complainant
—Petitioner.

v.

H. B. Yorke — Accused — Opposite
Party.

Criminal Revn. No. 112 of 1932 and Criminal Revn. Petn. No. 107 of 1932, Decided on 24th August 1932, against order of Subdivl. Magistrate, Cocanada, in Criminal Case No. 49 of 1931.

(a) **Madras Local Boards Act (1920), S. 193**
—Licence fee is not tax.

A license-fee is not a tax. [P 149 C 2]

(b) **Madras Local Boards Act (1920), S. 202**
—Bye-laws under—Reasonableness can be
considered by criminal Courts.

The reasonable and equitable nature of bye-laws framed by local bodies is a matter open to the criminal Courts to consider when offenders against the bye-laws are put up for prosecution before them : *Steels v. Galinski*, (1904) 1 K B D 615 and *Kruse v. Johnson*, (1898) 2 Q B 91, Ref.

[P 150 C 2]

(c) **Madras Local Boards Act (1920), S. 193**
—License-fee — Questions of legality and
reasonableness are separate.

A bye-law, or any rule or order of the kind, as to the taking out of a license is not bad merely because the license fee is excessive. The questions of the legality of ordering that a license should be taken out and that of the reasonableness or unreasonableness of the fee charged for such license are separate and independent questions, and the legality of the order does not depend on the fees being reasonable : *Criminal Revision No. 401 of 1931, Rel on.* [P 150 C 2]

(d) **Madras Local Boards Act (1920), Ss. 193 and 212 (9)**—Excessive fees cannot be recovered summarily.

Where the license fee levied is excessive and cannot be justified Court will refuse its summary recovery under S. 212 (9) ; *A I R 1931 P C 217, Ref.* [P 151 C 2]

(e) **Madras Local Boards Act (1920), Ss. 193 and 166**—S. 193 is imperative.

Section 193 is mandatory in its terms like S. 166, and hence a license should be taken out for a place to be used for any of the purposes specified in Sch. 7. [P 151 C 1]

P. Somasundaram and G. Balaparameswari Rao—for Petitioner.

O. T. G. Nambiar for King and *Partridge*—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—The petition is filed by the President of the Samalkota Panchayat Board, the respondent being the Manager of the Deccan Sugar and Abkari Co., Ltd., at Samalkota. The respondent was prosecuted by the petitioner for failure to take out licenses for (1) the manufacture of arrack with machinery; (2) the manufacture of CO₂ gas with machinery; (3) the manufacture of confectionery with

machinery. The Cocanada Taluk Board had on 28th August 1930 passed a resolution to the effect that no place within its jurisdiction should be used for any of the three specified manufactures, without the license of the President of the Union Board concerned if the place was within Union limits, the fee for a licence in each case being Rs. 400 while the license was only to endure for a year. The manufacture or refining of sugar was also specified and the fee for this was fixed at Rs. 500. This resolution was notified in the District Gazette on 23rd September 1930. A resolution in similar terms, though of course restricted in its scope to the limits of the panchayat's jurisdiction, was passed by the Samalkot village panchayat on 12th November 1930, and this resolution was notified in the District Gazette on 22nd November 1930: (Ex. A-1). By Ex. A-1 the owner or occupier of every place used for the specified manufacture was to apply to the President of the panchayat for a licence for the use of such place for such a purpose within 30 days of its publication.

The order as to applying for the licence was with reference to Sch. 7, Madras Local Boards Act 14 of 1920 and the three manufactures noted above as (1), (2) and (3) can fall under either Cl. (p) or Cl. (q) of that schedule. The heading of Sch. 7 is "Purposes for which premises may not be used without a Licence" and Cl. (p) runs "using for any industrial purposes any fuel or machinery," while Cl. (q) runs :

"in general doing in the course of and industrial process anything which is likely to be offensive or dangerous to human life or health or property."

For the purposes of this case, if any clause applies, it must be Cl. (q). The respondent did not apply for any licence for the manufactures (1), (2) and (3), but instead a letter (Ex. B), dated 18th December 1930, was sent through the solicitors of his firm, the managing agents of which are Messrs. Parry & Co., Ltd., pointing out that the firm had been paying a license-fee of Rs. 300 for the use of their factory at Samalkota for the manufacture or refining of sugar and for manufactures (1), (2) and (3); that it was well-settled law that licence-fees are not analogous to taxation, but should be proportionate to the expenses incurred for

supervision of the industry or purpose which is licensed ; that it was obvious that the fee of Rs. 1,700 in all now imposed could have no relation to the cost of supervision by the panchayat, and that the firm therefore did not propose to apply for licences and would resist any attempt on the part of the President of the Union Board to enforce the levy. The prosecution of the respondent then followed. Ex. B had stated that the respondent's company might address the Government in the matter, but I understand that it has not done so. The prosecution was brought under Ss. 193, 207 and 212 (9), Madras Local Boards Act. S. 193 provides that a panchayat may notify that no place shall be used for any one or more of the purposes specified in Sch. 7 without a licence issued by the President of the panchayat, which licence is to be applied for by the owner or occupier of such place within 30 days of the publication of such notification. Under S. 207 a person shall on conviction be punished as provided in Col. 4, Sch. 8 for contravention of any provision of any of the sections specified in Col. 1 of that schedule. In Col. 1, Sch. 8, is found S. 193, and the subject noted against it is

"using a place for an offensive or dangerous trade without a license."

The punishment provided for is one of a fine of Rs. 100. By S. 212 (9), when any person is convicted of an offence in respect of the failure to obtain a licence as required by the provisions of the Act, the Magistrate shall, in addition to any fine which may be imposed, recover summarily and pay over to the Local Board the amount of the fee chargeable for the licence. The case was heard by the Sub-divisional Magistrate of Cocanada, who found the respondent not guilty and acquitted him under S. 245, Civil P. C. The Magistrate's ratio decidendi has been stated by him thus :

"The proposed licence fees being contrary to the purposes of chapter (obviously a mistake for Part) 4 of the Act, I hold that the panchayat's action is not within the powers given to it under the Act. The notifications are therefore ultra vires. Disobedience of a legal notice only constitutes an offence, but not of a notice which is ultra vires. I accordingly hold that no offence is made out under Ss. 193 and 207, Local Boards Act."

Against this decision the President of the Panchayat Board has come up on revision. It is conceded for the peti-

tioner, and well established, that a licence-fee is not a tax. Licences are imposed under Part 4 of the Act for purposes of public health, safety and convenience. The Magistrate's view that the notification was contrary to Part 4 was based on his finding that the object of the Panchayat Board was to make money from licence-fees and was not required to meet any expenses of supervision, as there was a technical Government staff to supervise the factories and no such staff was employed by the Panchayat Board, while the factory itself was outside the village and unconnected with it, so that it was really not a source of danger to the village. There can be no doubt as to the correctness of the findings. Obviously the Panchayat Board was out to make money by suddenly raising the licence-fees to be paid by these respondent company from Rs. 300 to Rs. 1,700 a year. The evidence of the President, as the one witness for the prosecution, shows that the Board's sanitary staff consisting of a Sanitary Inspector on Rs. 40 a month whose post had been vacant for a year, and of two maistries on Rs. 23 and Rs. 20 respectively per mensem, have to look after the sanitation of the whole panchayat area, and, in respect of the factory premises, have only to see whether they are kept in a sanitary condition or not, while the company itself looks after the sanitation of the factory compound.

He says indeed that the licence-fee for the sugar factory was raised to Rs. 500 with the object of appointing a special staff over the sugar factory, but he has to admit that there was no one in view to be appointed for the factory's supervision, and that no resolution had yet been passed for the appointing of an officer for such supervision. It has also to be observed that the manufacture of arrack had been carried on in the factory premises for over 30 years and those of CO2 and confectionery for nine and seven years respectively, before the panchayat decided to treat them as offensive or dangerous to human life, so as to necessitate the taking out of licences for them. Of course however if the manufactures are such that licences can be legally ordered to be taken for them, the panchayat had the right to direct at any time that licenses for them should be applied for. Further, I must note that

the schedule to Ex. A, giving the rates of fees for licences for dangerous trades, shows no rate in any approaching those now fixed for the manufactures in question, nor does P.W. I attempt to explain why such heavy fees should be paid by the defendant's company. The Magistrate has stated in his judgment that he has refrained from adjudicating upon the reasonableness or otherwise of the notifications in question, as he was doubtful in the face of *Chairman Municipal Council, Chidambaram v. Tirunarayana Iyengar* (1) whether it was competent for him to do so.

In fact however the question of reasonableness or otherwise is largely involved in the discussion that leads to his conclusion. I have not looked into *Chairman, Municipal Council, Chidambaram v. Tirunarayana Iyengar* (1) as it has not been quoted before me, and I do not find it necessary for me to do so for the purpose of deciding this case, but I may note that Wallace, J., in *Criminal Revision Case No. 404 of 1931* which was referred to him on a difference between two learned Judges, Waller, J., and Krishnan Pandalai, J., has, with reference to earlier decisions of this High Court as well as of the High Courts of Allahabad and Lahore, held that the reasonable and equitable nature of bye-laws framed by local bodies is a matter open to the criminal Courts to consider when offenders against the bye-laws are put up for prosecution before them. It is also the law of England that a bye-law may be bad for unreasonableness: *Steels v. Galinski* (2), though a Court ought to be allowed to hold that a bye-law is void for unreasonableness: *Kruse v. Johnson* (3). The matter of reasonableness can also be considered from another point of view, in case of prosecution for failure to take out a licence, namely that of whether, when there has been a legal and valid order for taking out a licence, the fee charged for the licence was reasonable so that its summary recovery could be ordered under S. 212 (9) or whether it was so unreasonable that the Court could refuse to order its recovery. That the matter of reasonableness could be gone

into in such a case is what was actually decided by Wallace, J., in *Criminal Revision Case No. 104 of 1931* in agreement with Waller, J., one of the referring Judges.

As I have already remarked, the Magistrate's finding is largely based on what he considers to be the unreasonableness of the notification; and, further what he holds to be illegal is not the order for the taking out of the licence but the proposed licence-fees which he finds to be contrary to the provisions and purposes of part 4 of the Act. Nowhere has he held that the manufactures in question are not of such a nature that the licences could be ordered to be taken out in respect of them. He has indeed remarked that the factory was not in itself a source of danger to the village, but he has not found that the manufactures carried on in it could not from any point of view be regarded as dangerous to human life. Had the Magistrate's decision really been that the entire notifications were illegal, and could that finding be taken as correct, then there are a number of decisions which show that there can be no criminal conviction for the disobedience of an invalid order. To these decisions I do not find it necessary to refer as the point with which they deal is not the one that I have now to consider. I have only to say that no case had been shown to me in which a bye-law, or any rule or order of the kind, as to the taking out of a licence has been held to be bad merely because the licence-fee was excessive. Clearly, I take it, the questions of the legality of ordering that a licence should be taken out and that of the reasonableness or unreasonableness of the fee charged for such licence are separate and independent questions and the legality of the order does not depend on the fees being reasonable. And there is authority for this view in the decision to which I have already referred in *Criminal Revision Case No. 404 of 1931*.

It has been argued for the respondent that, while S. 166 makes it imperative that a licence shall be taken out before a motor vehicle can be used by him on any public road, S. 193 does not require that a licence shall be taken out for a place to be used for any of the purposes specified in Sch. 7 before that place can be used for any such purposes. I can however see no force in this argument.

1. A I R 1928 Mad 847=29 Cr L J 710 = 51 Mad 876=110 I C 454.

2. (1904) 1 K B D 615.

3. (1898) 2 Q B 91 = 67 L J Q B 782 = 46 W R 630=78 L T 647.

Both S. 166 and S. 193 appear to me to be equally mandatory in their terms. By S. 166 no person shall use any motor vehicle for hire on any public road in a district except on a license obtained from the President of the District Board, while under S. 193 the panchayat may notify that no place shall be used for any one or more of the purposes specified in Sch. 7, without a licence issued by the President of the panchayat; and the owner or occupier of every such place shall apply to the President for the use of such place for such purpose. It is true that the defendant's company had been carrying on the manufactures in question for a considerable time without having to take out licences therefor, but that cannot exonerate the defendant from continuing the manufactures without licence after the expiry of the term fixed by the panchayat's notification provided that the circumstances warranted the panchayat in ordering the taking out of the licences. This point was not taken before the Magistrate and at the trial the matter seems to have been taken for granted. I do not however think it necessary to ask the Magistrate to give a decision on this point which was not brought to his notice, but has only been taken here by way of opposition to the revision application, especially when it can be decided by a reference to the plain words of the statute and when its decision here will simplify the issue on which he has to find.

The main point which I have now to consider is that of whether the licence-fees for the manufactures (1), (2) and (3) are so unreasonable that their summary recovery should not be ordered under S. 212 (9). Strictly speaking, the point will not arise unless it is first decided that the defendant can be convicted under S. 207. For reasons already stated I must hold that this matter has not been properly decided by the Magistrate in that he has found that the licence-fees are improper without finding that the panchayat had no right to insist on the taking out of licences; and I shall have to send the case back to him for a decision on proper grounds. Still, as the matter has already been dealt with by the Magistrate and as it has also been fully discussed before me, besides being one which admits of no doubt, I shall consider it. The fees imposed by the

notifications are most certainly exorbitant and unreasonable. I have stated some of the grounds on which they must be held so to be above in para. 3; and to what is stated there I would add the citation made by Wallace, J., in the criminal revision case already referred to from the Privy Council decision in *Pazundaung Bazar Co. Ltd. v. Municipal Corporation of the City of Rangoon* (4) that the fee:

"need not be confined to the cost of the issue and inspection of licences and the office expenses of the controlling authority, but may reasonably cover the case of all special service necessitated by the duties and liabilities imposed on the Corporation."

In the case dealt with by him, which was one as to the reasonableness of the fee charged under S. 166 (2) of the Act for the plying of motor-buses on the public road, Wallace, J., mentioned certain service the cost of which might reasonably be covered by the licence-fee. But in the present case services such as those specified by the learned Judge cannot be supplied nor are any services supplied to it that are at all analogous to them. In fact the panchayat supplies no services that are at all special to the respondent's company, while its President's suggestion that it may do so at some future time are quite nebulous. The very excessive fees then that it has sought to impose cannot be justified, and so they could not in any event be recovered under S. 212 (9).

The panchayat will have acted within its powers in directing that licences be taken for manufactures (1), (2) and (3) if those manufactures are found to be manufactures separately carried on, that are offensive or dangerous to human life or health or property. I understand that a contention for the respondent is that these manufactures are only parts of the sugar manufacture for which his company had long been taking out a licence and that what they produced are only by-products of the main manufactures. This is a point that I need not now consider as it should be decided first of all by the trial Court.

The acquittal of the respondent is set aside and the case will be sent back to the Subdivisional Magistrate, Cocanada, for proper disposal in the light of these remarks. What he has to decide is whe-

4. A I R 1931 P C 217=133 I C 724=58 I A 313=9 Rang 440 (P C).

ther the notifications of the Taluk Board and Union Panchayat were orders that the respondent was legally bound to obey and the disobedience of which constituted an offence punishable under S. 207 read with Sch. 8. No question of recovery under S. 212 (9) will arise.

P.R.S./K.S.

Case remanded.

* A. I. R. 1933 Madras 152

VENKATASUBBA RAO AND REILLY, JJ.

K. G. Ethirajulu Chettiar—Appellant.
v.

Official Receiver, East Tanjore, Negapatam—Respondent.

Appeal No. 226 of 1932, Decided on 3rd October 1932, against order of Sub-Judge, Mayavaram, D/- 24th March 1932.

* (a) **Provincial Insolvency Act (1920), S. 52—Immovable property which is not attached is not in the possession of Court within the section.**

Property which is not attached cannot be said to be in the possession of the Court within the meaning of S. 52. Therefore property, which a judgment-creditor is seeking to bring to sale, on the ground that the decree creates a charge upon it, is not property in the possession of the Court, and the interim receiver cannot have the sale stopped under the section: *A. I. R. 1932 Mad. 95; A. I. R. 1928 Bom. 177 and A. I. R. 1929 Cal. 524, Ref.* [P 153 C 1]

* (b) **Provincial Insolvency Act (1920), S. 52—Decree creating a charge—Property brought to sale in execution—Order under S. 52 stopping sale is not appealable—Civil P. C. (1908), Ss. 2 and 47.**

Where a property over which a charge is created by a decree is brought to sale in execution of the decree and the sale is stopped under S. 52, Insolvency Act, on the application of the interim receiver, the order stopping the sale is neither a decree nor an order under S. 47, Civil P. C., and hence it is not appealable. [P 153 C 1, 2]

(c) **Civil P. C. (1908), S. 115—Discretion to treat appeal as civil revision.**

Where the lower Court passes a non-appealable order which it had no jurisdiction to pass and which infringes the plain provisions of law and an appeal is filed from such order, the Court can treat the appeal as a civil revision. [P 153 C 2]

T. R. Venkatarama Sastri and K. P. Mahadeva Ayyar—for Appellant.

C. A. Seshagiri Sastry and K. S. Desikan—for Respondent.

Venkatasubba Rao, J.—The lower Court has held that the decree is invalid for want of registration under S. 17, Registration Act, and Mr. Venkatarama Sastri contends this view is wrong. It is unnecessary to consider this point on account of the opinion we have formed on another question that has been raised. A few facts bearing on that question

may be stated. The appellant filed a suit (C. S. No. 164 of 1931) in the High Court on its original side for the recovery of a certain sum of money. That suit was compromised by the defendant agreeing to pay a certain specified amount, which was declared to constitute a charge on some immovable property. It was also stipulated that in default of payment of the sum the property itself should be sold. In pursuance of this compromise a decree was passed, which after stating that the immovable property set forth in the schedule thereto should be security for the payment of the amount mentioned, went on to provide that in default of payment the plaintiff was to be at liberty to bring the property to sale in execution of the decree itself. This decree was passed in April 1931, and in June the plaintiff (appellant) got it transferred to the lower Court for execution as the property charged by the decree was situated within the jurisdiction of that Court. In July 1931 a petition was filed for adjudicating the defendant an insolvent, and the respondent was appointed interim receiver in the insolvency. In September 1931 the appellant filed an execution petition in the lower Court applying for the sale of the property, which was charged by the decree. He also applied that the interim receiver should be impleaded as defendant 2 in the suit. The latter did not oppose the application and was accordingly impleaded as a party. The proclamation of sale was in due course settled, and the sale was finally fixed for 21st March 1932. In the meantime, on 12th March the interim receiver applied to the executing Court under S. 52, Prov. Insol. Act, that the sale should be stopped and that other suitable relief should be granted.

Mr. Venkatarama Sastri on these facts contends that S. 52 is inapplicable. The gist of the interim receiver's application is that the decree of the High Court was ineffectual, not having been registered and that it did not therefore have the effect of making the plaintiff a secured creditor. The section provides as to what should be done, where a decree being under execution, the executing Court is informed that a petition to declare the judgment-debtor as insolvent has been admitted. The executing Court, the section says, shall direct the property

of the debtor against which execution has issued, if in the possession of the Court, to be delivered to the receiver. Mr. Venkatarama Sastri's contention is that the property in question was not in the possession of the Court and that the section therefore is inapplicable. The words "if in the possession of the Court" have given rise to some difficulty. If what is attached is moveable property, there can be no doubt that it is the property in the possession of the Court. As immovable property under the procedure obtaining in India is not attached by seizure, some doubts were expressed whether such property can be said to be property in the possession of the Court. In *Sivasami Odayar v. Subramania Aiyar* (1), a Bench of this Court, after referring to *Mahasukh Jhavadas v. Valibhai Fatubhai* (2), and *Haranchandra Chakravarti v. Joychand* (3) reluctantly came to the conclusion that immovable property under attachment must be held to come within the terms of the section. But at any rate there is no warrant for holding that property, which is not even attached, is in the possession of the Court. By no fiction of law can it be held, that the property which a judgment-creditor is seeking to bring to sale, on the ground that the decree creates a charge upon it, is property in the possession of the Court. S. 52 does not therefore apply, and the lower Court should not have allowed the interim receiver's application.

A preliminary objection has been taken that the appeal is incompetent. The interim receiver, as I have pointed out, was impleaded as a party to the suit in execution. But his application cannot be treated as falling within S. 47, Civil P. C. In making the application he cannot be deemed to have represented the judgment-debtor; for the right he put forward was a paramount one, being that of the general body of creditors. Mr. Venkatarama Sastri in the circumstances did not seriously contend that this should be treated as an appeal filed from an order made under S. 47, Civil P. C. The interim receiver by reason of a statutory right conferred upon him by S. 52, Prov.

Insol. Act, made the application in question to the lower Court, and against an order made in such a proceeding, no appeal is provided. Such an order comes neither under S. 47 nor falls within the definition of "decree" in the Code. To give effect to Mr. Venkatarama Sastri's contention, we must be prepared to convert the appeal into a civil revision petition. The question then is, can we in the exercise of our discretion treat this appeal as a civil revision petition? We are prepared to so treat it, as the lower Court has infringed the plain provision of S. 52 and had no jurisdiction to make the order in question. The order of the lower Court is accordingly set aside, but in the circumstances we direct the appellant to pay the respondent's costs of this appeal.

Reilly, J.—I agree.

P.R.S./K.S.

Order set aside.

A. I. R. 1933 Madras 153

CURGENVEN, J.

(*Yerramilli*) *Satyanarainarao* and others—Plaintiffs—Appellants.

v.

(*Guna*) *Venkataswami* and others—Defendants—Respondents.

Second Appeal No. 1347 of 1926, Decided on 30th April 1931, against decree of Sub-Judge, Narsapur, in A. S. No. 140 of 1924.

(a) Civil P. C. (1908), S. 47—Execution sale—Decree-holder becoming auction-purchaser—Possession is taken as auction-purchaser.

When the auction purchaser and the decree-holder are combined in one person in an execution sale it is plainly *qua* auction-purchaser and not *qua* decree-holder that he gets possession of the property sold by auction. [P 155 C 1]

(b) Limitation Act (1908), Art. 116—Execution sale—Auction purchasers getting no lawful delivery but selling that property to plaintiff—Sale deed laying down that vendor to give plaintiff lawful delivery after getting sale certificate from Court—Failure to do so—Judgment-debtor setting up adverse possession—Plaintiff suing for return of consideration—Art. 116 applied—Time would run when vendor became incapable of fulfilling his undertaking.

The defendants were the auction-purchasers in an execution sale on a decree in a different suit but had not got the lawful delivery of the property sold. The plaintiff got a sale deed of the said property from the defendants. The judgment-debtor in decree on which execution sale was held pleaded adverse possession. The plaintiff then sued the defendants for the recovery of the property or return of the consideration paid by him to the defendants. There was a clause in the sale deed as under: "We shall

1. A I R 1932 Mad 95=136 I C 238=55 Mad 316.

2. A I R 1928 Bom 177=109 I C 152.

3. A I R 1929 Cal 524=123 I C 737=57 Cal 122.

put in an application for delivery and give delivery to you. Afterwards we shall bring from the Court the said receipt for delivery, and the certificate and give the same to you. You will have to bear the charges for the said delivery."

Held: that Art. 116 applied to such cases. That no time was fixed within which delivery was to be given, and although it was true that the plaintiff might at any time after the execution of the sale deed have sued to enforce delivery under it, so that time would have begun to run for such a suit from the date of contract, yet under the circumstances of the case the cause of action for refund of the purchase money would not have simultaneously arisen but would only have become available when the vendors became incapable of carrying out their undertaking. Before that occasion arose the vendees could not have sued, alleging a breach of the contract of title, for the return of the purchase money: *A I R 1915 Mad 708* and *26 Bom 750, Dist.*

[P 156 C 1]

(c) **Limitation—Plaint amended—Question as to limitation—Civil P. C., O. 6, R. 17.**

The amendment of a plaint relates back to the date of institution of the suit with regard to a question of limitation: *36 Mad 378*; *19 Mad 425*; *A I R 1921 P C 50* and *33 Bom 641, Rel. on.*

[P 156 C 2]

P. Somasundaram—for Appellants.

C. Rama Rao, M. Appa Rao and K. Ramamurthi—for Respondents.

Judgment.—This second appeal is preferred by plaintiffs 2 to 5 as the legal representatives of the deceased first plaintiff. Defendant 1, now also deceased, mortgaged the suit property to defendant 11 who obtained a decree upon it in O. S. No. 484 of 1903. The property was brought to sale and was purchased by defendant 12, who is said to be a clerk of defendant 11 benami for his employer. That sale was confirmed on 4th November 1908 but no attempt was made to secure delivery through the Court. On 21st July 1909 the first plaintiff took a sale deed of the suit property from defendants 11 and 12, and this was attested by defendant 1, the judgment-debtor. It is said that on the same occasion cowles were executed to defendant 4 who is a divided brother of defendant 1, and to defendants 9 and 10, sons of a brother of defendant 1's wife. There is a promissory note, Ex. E, filed in evidence said to have been executed by these lessees at the same time and place in respect of an advance of money for cultivation expenses. A few days later, on 4th August 1909, the plaintiff leased the property, under a registered lease-deed, Ex. B, to those same lessees for a term of five years. He brought the present suit because those lessees have re-

pudiated his title and set up the adverse title of defendant 1 against it. The relief prayed for was either the recovery of the property or the return of the consideration paid by him to defendants 11 and 12.

The learned District Munsif who tried the case came to the conclusion that neither the first plaintiff nor his vendors ever had possession of the suit property, which had remained throughout with defendants 1 to 3. Accordingly he found that the suit to recover possession was barred by S. 47, Civil P. C. He further found that these latter defendants had had possession adversely for more than the statutory period, so that if a suit had lain it would be barred by limitation. The learned Subordinate Judge who first heard the appeal from that decision agreed with the District Munsif on the question of possession and of the applicability of S. 47. He gave the plaintiff a decree for the refund of the purchase money. The case then came up in second appeal to this Court and the learned Judge who heard it found it necessary to remand it to the lower appellate Court for a re-hearing of the first appeal. The grounds for adopting this course were twofold. In the first place it was found that the lower appellate Court, in dealing with the question of transfer of possession, had neglected to consider the documents Exs. B, C, D and E. In the second place exception was taken to the finding with regard to limitation. Upon a re-hearing by the lower appellate Court the latter question has been decided in favour of the plaintiff. The learned Subordinate Judge's observations upon the former question are contained in para. 7 and 10 of his judgment.

In para. 7 he mentions various considerations bearing upon the question of delivery but records no explicit finding upon that point. He then goes on to consider the applicability of S. 47 as though he had finally disposed of the question of fact whether or not delivery had taken place, because it cannot be contended that if delivery had taken place, S. 47 would have application. Later on, in para. 10 he deals with the specific point which arises from the attestation of the sale deed by defendant 1, declining to draw any inference from that circumstance that defendant 1 had agreed to deliver possession of the land. It appears to me that the parts of the

judgment which deal with this question are open to the criticism firstly that no clear and definite finding is recorded whether at the time when Ex. A was executed there was in substance and in fact a delivery of the property, to the plaintiff and secondly—and this I think a more grave defect—that the direction issued by this Court, when the second appeal came on for hearing, that the four documents, Exs. B, C, D and E, should be taken into account in disposing of the question of delivery appears to have received no attention whatever. The most that can be said is that there is an inconclusive allusion to Ex. B in para. 10 of the judgment. I must hold accordingly that my learned brother Devadoss, J's direction has substantially not been complied with.

As a legal argument against the further investigation of the fact of delivery I am asked to hold that there can be no valid delivery of property after a Court auction unless there has been a certification to and recognition by the executing Court of the transfer of possession. In other words an endeavour is made to bring the circumstances within the terms of O. 21 R. 2, Civil P. C. I am unable to agree that this rule has any application to such circumstances. Even if it had, the only penalty would be that which is prescribed in sub-R. (3), namely, that the Court would not recognize the adjustment. The rule does not say that the delivery itself would be null and void. But I think that the application of the rule can only be sustained by means of an argument which confounds auction-purchaser with decree-holder. When the two are combined in one person, it is plainly *qua* auction-purchaser and not *qua* decree-holder that he gets possession, and that act does not therefore constitute satisfaction of the decree. Such an application of the rule would enable a decree-holder who had once bought the property and received possession out of Court to apply all over again in execution which seems absurd. I think there is no substance in this argument.

The plaintiff's precise case has perhaps not been very clearly stated in the plaint or elsewhere. It appears to be that on the occasion of the execution of the sale deed possession was transferred to him by defendant 1 either through his ven-

dors, defendants 11 and 12, or directly ; it cannot much matter which if, as alleged, all parties were present. As I have said, I cannot find that that question has been satisfactorily dealt with in the lower appellate Court and I cannot accede to the request that I should myself in these circumstances weigh the documentary evidence which that Court has omitted to take into consideration. Reluctant though I am therefore to extend the pendency of this protracted litigation, the only course that occurs to me as fair to the plaintiff is to remand the case for a second time for the determination of this question of delivery. I accordingly remand the case to the Subordinate Judge of Narsapur for a finding upon the issue :

"Whether the plaintiff obtained possession of the suit property from defendant 1, either directly or indirectly through defendants 11 and 12."

Accordingly as that question is settled the further question, whether the plaintiff is entitled to recover the price of the land from his vendors, may or may not arise for consideration. That question can accordingly be dealt with, if necessary, when the finding is returned. Time six weeks for the finding and seven days for objections. [In pursuance of the order contained in the above judgment, the Subordinate Judge of Narsapur submitted the following]

Finding.—I therefore find that plaintiff did not obtain possession of the land through defendant 1 directly or indirectly through defendants 11 and 12. [This second appeal coming on for final hearing after receipt of the finding from the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following]

Judgment. — The learned Subordinate Judge finds upon the issue referred to him that the plaintiff did not obtain possession of the land either directly or indirectly through defendants 11 and 12. I accept this finding. The further question therefore arises whether the plaintiff is entitled to recover the price of the land from his vendors. The learned Subordinate Judge in the judgment delivered before the remand has held that this claim is barred by limitation. It is well settled by decisions of this Court that Art. 116, Lim. Act, applies to such a suit. The lower Court has taken the

starting point to be the point of time from which the vendors were precluded from obtaining delivery, i. e. three years after the sale became absolute. Reckoning from this date, 4th November 1911, it finds that more than six years elapsed before the amendment of the plaint asking for this remedy was allowed. The correctness of this position, both as regards the terminus a quo and the terminus ad quem has been disputed before me. It is said in the first place that time began to run from the date of the sale, namely, 21st July 1909, and not from the date from which the vendors became unable to pass a good title. A reference to the sale deed will show that while in the earlier portion of it there is a recital that the vendors have put the plaintiff in possession of the land, this is contradicted by a clause at the end which runs :

"We shall put in an application for delivery and give delivery to you. Afterwards we shall bring from the Court the said receipt for delivery and the certificate and give the same to you. You will have to bear the charges for the said delivery."

I think that it was this latter arrangement which the parties intended to be operative. No time was fixed within which delivery was to be given, and although it is true that the plaintiff might at any time after the execution of the sale-deed have sued to enforce delivery under it, so that time would begin to run for such a suit from the date of contract, I think that the learned Subordinate Judge is right in holding that the cause of action for refund of the purchase money would not simultaneously arise, but would only become available when the vendors became incapable of carrying out their undertaking. Before that occasion arose I do not think that the vendees could have sued, alleging a breach of the contract of title, for the return of the purchase money. The point does not seem to be covered by authority, none of the types of cases referred to in *Subbaroya Reddiar v. Rajagopala Reddiar* (1) being on all fours with this one. In *Tulsiram v. Murlidhar* (2) the facts constituted a partial failure of consideration and time began to run under Art. 97 from the time of that failure. In the present case there was neither

failure nor anything analogous to failure, at any rate until the vendors lost the power to give delivery. I think accordingly that the lower Court is right in finding that time ran only from 4th November 1911.

I cannot however find any justification for its view that time should run up to the date of amendment of the plaint. Upon such an amendment of a plaint being allowed, whether or not it involves any question of limitation, it is well enough settled that the amendment relates back to the date of institution of the suit. This is the basis for such decision as *Sevugan Chetty v. Krishna Ayyangar* (3), *Cursetji Pestonjee v. Dadhabai Eduljee* (4), *Charan Das v. Amir Khan* (5) and *Kisandas Rupchand v. Rachappa Vithoba* (6). The respondents have attempted to meet this point by the plea that they were given no opportunity to contest the propriety of the amendment applied for. The only basis upon which this rests lies in the terms of the order which the District Munsif passed: "No objection. Allowed subject to objections." It is said that objections may pursuant to this order be at any time taken, but it appears to me that whatever opportunity may have existed after the date of that order has long since gone by. At the trial of the suit itself and notwithstanding this amendment no issue was framed regarding its subject-matter. There was an appeal by the plaintiff and No. 13 of his grounds of appeal complains that the lower Court had altogether ignored his alternative claim for the refund of the purchase money from defendants 11 and 12. Upon this appeal the Subordinate Judge's Court gave a decree for this refund. The judgment contains no allusion to any objections raised regarding the amendment of the plaint and it is to be inferred that no such objections were raised. The matter does not stop there because in the memorandum of second appeal filed by these respondents themselves, although they took exception to the decree for refund, no attempt was made to resist the claim on the specific ground now urged, that the plaint had

1. A I R 1915 Mad 708 = 23 I C 570 = 38 Mad 887.

2. (1902) 26 Bom 750 = 4 Bom L R 571.

3. (1913) 36 Mad 378 = 13 I C 268.

4. (1896) 19 Mad 425.

5. A I R 1921 P C 50 = 57 I C 606 = 47 I A 255 = 48 Cal 110 (P C).

6. (1903) 3 Bom 644 = 4 I C 726.

been amended without due notice being given to them. I can accordingly find no substance in this objection and must hold that time is to be reckoned up to the institution of the plaint. So reckoning it the claim is within time.

The appeal is accordingly allowed and the plaintiff will have a decree for the sum of Rs. 600, with interest at 6 per cent from the date of the District Munsif's decree (18th September 1919) with proportionate costs throughout. As against respondents 1 to 3 the second appeal is dismissed. The plaintiff will pay their costs of this appeal.

P.R.S./B.V. *Appeal allowed.*

*** A. I. R. 1933 Madras 157**

JACKSON AND MOCKETT, JJ.

Gurusamy Goundan—Appellant.

v.

Sivanmalai Goundan and others — Respondents.

Appeal No. 477 of 1929, Decided on 12th September 1932, against order of Sub-Judge, Coimbatore, D/- 28th March 1929.

*** (a) Civil P. C. (1908), O. 21, R. 2—Uncertified adjustment cannot be pleaded in execution even by assignee of decree-holder.**

An uncertified adjustment cannot be pleaded in execution even when an assignee from the decree-holder applies for recognition of the assignment and execution; and it does not matter even if the judgment-debtor pleads not a direct payment but an indirect payment through another his vendee, in satisfaction of the decree: *A I R 1932 Mad 372 (F.B.), Foll*; *A I R 1930 Mad 673* and *35 Mad 659*, (Per *Abdur Rahim, J.*), *Foll.* [P 157 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 15 and 2—Execution application by one of joint decree-holders — Objection by other decree-holders that application is a fraud—Court can disallow execution.

Where one of the joint decree-holders applies for execution of the decree fraudulently behind the back of the other decree-holders, the Court can, on the objection of the other decree-holders, disallow execution notwithstanding O. 21, R. 2. [P 158 C 1]

V. Balasundaram—for Appellant.

K. V. Ramachandra Ayyar and T. M. Krishnaswamy Ayyar—for Respondents.

Judgment.—Three persons Sivanmalai, Chidambara and Amarapathi Goundan, obtained a mortgage decree against one Ammani Ammal. She sold lands to Palayakottai Pattakarar, and part of the purchase price was paid by him in satisfaction of the decree. Sivanmalai and Chidambara were satisfied, and state in their affidavit that nothing more was

due. The third decree-holder Amarapathi however assigned his right to one Gurusami Goundan and he applied to execute the decree by sale of the hypotheca after recognizing his assignment.

The Subordinate Judge has found these facts to be true, and we see no reason not to accept his finding. As he says, Amarapathi Goundan got a final decree fraudulently behind the back of the judgment-debtor and other decree-holders. Accordingly he dismissed the petition and Gurusami Goundan appeals.

The appellant contends that Ammani Ammal has no right to plead against his application an uncertified adjustment. We entirely agree. It makes no difference that Gurusami Goundan is not an original decree-holder but his assignee applying for recognition; because it has now been clearly held by a Full Bench that in such circumstances O. 21, R. 2 is still operative: *N. Subramanyam v. D. Ramaswami* (1). Nor in our opinion does it make any difference that Ammani Ammal is not pleading a direct payment by herself, but a payment through her vendee as satisfaction of the decree. The law in this matter has been left in an unfortunate state. In *Rama Ayyan v. Srinivasa Pattar* (2) a single Judge held that if the transaction subsequently pleaded by an adjustment was by some person other than the decree-holder, O. 21, R. 2 or as it then was S. 258, Civil P. C., would not apply. If *A*, the judgment-debtor, transfers property to *B* on condition of his paying *C*, the judgment-creditor, then if *B* as subsequent assignee of the decree from *C* attempts to execute it *A* is not debarred by O. 21, R. 2 from pleading the uncertified adjustment.

This was approved by one member of the Bench in *Ponnusami Nadar v. Letchmanan Chettiar* (3) and dissented from by the other member *Abdur Rahim, J.*, who held that by the plain language of O. 21, R. 2 the judgment-debtor would be precluded from pleading any such adjustment. One of us had occasion to consider the passage in *Rama Ayyan v. Srinivasa Pattar* (2) and *Gopala Krishna Iyer v. Sankara Iyer* (4),

1. *A I R 1932 Mad 372=137 I C 28=55 Mad 720 (F B).*

2. (1896) 19 *Mad 220=5 M L J 218.*

3. (1912) 35 *Mad 659=12 Cr L J 567=12 I C 657.*

4. *A I R 1930 Mad 673=125 I C 543.*

and held that as soon as the agreement, no matter whether it be between judgment-debtor and decree-holder or someone else, is pleaded as an adjustment, the mischief of O. 21, R. 2 is attracted. To this opinion we adhere and unhesitatingly endorse the view of Abdur Rahim, J., in *Ponnusami Nadari v. Letchmanan Chettiar* (3). Therefore Ammani Ammal in this case cannot plead an adjustment which she has not troubled to certify under O. 21, R. 2.

But the present case is not entirely between the assignee decree-holder and the judgment-debtor. There are the other two persons in whose favour the decree has been jointly passed, and in such circumstances the Court is allowed a large discretion under O. 21, R. 15. For one decree-holder to be doing the execution on behalf of all is a curious business which may well put the Court upon its guard; and the Code very sensibly warns the Court to find sufficient cause for allowing the decree to be executed. Under this provision there is no objection to the Court hearing what the other decree-holders have to say, though no doubt the judgment-debtor even under this section could not plead an uncertified adjustment. If the other decree-holders say, as they say in their present affidavit (16th November 1928), that the application of their fellow decree-holder is a fraud, nothing in O. 21, R. 2 or any other provision of law prevents the Court from disallowing execution, and in this case the Court has acted quite properly in doing so.

The appeal is dismissed with costs to respondents 1 to 4.

P.R.S./K.S.

Appeal dismissed.

* * A. I. R. 1933 Madras 158

JACKSON AND MOCKETT, JJ.

Muthukumara Sthapathiar — Appellant.

v.

Sivanarayana Pillai and another—Respondents.

Letters Patent Appeal No. 29 of 1927, Decided on 20th September 1932, against judgment of Devadoss, J., reported in *A. I. R. 1927 Mad. 1084*.

* * Hindu Law—Joint family—Alienation of coparcener's share—Alienee's right is a fluctuating one—Family property as at the time of suit and not as at the time of alienation should be taken.

Though alienation of a coparcener's share is

inconsistent with Hindu law, on principles of equity, the alienee is given a right limited to compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place: 3 Cal. 198 (P.C.), *Foll.*; 5 Cal. 148 (P.C.), *Ref.*

[P 159 C 1]

This right of the alienee is a fluctuating one, the only exception recognized being that it does not become extinct on the death of the alienor coparcener. And in a suit for partition, the family property as existing on the date of the suit and not as existing on the date of alienation should be taken: 14 *Mad.* 408 (F.B.), *Foll.*; 35 *Mad.* 47 (F.B.), *not Foll.*; *Case law discussed.*

[P 162 C 1, 2]

K. Rajah Ayyar and V. Ramaswami Ayyar—for Appellant.

T. M. Ramaswami Ayyar—for Respondents.

Jackson, J.—The facts are set forth in the judgment under appeal and need not be restated in detail. The defendant is alienee from a brother in a Hindu joint family and by virtue of the alienation defendant got into possession of a certain parcel of land. The rest of the joint family property was dissipated, and then plaintiff, the other brother, sued for partition of this parcel. The District Munsif dismissed his suit. The Subordinate Judge decreed him a moiety. A single Judge of this Court again dismissed the suit, and plaintiff appeals under the Letters Patent. The parties agree that at the time of the alienation the defendant purchased the right to compel partition of the brother's share as it then stood. The plaintiff reads this as meaning that one-half was purchased, and from the property existing at the time of the partition suit defendant can take that half. The defendant would read into it something more, that he purchased not only the right to the fractional share, but the right to divide the family property as it stood on the date of alienation. But mathematically it may be said that plaintiff concedes that defendant a half, and defendant claims X/2. It is a question which, as the authorities abundantly show, cannot be decided by pure law or logic.

That alienations of a coparcener's share are inconsistent with Hindu law is laid down by the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh* (1), at p. 166, referred to by Arnold White, C.J., in *Chinna Pillai v. Kalimuthu Chetty* (2), at pp. 52 and 56, and Sankaran Nair, J.,

1. (1880) 5 Cal. 148=6 I A 88=1 Sar 1 (P.C.).

2. (1912) 35 Mad 47=9 I C 596 (F.B.).

on p. 56. But it was held that in equity a person who had parted with his money should receive something in exchange, and therefore in *Deendyal Lal v. Jugdeep Narain Singh* (3), the alienee was given a right limited to compelling the partition which his debtor might have compelled had he been so minded before the alienation of his share took place. In *Hardi Narain Sahu v. Ruder Perakash* (4), the Privy Council interprets this in the sense that:

"only that passed which the father, the person against whom the decree was obtained, had."

A very natural proposition, if one may say so, that a man cannot sell more than he has got,

"not the share in the property, but the right which the father would have to a partition."

Of course this right to a partition terminates upon death; and a coparcener always holds the right subject to this contingency. So, if the decree-holder literally bought only what his vendor had, he bought the right of partition subject to this contingency, and when his vendor died he would have no right at all. That seems to be hard logic, and in *Suraj Bansi Koer v. Sheo Pershad Singh* (1) the alienee was allowed the right even after the death of the alienor. "In Madras," the Privy Council observes on p. 173:

"the mortgage executed by the alienor in his 'lifetime' might operate after his death as a valid charge;"

and in the Bengal case under consideration it holds that the execution proceedings had gone so far as to constitute a valid charge which could not be defeated by death before the actual sale. If this is so, it is a clear departure from the dictum that an alienor could only sell what he had. He had a right subject to the contingency of death, and he sold a right not subject to the contingency of his death. This difficulty was pressed upon the referring Judges in *Rangasami v. Krishnayyan* (5), and they thought that in logic the alienee would be subject to all contingencies such as births diminishing his alienor's share, and his alienor's death obliterating that share. They referred to a Full Bench the question "to what share in the property is the plaintiff entitled." The Full Bench held

3. (1877) 3 Cal 198=4 I A 247=3 Sar 730=3 Suther 468 (P C).

4. (1884) 10 Cal 626=11 I A 26=4 Sar 510 (P C).

5. (1891) 14 Mad 408=1 M L J 603 (F B).

that the purchaser takes an uncertain and fluctuating interest. It did not decide what would be the effect of death, but observed obiter that because the interests carved out at the sale vest in the purchaser at once, the subsequent death of the vendee cannot divest the interest which has once vested. On this line of reasoning the other subsequent contingencies such as births into the coparcenary might, it may be thought, have been treated as not affecting the vested interest; however the Full Bench held that the alienated share is affected by subsequent births, and is to be reckoned with reference to the joint family as it stands at the time of the suit for partition and not as it stood at the time of alienation. In *Hardi Narain Sahu v. Ruder Perakash Misser* (4) the family consisted of father, mother and minor son. The father alienated his share and then made over his interest to his son who sued the alienee for possession.

The Calcutta High Court treating it as a suit for partition decreed that the minor, the mother, and the father's alienee should each have one-third. The alienee appealed claiming a half. It is not quite clear upon what he based this plea, but apparently (p. 633) Mr. Doyne on his behalf, while conceding that the mother would in Bengal be entitled to one-third on partition, argued that before partition she only had a maintenance right, and probably claimed that the alienee had carved out interests at the sale which would vest in him at once, the language of the obiter upon death in the Madras Full Bench case. The Privy Council quoted (p. 635-6) the passage already cited from *Deendyal Lal v. Jugdeep Narain Singh* (3), "only that passed which the father had" and also quoted

"so long as Bhagwa lived the alienee had an interest in the property which entitled him to demand a partition,"

and it then proceeds:

"The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. Doyne's argument that the father was entitled to a half."

Then it seems to have been suggested that in any case the Calcutta High Court did wrong to decree partition, and the rights of a second son who had been born into the family should be consi-

dered. The Privy Council agreed that the decree was not proper, but the person appealing was the alienee, not the minor and as the decree for partition gave him a more favourable decree than he may have been entitled to, and as no one was urging that he should have less than what the decree gave him (there was no cross-appeal) there was no ground for altering it.

The question whether the alienee's suit was maintainable after the alienor's death came directly before our Court in *Aiyagari v. Ramayya* (6), Davies, J., was inclined to follow *Rangasami v. Krishnayyan* (5), to its logical conclusion, holding that death was a contingency operating on the purchaser's fluctuating interest. Benson, J., thought that the point was decided by authority. They referred the question whether the suit was maintainable to a Full Bench. Arnold White, C. J. and Moore, J., agreed with Benson, J., that there was authority for an affirmative answer, and preferred simply stare decisis. Bhashyam Ayyangar, J., took the opportunity to traverse the whole question, and expressed the opinion that *Rangaswami v. Krishnayyan* (5) was wrongly decided. He quotes (p. 705) the definition of the alienee's right in *Deendyal Lal v. Jugdeep Narain Singh* (3), which has also been quoted above, and puts into his own italics the words "before the alienation of his share takes place." There does not seem to be any warrant for this special emphasis. In this case there was no question of fluctuating interest, and the sentence might have stopped with "compelling the partition which his debtor might have compelled" without injury to its sense. Even if "before the alienation of his share" has special significance, which I doubt at most it is a mere obiter on a question not discussed in the case, and upon which it would be most dangerous to build. Bhashyam Ayyangar, J., next discusses *Suraj Bunsu Koer v. Sheo Pershad Singh* (1) and then *Hardi Narain Sahu v. Ruder Parkash Misser* (4), which he summarizes in this manner, p. 709 :

"During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also The High Court overruled this contention. . . . The case was carried in appeal to the Privy Council

by the purchaser the decision of the Privy Council proceeds on the footing that neither the birth of the second son nor the death of the mother affected the share to which the purchaser became entitled.

As I have shown above the Privy Council, so far from making this the footing or basis of its decision, absolutely declined to go into the matter. Lastly Bhashyam Ayyangar, J., notices *Madho Pershad v. Mehrban Singh* (7), where the Judicial Committee ruled in unequivocal terms that the death of the alienor Zalim renders it impossible to order partition and charge his divided share with the money paid him by the alienee. But this was distinguished by the Full Bench as referring only to the Mitakshara law obtaining in Oudh. Then on p. 713 Bhashyam Ayyangar, J., gives it as his opinion that the actual decision in *Rangasami v. Krishnayyan* (5) "is opposed to the principle on which the above decisions of the Privy Council proceed." But, as pointed out above, *Deendyal Lal v. Jugdeep Narain Singh* (3), is only applicable if emphasis is given to special words, and *Hardi Narain Sahu v. Ruder Parkash Misser* (4), is not applicable at all. If *Suraj Bunsu Koer v. Sheo Pershad Singh* (1) is authority for the proposition that death does not affect the alienee's right, that proposition is not founded there on any principle, but emphasis rather is laid on the peculiar circumstances of that case where execution had proceeded almost up to sale. However, when the question of fluctuation came directly before the referring Judges in *Chinnu Pillai v. Kalimuthu Chetty* (2), they declined to accept the authority of *Rangaswami v. Krishnayyan* (5), and, thinking that the doubts entertained by Bhashyam Ayyangar, J. were well founded, they referred to a Full Bench the question, whether the mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born in family property mortgaged by him. A Bench of five Judges was constituted so that if necessary it might overrule the Bench of four which decided *Rangaswami v. Krishnayyan* (5). But unfortunately one of these five dropped out and the Bench as finally constituted only contained four.

Sir Arnold White, C. J., quotes (p. 52) with approval the view of the referring Judges in *Rangaswami v. Krish-*

6. (1902) 25 Mad 690 (F B).

7. (1894) 18 Cal 157=17 I A 194 (P O).

nayyan (5), but says that it is a position which the Full Bench declined to accept. But as he shows immediately afterwards the Full Bench did accept the position so far as to rule that the purchaser takes an uncertain and fluctuating interest. What they did was to modify this rule by suggesting obiter two exceptions where the fluctuation has worked out to the benefit of the alienee by his alienor's share increasing on the death of the other members of the coparcenary and where the share might seem to be obliterated by the alienor's death. The learned Chief Justice then points out, as I have observed above, that the argument for excepting death might serve to except any fluctuation. He next refers to *Aiyyagari v. Ramayya* (6) which settled, for this presidency, that death is an exception, and concludes :

"It seems to me that when once it is held that the death of the alienor does not create any right of survivorship to the other coparceners, it follows almost as a necessary corollary that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of coparceners."

This is good logic ; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest of the alienee fluctuates. We start with the principle "only that passed which the alienor had." We recognize an arbitrary exception that death does not diminish the alienee's right ; then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law or on logic.

Benson, J., accepted and treated as the principal part of his judgment the description of *Hardai Narayan Sahu v. Ruder Prakash Misser* (4), given by Bhashyam Ayyangar, J., in *Ayyagiri v. Ramayya* (6).

Munro, J., confined himself to a simple affirmative. Sankaran Nair, J., pointed out that in sheer logic, if one fluctuation such as death could not affect the alienee's right, then no fluctuation would affect it. The question was not dependent on Hindu law. In equity *Ayyagiri v. Ramayya* (6) should be approved, and in equity the alienee

should not be given more than he had at the time of the alienation. It is more consistent with the equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of alienation rather than that he gets a fluctuating share and he reaches the same conclusion as I have reached, that there is no final decision on the point to be found in the Privy Council cases. So it is held by this Bench that the alienee's share, does not fluctuate, but is to be reckoned as from the date of the alienation. Four Judges therefore have held that the share does, and four have held that it does not fluctuate.

In this state of the law the respondent contends that *Chinnu Pillai v. Kalimuthu Chetty* (2) and *Ramaswamy Ayyar v. Venkatarama Ayyar* (8), authorize him to work out a partition as on the date of the alienation. *Ramaswamy Ayyar v. Venkatarama Ayyar* (8) merely makes what was condoned in *Hardai Narain Sahu v. Ruder Perkes Misser* (4), a rule of practice allowing Courts to decree partition in a suit for recovery of possession and has no bearing upon the theoretical problem. The appellant relies upon *Manjaya Mudali v. Shanmuga* (9), where the recognized law is clearly stated, and Bakewell, J., points out that the right of the alienee is in personam and not in rem. This judgment would have afforded useful material for answering Mr. Doyne in *Suraj Bunsu Koer v. Sheo Pershad Singh* (1), and meets the theory that the share is something more material than a mere fraction. In *Subba Goundan v. Krishnamachari* (10), at p. 460 (of 45 *Mad.*), it is held that a purchaser has only an equity as against the other members of the coparcenary to work out his interests by a suit for general partition. It is not suggested that his equity extends to working out a partition as from the date of the alienation; nor indeed do I find this suggested anywhere except in the judgment under appeal. Devadoss, J., thinks it well settled by *Chinnu Pillai v. Kalimuthu Chetty* (2), that the time at which the share of the alienating brother should be deter-

8. A I R 1924 Mad 81=75 I C 403=46 Mad 815.

9. A I R 1914 Mad 440=22 I C 555=38 Mad 684.

10. A I R 1922 Mad 112=68 I C 869=45 Mad 449.

mined is the date of the alienation. I agree so far as the bare amount of the share, the fraction is concerned. But in that case it was never considered that the hotchpot should be taken as that which existed on the date of alienation. That question was never raised. Then his Lordship cites *Ramasami Aiyar v. Venkatarama Ayyar* (8) without showing it to have greater import than I have found it to have. So that in effect this judgment is simply based upon what the learned Judge thinks would be equitable, and considering the state of law, no other basis is possible.

It remains for us to see if we agree with this view of equity. In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got; that is a basic principle which I can understand, and I should have been quite prepared to hold that as the right of the alienor becomes extinct upon his death, the right of the alienee becomes extinct also. However the contrary opinion is founded upon a long series of cases and I agree with the Full Bench in *Aiyyagiri v. Ramayya* (6), that even at that date it was too late to think of upsetting it. So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating. But I see no reason to import other exceptions, and prefer the decision of the four Judges in *Rangasami v. Krishnayyan* (5) to the decision of the four Judges in *Chinnu Pillai v. Kalimuthu Chetty* (2). The former decision is logical, and quite equitable, for the alienee has only himself to thank if by delaying his right to compel partition he finds his security diminished.

Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation. And even if I agree with *Chinnu Pillai v. Kalimuthu Chetty* (2), that the share ceases to fluctuate from the date of alienation, I should not be prepared to go further and say that there must be a hotchpot hooked to the same date. Such a theory would be very cumbersome to work out in practice, for the Court might have to take into account transactions which had long passed beyond the memory of the parties. It is troublesome enough

dealing with the present day actualities of a partition suit. I therefore hold that the appellant is entitled to take the family property as existing on the date of his suit. This restores the decree of the Subordinate Judge and the appeal is allowed with costs of both appeals in this Court.

Mockett, J. — I entirely agree. I would only add that on a close examination of the cases cited there does not appear to be an exact authority covering the point which we have had to consider. I concur with the view of my learned brother that equity is best served by taking the property of the family as it stands at the date of the partition suit.

P R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 162

PANDALAI, J.

(*Kilaru*) *Gangaiya* and *another*—Defendants—Petitioners.

v.

(*Kilaru*) *China Lingaiya*—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 1863 of 1930, Decided on 27th April 1931, against order of Dist. Munsif, Narasaraopet, D/- 24th October 1930.

Stamp Act (1899), S. 2 (15)—Partition list which does not itself effect partition, but is agreement for effecting future partition on terms agreed is liable to stamp duty under Art. 4, Sch. 1 (a) and not S. 2 (15)—Stamp Act (Madras), Sch. 1 (a), Art. 4.

A partition list which does not itself effect any division, but is merely an agreement for effecting a future partition on terms agreed, is not an instrument of partition within the meaning of S. 2 (15) and is liable to stamp duty as an agreement under Art. 4, Sch. 1 (a). [P 162 C 2]

V. Pattabhirama Sastri — for Petitioners.

Judgment.—The partition list is not an instrument of partition within the meaning of S. 2 (15), Stamp Act, because it did not itself effect any division as the agreement for a subsequent stamped and registered instrument shows, but was an agreement for effecting a future partition on the terms agreed. The document is liable to stamp duty and penalty as an agreement under Art. 4, Sch. 1 (a), Madras Act 6 of 1922. The order of the District Munsif is varied accordingly. No costs.

P.R.S./V.B.

Order varied.

A. I. R. 1933 Madras 163

MADHAVAN NAIR, J.

Ramasamy Padayachy—Defendant—Appellant.

v.

Thiruvengada Padayachy and others—Plaintiffs—Respondents.

Second Appeal No. 780 of 1928, Decided on 21st September 1931, against decree of Sub-Judge, Cuddalore, in A. S. No. 49 of 1926.

(a) **Civil P. C. (1908), S. 100—Finding of fact—Omission by lower Court to consider important evidence and application of erroneous presumptions of law—Finding of fact can be challenged in second appeal.**

Although the High Court does not ordinarily interfere in findings of fact in second appeal, yet, if the lower Court has omitted to consider evidence which is important and in considering the evidence which it has examined, it has applied erroneous presumption of law, then the finding may be called into question in second appeal and the lower Court may be asked to submit a fresh finding. [P 163 C 2]

(b) **Hindu Law—Debt—Widow—Widow is not bound to discharge husband's debt from income of property.**

There is no rule of law that it is the duty of the widow to discharge the debt of her deceased husband from the income of her property: 18 I C 953, *Rel. on.* [P 164 C 1]

T. V. Muthukrishna Ayyar—for Appellant.

T. E. Ramabhadrachariar and S. Jagadisa Ayyar—for Respondents.

Order.—Defendant 1 is the appellant. One Subbaraya Padayachi died in 1872. His son Kuppusami died in 1879. After his death, his mother, Sengamalatham, inherited the properties, and she executed two documents: Ex. 1, dated 1890 and Ex. 2, dated 1917. In this second appeal we are concerned only with Ex. 1. This was executed in favour of defendant 1's father. Two items of consideration are mentioned in that document which are evidenced by Exs. 1-b and 1-a. The document also recites that a sum of Rs. 212 was borrowed by her from the mortgagee for the expenses of litigation in connexion with O. S. 48 of 1882 filed by her. The present suit out of which this second appeal arises has been filed by the plaintiffs, the reversioners, to set aside this alienation as not binding on them. The question is whether Ex. 1 is binding on the reversion. The District Munsif found against the plaintiffs on this question, but this finding was set aside by the Subordinate Judge.

Mr. Muthukrishna Ayyar has argued

before me that the finding of the Subordinate Judge should not be accepted inasmuch as he does not notice some important circumstances in connexion with the evidence and has not attached sufficient importance to certain other aspects of the evidence. Ordinarily, this Court does not interfere on findings of fact in second appeal, but if the learned Judge has omitted to consider evidence which is important and in considering the evidence which he has examined he has applied erroneous presumptions of law, then, I think, the finding may be called into question and the lower Court may be asked to submit a fresh finding. The document in this case is 37 years old. Both the Courts have treated it as an ancient document though the appellate Court does not attach much importance to the ancient character of it having regard to the other circumstances in the case. It has been attested by plaintiff 3. In considering the question whether the document will be binding on the reversion, an attestation by one of the reversioners would certainly be a relevant piece of evidence for the Courts to consider. The learned District Munsif refers to this attestation and draws his own conclusion in support of the binding nature of the document, but there is no reference to this piece of evidence in the judgment of the Subordinate Judge. This is a grave omission. Of course, it is open to the learned Judge to say for sufficient reasons, that he is not prepared to attach any value to the evidence afforded by the attestation, but it is necessary that this Court should be satisfied that the Judge paid attention to this item of evidence. As I have said he does not refer to the attestation of Ex. 1 by plaintiff 3 anywhere in his judgment. Another circumstance of some importance is the fact that in the arrangement Ex. 4, entered into between these plaintiffs, provision has been made for the payment of the debts of the deceased Subbaraya Padayachi. It is argued on behalf of the appellant that this is a very cogent piece of evidence from which inference may be drawn to the effect that the debts referred to in Ex. 1 must be binding debts; as otherwise the reversioners will not make any arrangement for the payment of such debts.

The District Munsif put Ex. 4 in the forefront of the discussion. The Sub-

ordinate Judge no doubt has referred to Ex. 4, but the reference to it is after he has made up his mind and concluded that the document in question is not binding on the reversion. He stated his conclusion in para. 29 and it is in para. 30 that he refers to Ex. 4. I think in considering the question whether the document is binding or not, Ex. 4 should have been referred to by him before he arrived at his conclusion on that point. The omission to so deal with Ex. 4 is also, I think, another defect in the finding arrived at by him.

Then in para. 21 the learned Judge indicates that in his opinion it is the duty of a widow to discharge the debts of her deceased husband from out of the income of the property. His opinion seems to be that there was income enough from the properties of the deceased Subbaraya which she might have used for paying off his debts and therefore the document, Ex. 1, is not binding. There is no rule of law that it is the duty of the widow to discharge the debt of her deceased husband from the income of the property. If authority were needed, reference may be made to the decision in *B. Jagayya v. G. Appala Raju* (1). As the learned Judge seems to have been influenced by this legal principle which is erroneous his conclusion on the main question cannot be accepted as satisfactory. There are various other reasons alleged by the Subordinate Judge in support of his conclusion. How those reasons will affect the main question when they are taken in connexion with these two or three points which I have referred to will be a question for consideration by the lower appellate Court to which I propose to send this case for a fresh finding.

I do not desire to express any opinion on the question argued before me lest it should embarrass the lower appellate Court in arriving at its conclusion; but I would refer to the use which the learned Judge has made of Ex. A-7 in discrediting Ex. 1-B. Ex. A-7 has been found to be a forged document by him because Ex. 1-B was produced along with Ex. A-7, so to say in the company of Ex. A-7, it does not follow that Ex. 1-B should also be taken to be a forged document. One more fact may be referred to, and it is this. The learned Judge does

1. (1913) 18 1 C 953.

not independently consider in any of the paragraphs in his judgment whether Ex. 1-A evidences a debt binding on the reversion.

For the above reasons I set aside the finding of the learned Subordinate Judge on this question and ask the lower Court to submit a fresh finding on the question after considering the evidence oral and documentary bearing upon the point. The finding is to be submitted within six weeks after the receipt of this order. Ten days for objections. All the other questions arising in the second appeal are reserved for argument after the receipt of the finding.

Finding.—In this case the High Court has called for a fresh finding upon the question “whether Ex. 1 is binding on the reversion * * *.” On the whole I am unhesitatingly of opinion that Ex. 1 is wholly binding on the reversion and I find accordingly—(After the return of the finding of the lower appellate Court upon the point referred by this Court for trial, the Court delivered the following.)

Judgment.—I accept the finding that Ex. 1 is binding on the reversioners. It is argued that the widow had no power to alienate the property which she had inherited through the son to pay her husband's debt. This question was not raised in the pleadings or in the issues and it was not argued in the first Court though the appellate Judge discusses the question. In these circumstances I cannot allow the question to be raised now. The result is that the second appeal is allowed and the plaintiff's suit is dismissed with respect to the properties covered by Ex. 1. Each party will bear its own costs throughout.

P.R.S./R.M. *Appeal allowed.*

A. I. R. 1933 Madras 164

PANDALAI, J.

Srinivasa Ayyangar — Defendant —
Petitioner.

v.

Pichumani Ayyangar — Plaintiff —
Opposite Party.

Civil Revn. Petn. No. 431 of 1929,
Decided on 18th March 1932, against
decree of Sub-Judge, Tinnevely, in S. C.
S. No. 532 of 1928.

Civil P. C. (1908), O. 19, R. 1—Fact that
Court admitting affidavit of plaintiff's next
friend to prove pro-note and not calling him

as witness is not illegal if there is no contention as to facts.

There is nothing illegal in a Court admitting proof of the execution of a pro-note by the affidavit of plaintiff's next friend instead of calling him as a witness into the witness-box and taking his deposition in open Court, when there is no contention as to the facts. [P 165 C 1]

K. V. Sesha Ayyangar—for Petitioner.

N. D. Varadachari — for Opposite Party.

Judgment.—The decree in this small cause suit was passed by the Subordinate Judge on a promissory note and contemporaneous agreement called a yadast. The defendant though served did not appear. The only ground urged in this petition is that the learned Judge erred in admitting proof of the execution of the note and yadast by the affidavit of plaintiff's next friend instead of calling him as a witness into the witness-box and taking his deposition in open Court. No objection on the merits of the claim is raised. In my opinion the ground urged is without any substance. O. 19, R. 1 enables any Court to order that any fact may be proved by affidavit and the proviso enables the Court to compel the attendance of the deponent in case of need. In *Woodroffe and Ameer Ali* it is stated that it is common practice to admit affidavits at the hearing when there is no contention as to the facts. That is what happened in this case and I can see nothing illegal in it. The petition is dismissed with costs.

P.R.S./S.N. *Petition dismissed.*

A. I. R. 1933 Madras 165

PANDALAI, J.

(*Penubarti*) *Gurumurti*—Appellant.

v.

Vemalapati Rangiah—Respondent.

Second Appeal No. 146 of 1928, Decided on 17th March 1931, against decree of Sub-Judge, Nellore, in A. S. No. 4 of 1927.

Landlord and Tenant—Agricultural tenant—Reasonable notice by landlord is necessary to ask tenant to quit—Till notice, he is tenant and mesne profits cannot be demanded prior to that time—Mesne profits.

What is needed to terminate an agricultural lease is not the six months' notice prescribed by the Transfer of Property Act, but reasonable notice. But such notice is necessary. Until such notice to quit is given by the landlord to the tenant the lessee remains a tenant on the usual agricultural terms applicable to the property and he cannot be compelled to pay mesne profits on the footing of being wrongfully in possession. [P 166 C 1]

B. Somayya—for Appellant.

V. Viswanatha Sastri and *P. R. Sundaresa Ayyar*—for Respondents.

Judgment.—Defendant 2 appeals. The suit was brought by the plaintiff-respondent 1 as tenant under a jeroiyati patta for possession of the land in dispute from the appellant who was alleged to hold the land on a terminable lease from respondent 2, the zamindar. Two questions arose: (1) whether the appellant's holding was an ordinary terminable lease or gave him rights of occupancy; and (2) if the former, whether proper notice to quit had been given. But the Courts have found concurrently against the appellant on both those points. He now appeals and urges that the decision as to the nature of the holding cannot be supported. On that point nothing was said which induces me to think that the decision of the lower Courts was not right. The question really was whether the land was raiyat land or home-farm land. A number of documents were produced on behalf of the respondents to show that the property was what in this particular zamindari is known as Nageri Idwa which means "home farm." The appellant had really no evidence contra. but on the contrary, being himself the karnam under the zamindar, had taken official part in preparing the records which showed that the lands were Nageri Idwa and had also attorned to the zamindar, respondent 2, by mesne of undertakings in which the land was similarly described. On those materials the finding as to the tenure of the property was correct.

It is next urged that the lower Court was not right in awarding mesne profits for three years prior to the suit because notice to quit was given only on 21st December 1921 about 21 months before the suit. This contention must, I think, prevail. It is answered that the appellant was prior to the notice a tenant who had promised the zamindar to take a lease on certain terms and to quit when demanded. But the lease not being taken and the land being agricultural land what that means in the absence of a lease with definite terms as to notice is that the appellant was bound to surrender the property on a proper demand being made. According to the decisions what is needed to terminate an agri-

cultural lease is not the six months' notice prescribed by the Transfer of Property Act but reasonable notice. But such notice is necessary. Therefore until notice was given the appellant was a tenant on the usual agricultural terms applicable to the property, i. e., that he could be called upon to quit at the end of the agricultural season on having been given reasonable notice before that time, but cannot be compelled to pay mesne profits on the footing of being wrongfully in possession. It is stated that the agricultural year in this part of the Presidency begins about Sankranti (January-February) and that must have been the reason why the notice, Ex. 24, was given in December 1921, so that the appellant may quit after harvesting the then standing crop. I am therefore of opinion that the award of three years' mesne profits was wrong. It must be reduced to the period after the notice and before suit. The figures are on that footing Rs. 165 for the year immediately prior to the suit and Rs. 149-12-0 for the nine months before that year.

The result is that the amount of mesne profits will be reduced to Rupees 314-12-0. The second appeal is otherwise dismissed. The appellant must pay three-fourths of the costs of this second appeal, one set to be divided between the respondents.

P.R.S./B.V.

Appeal dismissed.

* A. I. R. 1933 Madras 166

VENKATASUBBA RAO AND REILLY, JJ.
S. R. M. M. Seetharaman Chettiar—
Appellant.

v.

A. R. N. Chidambaram Chettiar and
others—Respondents.

Appeals Nos. 110 and 111 of 1929, Decided on 7th September 1932, against order of Temporary Sub-Judge, Devakotta, D/- 16th August 1928.

* (a) Civil P. C. (1908), S. 47—Previous suit filed and property attached before judgment—Subsequent suit, after such attachment—Property sold in subsequent suit under decree—Execution of decree in the prior suit resisted by purchaser under S. 47—Decree-holder in previous suit challenging other decree as collusive and fraudulent and alleging purchaser to be benamidar—Execution Court should decide the point and not refer decree-holder to a separate suit.

Subsequent to the attachment before judgment of certain property, it was sold in execution of a decree obtained in a suit filed subsequent to the attachment before judgment. The

execution of the decree in the prior suit, was resisted by the purchaser under S. 47. The decree-holder contended that the decree in the subsequent suit was a collusive and fraudulent one and that the purchaser was only a benamidar of the judgment-debtor, but he was referred to a regular suit to have that decree and sale set aside.

Held: that the purchaser was a representative of the judgment-debtor and entitled to intervene under S. 47; that the execution Court had no option either to dispose of the objection or refer parties to regular suit but was bound to decide the question itself and could not refer the parties to a separate suit: *A I R 1920 Mad 324 (F B), Rel on.* [P 167 C 1, 2]

Held further: that as the decree which was challenged was not the one which the executing Court was executing, there was nothing to prevent it from deciding whether that decree was properly obtained or not as incidental to the main question: *A I R 1920 Mad 626, Dist.*

[P 167 C 2]

(b) Civil P. C. (1908), S. 47—Both parts of section must be read together.

Both the parts of the section must be read together, and when once it is held that resort to S. 47 is the proper remedy the Court has no option but is bound to decide the question referred to there under that very section. [P 167 C 2]

(c) Civil P. C. (1908), S. 35—Bad conduct disentitles party to costs even though successful.

When an appellant raises several objections in the lower Court which are untenable and repeats them in the appeal also, his conduct disentitles him to costs in the appeal even though he succeeds on the main point in the appeal.

[P 163 C 1]

S. Panchapagesa Sastri and K. R. Krishnaswamy Ayyar—for Appellant.

S. R. Muthuswamy Ayyar—for Respondents.

Venkatasubba Rao, J.—Before stating the point of law raised, it is necessary that I should set out briefly the facts which have given rise to these appeals. The decree that is under execution is the one passed in O. S. No. 39 of 1924. The plaintiff in that suit (the appellant) attached before judgment the immovable property in question. Having obtained a decree in his suit, he has filed E. P. No. 39 of 1927 for the purpose of bringing the attached property to sale. In the meantime, but subsequent to the attachment before judgment, one Moyappan Ambalam filed O. S. No. 498 of 1924 against the same judgment-debtor and in execution of the decree he obtained he brought the same property to sale, purchased it in Court auction and conveyed it to the respondent. As such purchaser he is interested in resisting E. P. No. 39 of 1927 filed by the appellant. He first sought to assert his right by filing a

claim petition under O. 21, R. 58, Civil P. C. But that petition was summarily rejected on the ground that at the time of the attachment before judgment, the respondent had no right to the property, and his claim petition therefore was unsustainable.

Having failed in this he had recourse to another method for asserting the same right, that is, he intervened in E. P. No. 39 of 1927 under S. 47, Civil P. C., claiming that as the representative of the judgment-debtor, he could assert his right to the property and resist the execution of the decree in O. S. No. 39 of 1924. The application he filed for the purpose was E. A. No. 91 of 1928. The first point that has to be decided is whether the respondent is the representative of the judgment-debtor and whether he can intervene under S. 47. There can be no doubt that as the purchaser of the property belonging to the defendant he should be regarded as his representative and the question is undoubtedly one relating to the execution of the decree: see *Veyindramuthu Pillai v. Maya Nadan* (1). His application therefore under S. 47 was properly made and this is also the view taken by the lower Court. Mr. Panchapagesa Sastri, the appellant's learned counsel, does not question the correctness of this part of the learned Judge's order. The question then arises: what was the proper procedure the lower Court should have adopted, after it held that the respondent could rightly come in under S. 47? The appellant's contention was the decree obtained by Meyappan Ambalam was collusive and fraudulent, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continues to be in the possession of the latter.

The lower Court without deciding this question which is the subject of issues 1 and 3 framed by it, has referred the appellant to a regular suit for the purpose of getting rid of the decree obtained by Meyappa and the sale held in pursuance of it. It is this part of the order that Mr. Panchapagesa Sastri impugns. The learned Judge apparently seems to think that he has an option either to dispose of the application under S. 47 or refer the parties to a regular suit. In

this he seems to be wrong. Is a question to be agitated under S. 47 or by a separate suit? Once it is held that resort to S. 47 is the proper remedy, the Court has no option, but is bound to decide the question in execution under that provision. Para. 1 of the section shows that it is incumbent on the Court to decide the questions referred to there under that very section. The words used are "shall be determined by the Court executing the decree and not by a separate suit." These words are imperative and vest no discretion in the Court. Para. 2 is no doubt not happily worded, but both the parts should be read together and the interpretation I have suggested is the only proper one. The order made by the lower Court reads thus:

"Under the above circumstances I would declare in E. A. No. 91 of 1928, that the property sought to be sold in E. P. No. 39 of 1927 is not liable to be sold until the decree-holder gets the Court sale in favour of the vendor of the petitioner in E. A. No. 91 of 1928 set aside by a decree of Court and also obtains a declaration that the sale in favour of the petitioner in E. A. No. 91 of 1928 is benami for the judgment-debtor and is not valid and binding on him (the said decree-holder) and I would dismiss E. P. 39 of 1927 with a direction to the decree-holder (petitioner in the said E. P. No. 39 of 27) to comply with the abovesaid direction before he seeks to bring the property to sale in execution of his decree."

This order cannot be sustained and the lower Court should itself decide under S. 47 the question of fact raised by the appellant. The respondent's counsel in supporting the lower Court's order contends that an executing Court cannot take upon itself the responsibility of setting aside a decree passed by a competent Court. This argument is based upon a fallacy. In this case the executing Court is not called on to pronounce upon the validity of the decree which it is executing. The respondent's title to the property depends upon some decree and the question is whether that decree is vitiated by fraud or collusion. That is not the decree which the lower Court is executing and there is nothing to prevent it from deciding whether that was properly obtained or not, as incidental to the main question, namely, is the appellant's objection that the respondent is a benamidar well founded? The case relied upon by the respondent's learned counsel, *Venkataswami Naidu v. Guruswami Aiyar* (2), does not help him. The

1. A I R 1920 Mad 324=54 I C 209=43 Mad 107 (F B).

(2) A I R 1920 Mad 626=55 I C 626.

point under discussion did not arise for decision there. A suit had already been instituted and it was taken for granted that the parties were to be governed by the result of that suit.

The orders of the lower Court are set aside and E. P. No. 29 of 1927 and E. A. No. 91 of 1928 are remanded to it for disposal in the light of these observations. The appellant's conduct disentitles him to costs. He raised several objections in the lower Court which were untenable and repeated them in the memorandum of appeal filed by him here. For this reason I direct each party to bear his costs of the appeal.

Reilly, J.—I agree.

Mr. Muthuswami Ayyar for the respondent here, that is the petitioner in E. A. No. 91 of 1928, has maintained that his client rightly preferred that application to the Subordinate Judge's Court under S. 47 of the Code, and in that we agree with him. But he has gone on to contend that, although he came in rightly under that section, the Subordinate Judge has no jurisdiction to make any but one order on that application, viz., that he was bound to give effect to the applicant's objection without going into the answer of the decree-holder in O. S. No. 39 of 1924, who was the execution petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the decree-holder in O. S. No. 39 of 1924 was that Mr. Muthuswami Ayyar's client was merely a benamidar for the judgment-debtor in O. S. No. 39 of 1924, which would be an effective answer if true. It is quite impossible for Mr. Muthuswami Ayyar to maintain that his client had the right to come in with a petition under S. 47 of the Code, but that his opponent had no right to urge his answer and to claim that his answer should be heard under that section. I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.

P.R.S./K.S.

Order set aside.

A. I. R. 1933 Madras 168

VENKATASUBBA RAO AND
MADHAVAN NAIR, JJ.

(*Allu*) *Ramalinga Ayyar* — Defendant
—Appellant.

v.

Malli N. M. Subba Ayyar (dead) and
others—Plaintiffs—Respondents.

Appeal No. 158 of 1929, Decided on 22nd April 1931, against order of First Addl. Sub-Judge, Madura, D/- 9th October 1928.

Provincial Insolvency Act (1920), Ss. 78 and 49—Judgment-debtor becoming insolvent—Decree assigned—Direction in decree to prove debt in insolvency—Assignor referring to this direction in insolvency Court—Debt was deemed to have been proved.

A decree was passed in favour of the plaintiff after which the judgment-debtor was adjudicated an insolvent on his application filed pending the suit. The decree contained a direction that the plaintiffs should prove their debt in insolvency. The decree was assigned and the assignee applied to the insolvency Court to be recognized as the insolvent's creditor and referred to the direction as to proving the debt, in the decree.

Held: that in the above circumstances the debt must be held to have been proved, although the formal mode prescribed by S. 49 was not followed: *A I R 1930 Mad 356, Rel on.* [P 169 C 1]

D. Ramaswami Ayyangar—for Appellant.

A. Srirangachariar—for Respondent.

Judgment.—The question that this appeal raises is, whether the respondent has proved his debt within the meaning of S. 78, Provincial Insolvency Act. A certain Malli firm filed a suit claiming an amount against the appellant. During the pendency of the suit, the appellant applied to be adjudicated an insolvent, and the Insolvency Court appointed an interim receiver to take possession of his properties. Thereupon, the plaintiff, Malli firm, applied to the Court where the suit was pending, that the interim receiver might be brought on the record. That application was refused and eventually a decree was passed in favour of the plaintiffs. That decree contained a clause which ran thus: "The plaintiff may prove their debt in insolvency."

Some time after the passing of the decree, the appellant was adjudicated an insolvent. Then the decree was assigned by Malli firm in favour of the present respondent. We are now concerned with what happened subsequently. He applied to the insolvency Court, that he might be recognized as the insolvent's creditor, in the place of Malli firm. In

the affidavit which he then filed, he stated expressly, that the decree directed that the claim was to be proved in insolvency. The insolvency Court directed notice of this application to the insolvent, to the assignors and to the Official Receiver. The Court finally made an order directing the respondent's name to be substituted for that of Malli firm.

The short question to decide is, whether the debt on these facts is to be deemed as proved or not. Mr. Ramaswami Aiyengar strongly contends, that the Act prescribes by S. 49, a special mode of proof and unless that mode is strictly followed, a debt must not be held to have been proved. This contention is, in our opinion, untenable. We must look to the substance and not to the form of the thing. The respondent, as we have pointed out, specially referred to the fact, that the decree contained a direction that the debt should be proved. What was his object in referring to this direction, unless he meant to convey that he was then seeking to prove the debt? Where a creditor obtained a decree after the debtor's adjudication, in the presence of the Official Receiver, it was held that the debt should be deemed as proved, although the formal mode prescribed by S. 49 was not followed: *Ramalinga Ayyar v. Rayadu Aiyar* (1). The facts of the present case bring it within the principle underlying that decision. We therefore hold that the debt has been proved and that S. 78 applies. The appeal fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

1. A I R 1930 Mad 356=122 I C 341=53 Mad 243.

A. I. R. 1933 Madras 169

RAMESAM, J.

(*Puthiyakatu*) *Kunhammayan* and others—Plaintiffs—Appellants.

v.

(*Eachali*) *Nalakath Kunhi Sow* and others—Defendants—Respondents.

Second Appeal No. 2456 of 1927, Decided on 31st March 1931, against decree of Sub-Judge, Tellicherry, in A. S. No. 362 of 1926.

Malabar Law—Karar by majority of adult members of tarwad or tavazhi—Binding nature on other members considered.

A karar to which the majority of the adult members of a tarwad or tavazhi are parties is binding on the tavazhi in general. It is not

binding on the dissentient members only to the extent of not depriving them of their right to succeed as karnavan and of not depriving them of their right to maintenance. Apart from these two it is binding even on the dissentient members. If there are no dissentient members, but if all the adult members are present at the spot and the other members are absent and if that was the reason why they were not parties to the karar, the position seems to become somewhat stronger: 38 I C 513, *Foll.* [P 170 C 2]

P. Govinda Menon—for Appellants.

K. P. Ramakrishna Ayyar—for Respondents.

Judgment.—The suit out of which this second appeal arises was brought by plaintiff 1, as the assignee of plaintiffs 2 and 3 of their jenm rights under Ex. B and of their rights under the marupat Ex. A, to recover the suit property which is a shop from the three defendants or whichever of them who may be found by the Court to be in possession. To understand the position of the other defendants in the case we must go to the earlier history of the Cheeramoolayil Pookkoth tarwad of which defendant 2 is now the karnavan. The suit property originally belonged to one Kutti Acha, a member of the Cheeramoolayil Pookkoth tarwad and after her death it has become the property of the Cheeramoolayil Pookkoth tarwad. This was not originally admitted by the present plaintiffs, but the lower Courts have now found it and the plaintiffs do not question this finding before me now. After the death of Kutti Acha, her son Kunhikutti Ali became the karnavan of the tarwad. He died in November 1912 while on his return journey from Arabia where he had gone on a pilgrimage. So he is referred to as Hajee. Before he went on pilgrimage it would seem he was able to induce most of the adult members of the Cheeramoolayil Pookkoth tarwad to agree to a certain karar Ex. E according to which some arrangements were made. One of those arrangements was that Rs. 100 were to be paid by the tarwad to his three children by the second wife—they are the present plaintiffs 2 and 3—and his deceased son named Ammad. If the Rs. 100 are not to be paid within six months after his death, the suit property was to vest in the children as their property.

To this arrangement most of the adult members of the tarwad agreed. One of such agreeing members is the present defendant 2 who was then an anandravan

of the tarwad but now karnavan of the tarwad. After Kutti Ali's death, the succeeding karnavan was one Kunhi Ali. It does not appear that he did anything to pay the Rs. 100 within six months. It looks as if he was willing that the suit property or shop should vest in the present plaintiffs 2 and 3. His conduct also supports to some extent the propriety of the arrangement made by the Hajee. After him, one Pookkoth Sow was the succeeding karnavan. It does not appear that Sow did anything either to question the validity of the karar or help the plaintiffs' right under the karar. It is said Suit No. 505 of 1915 was filed to question the karar by some of the members of the tarwad, but the papers connected with it are not filed and therefore we may ignore that suit. Another suit, 512 of 1915, also filed by some of the junior members of the tarwad, ended in a compromise, Ex. 2, according to which the provision in favour of plaintiffs 2 and 3 was made not binding on the tarwad. But this compromise cannot bind plaintiffs 2 and 3 because they were not parties to it and it was a collusive compromise between the members of the tarwad. Kunhi Ali was defendant 1 in that suit. From Ex. 2 it does not appear that he was even a party to the compromise. The property itself was held originally by one K. Ammad under a marupat executed to Kunhi Kutti Ali dated 11th July 1912, Ex. 5.

He afterwards assigned his lease rights to Hajee's eldest son, defendant 1, who was Hajee's son by a different wife from the mother of plaintiffs 2 and 3 and who therefore belonged to a different tarwad, namely, Eachal Nalakath. Defendant 1 afterwards executed a marupat Ex. A to plaintiffs 2 and 3. This produces the impression that at that time certainly defendant 1 and perhaps the senior members of the Cheeramoolayil Pookkoth tarwad were siding with the plaintiffs and were inclined to support the arrangements in the karar. Plaintiffs 2 and 3 afterwards sold their jenm right under Ex. B and their rights under the marupat Ex. A. In the present suit both the District Munsif and the Subordinate Judge in observing that the Hajee brought about the arrangement to benefit his children thought that Ex. E was not binding on the Cheeramoolayil Pookkoth tarwad. But it has been held in *Cheria*

Pangi Achan v. Unnalachan (1), that a karar to which the majority of the adult members of a tarwad or tavazhi are parties is binding on the tavazhi in general and it is not binding on the dissentient members only to the extent of not depriving them of their right to succeed as karnavan and of not depriving them of their right to maintenance. Apart from these two it is binding even on the dissentient members. If there are no dissentient members but if all the adult members are present at the spot and the other members are absent and if that was the reason why they were not parties to the karar, the position seems to become somewhat stronger.

In the present case beyond the reasons given by the lower Courts, viz., that the Hajee got the arrangement made in favour of his children and the observation of the Subordinate Judge that the rights of plaintiffs 2 and 3 originally were only for Rs. 100 and that the granting of the shop was a penal provision, they do not seem to have gone into the question of the binding nature of the karar properly. If most of the adult members were there and agreed to do so, I do not see why the giving of the shop to plaintiffs 2 and 3 should be regarded as a penal provision and not a genuine provision inserted for their benefit. It is said that Hajee did so much for the welfare of the tarwad that all the other members readily consented. I do not know if these statements are correct or not. It is a matter which ought to be inquired into. Now seeing that defendant 2 is himself a party to the karar, it may be said that the interest of the other members of the tavazhi will not be properly represented by him only though he is the karnavan. I therefore think it proper that the case should go back for a fresh inquiry after making eight members of the particular tavazhi which is interested in attacking the karar parties to the suit in a representative capacity. The District Munsif will inquire and determine who the eight members ought to be. Preferably they ought to be members who are not parties to the karar but any other member of the tavazhi who wants to attack the karar may come on record of his own accord, but the plaintiffs should not be put to the expense of issuing notices to them. After

making all these persons parties, the binding nature of the karar ought to be inquired into in the light of my observations and the decisions on the matter. The decrees of the Courts below are set aside and the suit remanded to the District Munsif for fresh disposal according to law. Court-fees paid in this Court and the lower appellate Court will be refunded to the plaintiffs. Costs up to date as well as hereafter will abide the result by which I do not mean that they should follow the result. The Courts will provide for the costs according to their discretion after the trial.

P.R.S./V.B.

*Case remanded.***A. I. R. 1933 Madras 171**

PANDALAI, J.

(*Gudimalla*) *Narasimham* and another—Appellants.

v.

(*Paidimarri*) *Venkata Subbayya* and another—Respondents.

Second Appeal No. 2005 of 1927, Decided on 17th February 1931, against decree of Sub-Judge, Masulipatam, in A. S. No. 21 of 1927.

(a) Interest—Post diem—No stipulation for—Such contract may be implied and interest awarded.

Even where there is no express stipulation in a mortgage document for post diem interest, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at the contract rate. [P 171 C 1]

(b) Interest—Compound interest.

No compound interest can be awarded unless it has been specially agreed to: *A I R* 1928 *P C* 80, *Ref.* [P 172 C 2]

(c) Deed—Construction—Registered mortgage deed setting out terms of contract—No subsequent conduct of parties should be looked to for interpreting it.

Where there is a registered document like a mortgage setting out the terms of the contract, namely, the interest, it is improper to look at the subsequent parol conduct for the purpose of interpreting the document. [P 172 C 2]

Ch. Raghava Rao and *B. T. M. Raghavachari*—for Appellants.

P. Somasundaram—for Respondents.

Judgment.—This was a suit upon a mortgage (Ex. A) in which the plaintiff was awarded a decree by the District Munsif for about Rs. 356 and in appeal by the learned Subordinate Judge for Rs. 2,982 odd. The discrepancy between the figures is mainly due to the difference in the findings of two Courts as to the plaintiff's right to compound interest. The District Munsif took a

view which was adverse to the plaintiff on the question of compound interest, while the learned Subordinate Judge took a view in his favour. In second appeal by the defendants three points are raised: first, that the decree of the Subordinate Judge awarding compound interest to the plaintiff is wrong; second, that the decree of the Subordinate Judge awarding post diem interest to the plaintiff is wrong; and thirdly, that the defendants should have been awarded compensation for alleged breaches of the mortgage contract by the plaintiff. The second and third points may be briefly dealt with as there is no substance in them. The argument is that the mortgage document (Ex. A) does not contain any clear stipulation for post diem interest and therefore it should not have been awarded. This argument is not correct. It has been held that even where there is no express stipulation in a mortgage document for post diem interest, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at the contract rate. I think no fault can be found with this part of the decree.

So also as to the claim for compensation by the defendants. The alleged breach by the plaintiff is that he failed to pay off two creditors to whom he undertook to pay Rs. 900 out of the mortgage money. It is admitted that the plaintiff did not make the payment and that the defendants themselves paid off those debts. But all this took place prior to 1913. The suit was brought in 1925. The Subordinate Judge has held that whatever claim the defendants may have had to compensation for the breach by the plaintiff, which would be the difference between the interest payable to the plaintiff and the interest subsequent to the mortgage actually paid to the creditors by the defendants, it is barred by limitation. It was urged that this view of the question of limitation was wrong. But it is immaterial to decide that point; because even if it is competent for the defendants to raise that question, there are no materials on record on which any relief can be given. From the first the defendants nowhere stated what was the amount of compensation due to them. I am not inclined to go into the question of limitation for

the purpose of remanding the case in case it was found in favour of the appellant.

The only substantial point in the appeal is that relating to compound interest. On this the District Munsif held that the mortgage document did not provide for it, while the learned Subordinate Judge held that it did. Ex. A is a Telugu document, very brief and extremely unconventional. It was probably prepared by a village document writer. But as it is it has to be interpreted on its own words. According to the learned Subordinate Judge the provision relating to interest is as follows :

"The total sum due to you is Rs. 2,000. On this the interest is Rs. 0-14-3 per Rs. 100 per mensem. At this rate, with Salu-sari Vaddi (literally for every year-interest) we shall pay in four equal instalments of Rs. 500, each payable on 20th March of each year."

The District Munsif thought that "salu-sari vaddi" which means literally interest for every year or interest calculated for every year means simple interest for every year at the agreed rate and that there was no provision in the document for compound interest on default of payment of the instalments. The learned Subordinate Judge took the view that the expression "salu-sari vaddi" was ambiguous and that it may mean interest either "calculated for each year" or "with yearly rests." Having so held, he proceeded to resolve the ambiguity by what he describes as the subsequent conduct of the parties from which he inferred that the intention of the parties was to pay and to be paid compound interest. In the first place I think the learned Subordinate Judge is not right in imputing any ambiguity to the expression "salu-sari vaddi." There is no idea of rests or compound interest at all in it.

It looks as if the learned Judge was so impressed with what he describes as subsequent conduct that he led himself to be convinced that it might be read into the document itself. The document is, in my opinion, perfectly simple and is capable of only one meaning, namely that the principal sum of Rs. 2,000 was to be paid in four yearly instalments of Rs. 500 each on 30th March of each year (beginning from 30th March 1910) with interest at the agreed rate of Rs. 0-14-3 per cent per annum on the balance of principal remaining due for each year, that is, the year during which interest

fell due. That being so, the agreement between the parties contained in the mortgage deed is only for simple interest and no compound interest can be awarded unless it has been specially agreed to: *Jewan Lal v. Nilamani Choudhuri* (1). The next point is whether, as the learned advocate for the respondent says, in ascertaining the meaning of the mortgage deed what is described by the learned Subordinate Judge as the subsequent conduct of the parties may be looked into; and if looked into, what is the result? It seems to me that where there is a registered document like a mortgage setting out the terms of the contract, namely the interest, it is improper to look at the subsequent parol conduct for the purpose of interpreting the document. There may be a subsequent agreement to alter the terms of a mortgage deed. If that is so, it is quite a different matter; and if any such agreement is pleaded, it will have to be proved as a fact and it must be supported by consideration. In this case there is no such question of subsequent agreement. No such agreement is either pleaded or found. The sole point then is whether from the subsequent conduct of the parties the meaning of the mortgage deed can be said to be something different from what it is. To make use of subsequent conduct for such purposes is improper. Assuming that it was admissible, the subsequent conduct adduced in this case is not sufficient to prove that at the time of the mortgage deed the parties agreed to compound interest. As to subsequent conduct there is only the inference to be drawn from Ex. 3 which was not put to defendant 1, but which is now sought to be used against him. In fact he himself produced it. He produced it for the purpose of showing not that he then agreed to pay compound interest but that he had paid Rs. 100 more to plaintiff than was admitted by him. But it appears that in Ex. 3 there are at the top the words "with annual compound interest." Ex. 3 is undoubtedly a document which came into existence long after the mortgage deed. Defendant 1 states that it was a voucher kept by him in which the plaintiff signed for the payments made to him. The first payment made was in

1. A I R 1928 P C 80=107 I C 337=55 I A 107 =7 Pat 305 (PC).

November 1909 the mortgage itself being on 23rd April 1909. It nowhere contains the signature of defendant 1, and it appears to be a memorandum containing the date of the mortgage, the name of the mortgagee, the principal amount and interest described in these words:

"Interest is settled to be paid at the rate of 14 annas and three pies per cent per mensem (with annual compound interest)."

Now in this document tendered by the plaintiff as a memorandum of acknowledgments of payment and prepared either by him or on his behalf and given to defendant 1, to be kept as a voucher seven months at least after the mortgage deed "compound interest" first occurs. I am not able to say how from this document said to have been kept by defendant 1 as a voucher and produced by him as such it is to be inferred that he had at the time of the mortgage agreed to compound interest. But it is pointed out that in the written statement it was not definitely denied that the plaintiff was entitled to compound interest under the mortgage deed. Whether that was so or not, the question of compound interest was undoubtedly in controversy between the parties in the Court of the District Munsif as well as in the Court of the Subordinate Judge, and the District Munsif found against the claim of the plaintiff on this head. What seems probable on this question of what is called subsequent conduct is that the plaintiff some time after the mortgage asked that the defendants should pay him compound interest, that on the contrary the defendants charged the plaintiff with having put them to loss by non-payment of the debts mentioned in the mortgage deed and that without any clear knowledge of their mutual rights they thought that if one gave up one claim the other would give up the other. I can find nothing which would affect the construction to be placed upon the mortgage document Ex. A and hold that the plaintiff is not entitled to compound interest. He is only entitled to simple interest at the rate mentioned in the mortgage.

The learned advocate for respondent 1 urged that even if he is not entitled to compound interest with annual rests his client is entitled at least to simple interest on the interest in arrear from the date of the first default. This is

only a modified form of compound interest. I do not find any warrant for it any more than for a claim for compound interest with annual rests. This claim must also be disallowed. The result is that the decree of the Subordinate Judge must be varied by disallowing the claim for compound interest and also ordering an account by appropriating the payments made by the defendants as found by the learned Subordinate Judge towards interest, if any due in arrear on those dates. Before passing the decree, the office will draw up a calculation of the amount payable to the plaintiff on the above footing. (On receiving the accounts, the Court delivered the following)

Judgment.—The account ordered has now been taken and it is ascertained that Rs. 2,015-11-3 is the amount due to the plaintiff on 17th April 1931. It is declared that this is the amount due on that date exclusive of costs, and there will be a preliminary mortgage decree fixing the date of payment on that date. The plaintiff will get costs on Rs. 1,300 and pay costs on the balance of the amount sued for in the Court of first instance. The plaintiff will get costs on Rs. 1,000 and pay costs on the balance of the amount appealed for in the lower appellate Court. The defendant-appellant will get costs in this second appeal on Rs. 700 and pay costs on the balance of the amount appealed for.

P.R.S./B.V.

Decree varied.

* A. I. R. 1933 Madras 173

JACKSON AND WALSH, JJ.

Secy. of State—Appellant.

v.

Ram Narayan Sarma — Respondent.

Letters Patent Appeal No. 23 of 1927, Decided on 4th October 1932, against judgment and decree of Waller, J., D/- 7th December 1926, reported as *A. I. R. 1927 Mad. 460*.

*** Government Servants' Conduct Rules—Fundamental R. 52 — Government servant accepting private job during leave period and drawing leave allowance—Leave not revoked by Government — Government is not entitled to refund of allowance paid.**

Where a Government servant who is granted leave and who has been drawing allowance during such leave period, accepts a private job during the leave period, unless the order granting leave is revoked by the Government dating from the breach of the rule, allowance already paid cannot be refunded.

[P 174 C 2]

Advocate-General—for Appellant.

K. V. Krishnaswami Ayyar and *T. K. Rangaswami*—for Respondent.

Jackson, J.—The respondent, an overseer in the Public Works Department, took leave in January 1921 and was granted, Ex. F, extensions up to 3rd May 1923; but wrote on 11th August 1922, Ex. 3, to the Chief Engineer that he would resign from 6th September 1922. The Chief Engineer had learnt that during this leave the respondent took employment in a private firm in contravention of the Government Servants' Conduct Rules and of the express orders of the Chief Engineer issued in March 1921, Ex. D. Accordingly the Chief Engineer wrote on 29th August 1922 Ex. G calling on the respondent to show cause why he should not be dismissed and on 28th October 1922 an order was issued, Ex. J., that respondent was dismissed from the service of the Government for having taken up private employment during leave without permission in contravention of the rules and in direct disobedience of the orders of March 1921. At the same time the Executive Engineer of the division to which the respondent was attached was informed, Ex. 4, that no more leave allowance should be paid to him.

About nine months later, on 11th August 1923, the Government Solicitor wrote to the respondent demanding the refund of Rs. 1,312-1-0, the leave allowances drawn by him from 3rd January 1921 to 31st July 1922 while he was in private service without sanction in contravention of the Rules—Ex. K. The respondent replied that Government was not entitled to the refund of this sum "drawn as allowances for leave legitimately due," Ex. L. Hence the suit, and since plaintiff was non-suited by a single Judge of this Court on appeal, the Letters Patent appeal. On behalf of the appellant, the Secretary of State, it is not denied that respondent duly obtained leave, and was duly entitled to these allowances during leave in ordinary circumstances. But it is argued that he disentitled himself to the allowances by infringing the Government Servants' Conduct Rules; and when there has been a breach of duty allowances are no longer payable to a Government servant: cf. ground 6 of this Letters Patent appeal. The allowances therefore were

paid under a mistake of fact, and should be refunded.

The respondent was duly granted leave and by virtue of that grant drew his allowances. His conduct may have been such as would justify Government in revoking his leave, but unless this was done it cannot be said that his conduct by itself effected a revocation. The rule that a Government servant may not undertake any employment is evidently framed with a view to the bearing that such employment may have upon a servant's conduct after his resumption of public duty; for easy and well paid employment may well amount to a bribe. But if the servant is not resuming public duty the objection to his private employment largely vanishes; and though in the present case the respondent's direct disobedience to orders might have justified the revocation of his leave it cannot be said that it necessarily involved such revocation. In view of his past good service, domestic trouble, and ultimate resignation, the superior authority might (which is not to say that it should) have condoned his lapse of conduct. Therefore it is not mere verbal formalism, as the learned Advocate-General would argue, for the Court to require assurance that the leave was actually revoked before it sanctions the refund.

Until there has been an order of revocation, or an order of dismissal dating from the breach of rule which would have the effect of revocation, Rule 52 of the Fundamental Rules makes it plain that a Government servant is entitled to draw his allowances. Here English case law in reference to mistake of fact affords no assistance. If the grant of leave justifies the payment of allowances and such grant cannot be automatically cancelled by the conduct of the servant, but only by the action of Government, then, when Government has taken no such action the grant remains as a fact justifying the payment; and there has been no mistake of fact. The appeal is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 175

CURGENVEN, J.

C. Ramaswami Chettiar—Appellant.

v.

K. Ankappa Mudali and another — Respondents.

Appeal No. 211 of 1930, Decided on 1st December 1931, against appellate order of Sub Judge, South Malabar, in A. S. No. 54 of 1929.

(a) Hindu Law—Alienation — Guardian — Personal decree against—Minor's property is not liable if no decree is passed against minor as well.

On a mortgage executed by defendant 1 for himself and as guardian of his minor brother defendant 2, the mortgagee obtained a decree for sale but as the mortgaged property was sold under a decree on a prior mortgage he applied for a personal decree against defendants 1 and 2. Such a decree was passed against defendant 1 and not against defendant 2. The mortgagee then applied to proceed against the remaining family property of the mortgagors in execution of his personal decree on the ground that the decree was in substance and in effect against defendant 1 as family manager and accordingly a personal decree passed against him in that capacity would enable the decree-holder to get access to the whole family property.

Held : that if no supplementary decree under O. 34, R. 6, Civil P. C., which is in effect a money decree, has been passed against a minor such a decree passed against his guardian in his individual capacity could not have any effect in rendering the minor's property liable.

[P 175 C 2]

(b) Decree — Execution — Decree-holder cannot prove that property was family property and that defendant was manager thereof.

Where a suit leaves the matter in doubt as to the capacity which the defendant occupied against whom the claim was made, the omission may be supplied by adducing evidence in execution which ought more properly to have formed part of the record of the suit; still less where the capacity, that of a guardian, is expressly stated. It is therefore not open to the decree-holder or his transferee to prove in execution that the property mortgaged was in fact family property and the judgment-debtor was in fact manager of the family when he mortgaged it.

[P 176 C 1, 2]

K. P. Ramakrishna Ayyar—for Appellant.*T. C. K. Krompt and P. K. Achari* — for Respondents.

Judgment. — This appeal raises the question of the effect of a mortgage decree passed against two brothers. The mortgagee sued upon a deed executed by defendant 1 for himself and as guardian of his minor brother, defendant 2, and obtained an ordinary mortgage decree. It so happened that the mortgaged property was sold under a decree obtained

on a prior mortgage, and the decree-holder accordingly applied to proceed against the other property of the brothers. He was granted a personal decree against defendant 1, but not against defendant 2, being a minor. He then applied to proceed against what he described as the remaining family property of the judgment-debtors and this has been allowed by the District Munsif upon the ground that the decree was in substance and in effect against defendant 1 as family manager and accordingly that a personal decree passed against him in that capacity would enable the decree-holder to get access to the whole family property. On appeal the learned Subordinate Judge has reversed this decision and the transferee-decree-holder accordingly now presents this second appeal. An attempt has been made to contend that even in his capacity as a guardian a personal decree against defendant 1 would enable the minor's property to be proceeded against. That I think is clearly an unarguable position. O. 34, R. 6, Civil P. C., enables a supplementary personal decree to be passed if it is found that the mortgage security is insufficient to discharge the debt, and it is impossible to hold that if no such personal decree, which is in effect a decree for money, has been passed against a minor such a decree passed against his guardian in his individual capacity can have any effect in rendering the minor's property liable.

It can only be on the footing adopted by the learned District Munsif, that the suit was in substance and in effect a suit against defendant 1 as family manager upon a document which he executed in that capacity that such a consequence might ensue. I have been referred to a series of cases which relate in point of fact to families governed by Marumakathayam law although no doubt the principles enunciated in them extend equally to cases of an ordinary Hindu joint family, *Manakat Velamma v. Ibrahim Lebba* (1), *Rayarappan Nambiar v. K. C. V. Kannaran* (2) and *Vesu v. Kannamma* (3); and those cases decide I think that if in substance and in effect the suit and the decree is, in the case of a Mitakshara family, against a father or

1. (1904) 27 Mad 375.

2. (1918) 45 I C 489.

3. A I R 1926 Mad 991=97 I C 551.

managing member as such, although it may not be expressly so stated, such a decree will bind the interests of the remaining members of the family. I cannot extract any more extensive principle than that from those decisions. It may of course be said that in order to ascertain whether the defendant was in fact the father or the managing member evidence was needed supplementary to the materials supplied by the decree. But I do not think that those cases go to the length of saying that where a suit leaves the matter in doubt as to the capacity which the defendant occupied against whom the claim was made the omission may be supplied by adducing evidence in execution which ought more properly to have formed part of the record of the suit; still less where the capacity—that of a guardian—is expressly stated.

In the present case, it would be necessary to show that defendant 1 was the family manager, that the property in respect of which the decree was obtained was the family property and that the purpose for which the mortgage was executed was one binding upon the family. It may perhaps be held that the records of the suit may be looked into in order to ascertain whether it was in substance a suit of that character, intended to bind the family property in the hands of the manager, and therefrom to construe the decree. But in the present case, as the learned Subordinate Judge has pointed out, there is no material whatever prior to the decree upon which such conclusions can be formed. We have neither the mortgage deed, nor the plaint nor the depositions in the case or other evidence, nor the judgment, and all that appears is that in the execution proceeding defendant 1 was put into the witness-box, evidently for an entirely different purpose on behalf of defendant 2, and an admission was extracted from him in cross-examination that he executed the mortgage deed as family manager and that he thought that it was in the family interest although he could not specify the precise purpose. In these circumstances, and the claim being perfectly intelligible, upon an entirely different aspect of the relationship between the two defendants, namely, that of guardian and ward, I think it would be going far beyond the reported cases to

hold that it is open now to the decree-holder or his transferee to prove in execution that the property mortgaged was in fact family property and defendant 1 was in fact manager of the family when he mortgaged it. I can see no grounds accordingly for holding that the lower appellate Court has adopted an erroneous view of the law and I accordingly dismiss the appeal with costs.

P.R.S./K.N.

Appeal dismissed.

* A. I. R. 1933 Madras 176

JACKSON AND MOCKETT, JJ.

N. K. N. Ramier and Bros.—Plaintiffs—Appellants.

v.

S. S. Ramudu Ayyar and another—Defendants—Respondents.

Second Appeal No. 1060 of 1928, Decided on 2nd August 1932, from decree of Dist. Judge, Madura, in A. S. No. 232 of 1926.

*** (a) Sale of Goods Act (1930), S. 37 (3)—Contract to supply goods—Refusal by buyer to take delivery and repudiation of entire contract on ground of defective tender—Subsequent plea as to goods being defective cannot be raised—Vendor and Purchaser.**

Where a buyer of goods refuses to take delivery on the ground of defective tender and repudiates the whole contract he cannot be allowed to set up the plea of the goods being defective when the time has expired and there is no question of replacement. Such a plea is unbusiness like and unreasonable; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543, *Foll*; A. I. R. 1925 Mad. 974 and A. I. R. 1926 Mad. 778, *Ref.*

[P 177 C 2]

*** (b) Sale of Goods Act (1930), S. 34—Contract to supply in instalments—Repudiation of instalment by buyer is not repudiation of whole contract where seller elects to keep contract alive—Vendor and Purchaser**

The question whether a contract to supply goods in instalments is an indivisible one and whether a repudiation of one instalment by a buyer is a repudiation of the whole so as to absolve the seller from obligation to tender the remaining instalments is a matter of fact in each case. Where in such a contract the buyer repudiates the whole contract by refusing to take delivery of one instalment, but the seller without accepting the repudiation elects to keep alive the contract, he must be deemed to have treated the contract as divisible and he is not absolved from the obligation of tendering the remaining instalments; *Frost v. Knight*, 7 Ex. 3, *Rel. on.*

[P 178 C 1, 2]

T. R. Venkatarama Sastri and N. Rajagopala Ayyangar—for Appellants.

T. Krishnaswami Ayyangar and S. K. Narasimhachari—for Respondents.

Jackson, J.—The appellants-plaintiffs and respondents-defendants are Madura cotton brokers who on 21st August 1919,

Ex. 8, engaged with others in what is known there as a chain contract. The mills of Messrs. Harvey were to produce 60 bales of certain counts, and, as they passed down the chain, these were to be received by Messrs. Ramudu Ayyar, the defendants, and sold by them to Messrs. Ram Ayyar, the plaintiffs, who will be described henceforth as the sellers and the buyers, because in previous litigation their position was reversed and the terms "plaintiffs" and "defendants" will only lead to confusion. 28 bales were tendered by the sellers, and taken delivery of by the buyers; nine bales were tendered (as will be shown below) by the sellers and rejected by the buyers. 23 bales have never been tendered at all. The buyers now sue for a return of the advance made by them to the sellers on the date of the contract with interest thereon in respect of the 32 bales of which they did not take delivery. The suit has been dismissed by both lower Courts, and the buyers appeal. We agree with the lower appellate Court that the terms of Ex. 9 clearly constitute a tender of the nine bales on 15th November 1918. On 19th December 1918, Ex. 10, the buyers complained that contrary to the custom of the trade deliveries were not being made as and when the bales were ready at the mills, and therefore they refused both to admit liability for the 28 bales already delivered, and to take delivery of the nine bales tendered on 15th November 1918.

It came out in the course of another suit between the parties that three out of these nine bales had been bought from the mills at a price less than that contracted for in the chain contract Ex. 8, and therefore the buyers would have been justified, on these grounds, in refusing not only the three defective bales, but the whole instalment. The point is not one covered by the Indian Contract Act, but is clearly laid down in the English Sale of Goods Act, 1893 which embodies the existing law on the subject. S. 30 (3):

"Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may reject the whole."

This section has been repeated since this suit began in S. 37 (3), Indian Sale of Goods Act (3 of 1930), and the parties are agreed that, whatever be its interpretation, this is the law on the subject.

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Therefore if on 19th December 1918 the buyers had said we reject the nine bales because six good are mixed with three bad bales, they would have been within their rights. The sellers might then immediately have tendered the six good bales as a fresh instalment, and, if so advised, they had plenty of time in which to replace the three bad bales. But since the buyers did not so state, but preferred to repudiate the whole contract, the question arises whether, when the time has expired and there is no further question of replacement, the buyers can for the first time complain that three bales were defective. This proposition is precisely what Mathew, L. J., stigmatizes as unbusiness like and unreasonable in the leading case on the subject *Braithwaite v. Foreign Hardwood Co.* (1): This case has been canvassed in the English rulings, but as regards our Court its principle is clearly affirmed in *Rajulu Aiyar v. Kuppu Aiyar & Sons* (2), and *Nannier v. Rayalu Iyer Nagaswami Aiyar Co.* (3), and the following passage, p. 551, shows how closely it runs on all fours with our present case:

"After there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment, but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract, and refused to be bound by it."

In the opinion of Collins, M. R., "that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which presumably he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not willing and ready to perform the conditions precedent devolving upon him."

Commenting upon this decision in *British and Beningtons, Ltd. v. N. W. Cachar Tea Co.* (4), Lord Sumner says:

"Furthermore it does not anywhere appear that even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract which he might have duly tendered and so have put himself right,"

1. (1905) 2 K B 543=74 L J K B 688=92 L T 637=10 Com Cas 189=10 Asp M C 52=21 T L R 413.

2. A I R 1925 Mad 974=88 I C 241.

3. A I R 1926 Mad 778=93 I C 673=49 Mad 781.

4. (1923) A C 48=92 L J K B 62=128 L T 422 =28 Com Case 265.

Therefore since the sellers have proved that they duly tendered these nine bales we do not find that it is open to the buyers to raise the belated plea that three of the bales were not according to the contract which they had preferred entirely to repudiate. But as regards the 23 bales there was no tender at all. It is clear that the sellers did not accept the repudiation of the contract, and on 2nd April 1919, Ex. 14, they are warning the buyers that:

"you should also take delivery of the remaining bales (i. e., 23) without delay on payment of the amount when and as they are received;"

but as a matter of fact they never did tender, and there was never any rejection after tender, as with the nine bales. It was argued for the sellers that this contract though by instalments was indivisible and that a repudiation of one instalment was a repudiation of the whole so as to absolve the sellers from the obligation to tender the twenty-three bales. The answer to this is that as stated in S. 31 (2), English Sale of Goods Act, the question of indivisibility is a matter of fact in each case and as will later appear the sellers themselves clearly treated the contract as divisible. In these circumstances the law seems clear as laid down in *Frost v. Knight* (5):

"The promisee may treat the notice of intention (to renounce) as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it: cf. Leake on Contract, Edn. 8, p. 175."

The sellers were still under the obligation of tendering, as they themselves admitted in their letter of 2nd April 1919, Ex. 14, and in the "note" to their plaint in O. S. No. 70 of 1919, Madura Sub-Court, which is an exhibit in this case. The sellers at that time instead of bringing their suit regarding the 23 bales at once as they might have done elected to keep the contract alive so far as the 23 were concerned thereby preserving the mutual obligation of the parties intact. One of

these obligations was that they, the sellers, should tender the goods; and since they never did tender, they cannot now be heard to say that they can retain the buyers' earnest money on account of the 23 bales. For the above reasons we agree with the lower Courts in respect of the nine bales, but allow the appeal in regard to the 23 bales, the advances for which must be returned with interest at 9 per cent from date of demand. Proportionate costs throughout.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 178

VENKATASUBBA RAO AND REILLY, JJ.

Secretary of State—Petitioner.

v.

N. M. R. Ayyasami Chettiar — Opposite Party.

Civil Revn. Case No. 520 of 1932, Decided on 8th September 1932, to revise order of Dist. Munsif, Dharapuram, D/- 4th December 1930.

Court-fees Act (Madras) (1870), S. 17—Sch. 1, Arts. 1 and 2—Suit on two promissory notes of Rs. 600 and Rs. 400—Court-fee should be paid on distinct amounts — Court-fee for Rs. 400 should be paid as under Art. 2 and not Art. 1.

In a suit on two promissory notes of Rs. 600 and Rs. 400 the court-fee should be paid not on the aggregate of the two but on the distinct amounts, and the claim in regard to Rs. 600 is governed by Art. 1, Sch. 1, but the claim in regard to Rs. 400 is governed not by Art. 1, Sch. 1 but by Art. 2, Sch. 1, as S. 6 is controlled by S. 17 which applies to this suit. [P 178 C 2]

Government Pleader—for Petitioner.

Venkatasubba Rao, J.—The view of the learned District Munsif is perfectly right. The question that has been raised may be stated in this form. If two sums of Rs. 600 and Rs. 400 respectively are claimed in a suit on the basis of two promissory notes, what is the court-fee payable? S. 17 provides expressly that it is not on the aggregate sum that the fee is to be paid, but on the several sums which go to make up that aggregate. Under that section the test is what is the amount that would be payable had separate plaints been filed for each of the several distinct claims, all of which the suit embraces? The claim in regard to Rs. 600 is governed by Art. 1 Sch. 1, but the other claim in regard to Rs. 400 comes, as the District Munsif rightly points out disagreeing with the court-fee examiner, within Art. 2 and not Art. 1. S. 6 is

controlled by S. 17, which is the section applicable to the facts of the present case. The order of the learned District Munsif is right, and the civil revision petition is dismissed.

Reilly, J.—I agree.

P.R.S./K.S. *Petition dismissed.*

A. I. R. 1933 Madras 179

SUNDARAM CHETTY, J.

Vasamsetti Swami—Plaintiff—Appellant.

v.

(*Gundalattulla*) *Tatayya* and others—Defendants—Respondents.

Misc. Second Appeal No. 143 of 1928, and Civil Revn. Petn. No. 1708 of 1928, Decided on 7th April 1931, against order of Sub-Judge, Amalapuram, in A. S. No. 9 of 1926.

(a) Civil P. C. (1908), O. 32, R. 3—Mother unsuccessfully tried to be served for being appointed guardian—Court officer made guardian—Minor cannot be said to be not represented at all.

In a suit one of the parties died and one of the two minor sons of the deceased was brought on record as the legal representative while the other son was not brought on record at all. The mother of the minor was to be made the guardian ad litem but could not be served for a long time. Therefore the Court, to avoid delay, appointed the Court officer as the minor's guardian ad litem and proceeded with the case.

Held: that the appointment of the Court officer as guardian of the minor in the circumstances of this case could not be deemed to be such an irregularity as would justify the Court in holding that the minor was not represented at all. The minor when represented by the Court officer as guardian could not strictly be deemed to be one who was not represented at all in the eye of the law however much it would be desirable to have appointed the mother herself as guardian, making some more attempts for effecting personal service on her. Also the omission to bring on record the other minor son of the deceased was not such an irregularity as would vitiate the whole case. If this omission was proved to be due to any fraud or collusion, then it would have been a different matter.

[P 180 C 1, 2]

(b) Practice—Abandonment—Execution sale—Objections—Inquiry by Munsif—Sale set aside on technical grounds—Appeal against order—Appellate Court confirming sale—Other objections not pressed by either party before any Court nor any mention made in revision application to set aside appellate Court's order of having pressed them—Presumption is that they were abandoned in lower Court.

After an execution sale some objections were filed against it in an application to set aside the sale on various grounds. On an inquiry by the Munsif, the sale had been set aside on some technical grounds. An appeal against that order had been filed. The appellate Court had confirmed

the sale but had not considered any of the other objections to the sale. Those objections had been disallowed by the Munsif, and had not been pressed before the appellate Court by either side. Even in the grounds of the revision petition no specific mention was made of having followed that course by the petitioners for revision.

Held: that the petitioners ought to have pressed all their objections in the appellate Court, in case the appellate Court decided against them differing from the lower Court. Therefore in the circumstances of the case, the presumption had to be made to the effect that those objections had been abandoned by the petitioners in the lower appellate Court: *A I R 1923 Lah 124, Ref.*

[P 181 C 1]

K. Kameshwara Rao—for Petitioners.

K. Bhimasankaran—for Respondents.

Judgment.—As against an order passed by the Subordinate Judge of Amalapuram refusing to set aside a court-sale and confirming the sale, this civil revision petition and also the civil miscellaneous second appeal have been filed. The petitioners are the two minor sons of the deceased Rama Jogi who was one of the sons of the judgment-debtor Vasamsetti Swami. In the course of the execution proceedings against the four sons of the judgment-debtor, one of them, viz. Rama Jogi, died. The other three sons continued to be on record. In the place of the deceased Rama Jogi, his minor son was sought to be added as his legal representative and a petition for the appointment of his mother as his guardian was also put in. In respect of that petition, notices were taken out thrice to the proposed guardian, but as she could not be served personally, the Court seems to have dismissed that petition and the decree holder thereupon filed another petition for the appointment of a Court officer as guardian, and that was granted. The execution proceedings were then continued which eventually resulted in a sale of the attached properties being effected. In order to have that sale set aside, the aforesaid minor, and another son of Rama Jogi who was not brought on record at all, have filed the present petition, alleging various grounds for impeaching the validity of the Court sale.

There was an elaborate inquiry by the District Munsif who found that the alleged material irregularity in conducting and publishing the sale and the substantial injury by reason of any such material irregularity have not been made out. On the merits he decided the case against the petitioners, who however have thought fit to set aside the sale on two

technical grounds, namely, that one of the minor sons of the deceased Rama Jogi, who was brought on record as his legal representative, was not properly represented as the appointment of the Court officer as guardian was not proper and as the other minor son of the deceased Rama Jogi was not brought on record at all. Against that order of the District Munsif an appeal was preferred by the auction-purchaser. The learned Subordinate Judge held that, in spite of the omissions aforementioned in the matter of bringing in the legal representatives of the deceased Rama Jogi, there was sufficient representation in the absence of any fraud or collusion. Some decisions have been relied on by him in support of this view. He held that the proceedings in execution have not been vitiated by any illegality and therefore differing from the view taken by the first Court he upheld the validity of the Court sale and allowed the appeal.

As regards the first point, I am clearly of opinion that the appointment of the Court officer as guardian of the minor son of Rama Jogi in the circumstances of this case cannot be deemed to be such an irregularity as would justify the Court in holding that that minor was not represented at all. As no person could be appointed as guardian for the minor, unless the proposed guardian was served with notice and also expressed his or her willingness to act as guardian, the Court seems to have thought that the effecting of personal service on the mother who was proposed as guardian could not be done without unreasonable delay and therefore that petition was dismissed. It cannot be said that the dismissal of that petition was due to any default, wilful or otherwise, on the part of the decree-holder. The Court seems to have thought fit to appoint another guardian for the minor and therefore the petition by the decree-holder proposing the Court officer as guardian was granted. I am of opinion that the minor when represented by the Court officer as guardian cannot strictly be deemed to be one who was not represented at all in the eye of the law, however much it would be desirable to have appointed the mother herself as guardian, making some more attempts for effecting personal service on her. The omission to bring on record the other minor son of the deceased Rama Jogi is

not, in my opinion, such an irregularity as would vitiate the whole of the execution proceedings. If this omission is proved to be due to any fraud or collusion, then it would be a different matter. It is difficult to hold that the decree-holder was wanting in bona fides in proposing the appointment of a Court officer as guardian of the minor when his petition to appoint the mother was dismissed by the Court. I therefore agree with the Subordinate Judge in holding that these two omissions are not such as would justify us in holding that the sale itself was void on account of these defects.

It is unfortunate that the learned Subordinate Judge has omitted to deal with any of the other grounds which the petitioners urged in support of their contention that the Court sale is void or illegal. Those objections having been disallowed by the first Court, it seems to me that the appellant before the Subordinate Judge could have only argued the points decided against him by the lower Court. In all probability, that was the course adopted by the appellants' pleader. It looks as if the respondents' pleader contented himself with replying to those arguments and neither side seems to have dealt with the other grounds of objection put forward against the Court sale. It was not to the appellants' interests to agitate the points which had been decided in his favour by the lower Court. On the other hand, I should think that it was the duty of the respondents' pleader to have urged all or some of those points for the consideration of the Subordinate Judge, in case he thought fit to differ from the lower Court on the two points on which the sale itself was set aside. One would expect the respondents' pleader to have tried to support the judgment of the lower Court by attacking some of the findings which went against him.

It seems, such a course was not adopted by the respondents' pleader; otherwise the learned Subordinate Judge would have stated something in his order to indicate that any of those points was raised by the respondents' pleader and argued by him in order to support the order of the lower Court. Even in the grounds of the revision petition and the miscellaneous appeal filed in this Court there is no specific mention of any such course having been adopted by the res.

pondents' pleader in the lower Court. In such circumstances the presumption has to be made to the effect that those objections have been abandoned by the respondents' pleader in the lower Court. Such a view has been taken in a decision of the Lahore High Court reported in *Abdul Karim v. Ram Jagu Ram* (1). If I am satisfied that any of those points was really urged by the respondent's pleader before the learned Subordinate Judge in order to support the District Munsif's order and was omitted to be noticed in the judgment, I should send back this appeal to the lower Court for a re-hearing and disposal. If the omission on the part of the Subordinate Judge to consider any of those points was due to the reason aforementioned, there would be no justification to remand this case for re-hearing.

I therefore hold that there are no adequate grounds for interference with the order of the Subordinate Judge. In the result, the civil miscellaneous second appeal is dismissed with costs of respondent 3 and the civil revision petition without costs.

P.R.S./B.V.

Appeal dismissed.

1. A I R 1923 Lah 124=68 I C 740.

* * A. I. R. 1933 Madras 181

MADHAVAN NAIR, J.

Ranganatha Ayyangar—Defendant—Appellant.

v.

R. Rajagopala Ayyangar and others—Plaintiffs—Respondents.

Second Appeal No. 437 of 1929, Decided on 21st August 1931, against decree of Sub-Judge, Mayavaram, in A.S. No. 25 of 1927.

*** * Registration Act (1877), S. 17—Assignment of vendor's lien over property worth more than Rs. 100—Document is compulsorily registrable—Transfer of Property Act (1882), Ss. 55 (4) and 8.**

The unpaid vendor's lien under S. 55 (4), T. P. Act, is an interest in immovable property and therefore an instrument assigning such a right, when the property with respect to which the right exists is worth more than Rs. 100 in value, is compulsorily registrable under S. 17, Registration Act, despite the provisions of S. 8, T. P. Act : 39 I C 405; A I R 1922 Mad 344; A I R 1921 Mad 137 and 39 Mad 283, Dist. ; A I R 1926 Mad 903 ; A I R 1926 P C 94 and A I R 1931 P C 245, Ref. [P 184 C 1]

V. Rajagopalachariar—for Appellant.

K. Bhashyam Ayyangar and T. R. Srinivasan—for Respondents.

Judgment.—Defendant 2 is the appellant. Defendant 1 purchased the suit property from one Saranadha Ayyangar under Ex. A dated 5th October 1915 for a sum of Rs. 400. Towards payment of part of the consideration namely, Rs. 200, he executed a "debt-bond," Ex. B, dated 13th October 1915, in favour of the vendor. This bond was assigned by the vendor to the plaintiffs' father by Ex. B-1 dated 20th October 1915. The suit property is admittedly worth more than Rs. 100 and the assignment deed, Ex. B, has not been registered. The suit out of which this second appeal arises was instituted by the plaintiffs to recover by sale of the suit land and from defendant 1 personally, the sum of Rs. 351-12-3 due on the "debt-bond" executed by defendant 1 to Saranatha Ayyangar. The contesting defendant is defendant 2. He purchased the suit property from defendant 1 under Ex. 1 dated 3rd November 1921. Reversing the decree of the District Munsif which dismissed the plaintiffs' suit, the Subordinate Judge gave them a decree for the sum claimed together with interest against defendant 1 and also against the property.

It will be observed that under S. 55, Cl. 4 (b), T. P. Act, as part of the purchase-money due on the property remained unpaid by defendant 1, the vendor Saranadha Ayyangar had a charge on it in the hands of defendant 1 for the amount of this unpaid purchase-money. It is argued by the appellant that this "charge" called the unpaid vendor's statutory lien has been assigned under Ex. B-1 and as the assignment deed has not been registered under S. 17, Cl. 1 (b), Registration Act, the property being worth more than Rs. 100, the learned Subordinate Judge should have held that there has been no valid assignment of the "charge" and the plaintiffs' suit should have been dismissed in so far as it asked for relief against the property. S. 17, Cl. 1 (b), Registration Act, makes compulsorily registrable :

"instruments (other than instruments of gift) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property."

And by S. 49 it is declared that no instrument required by S. 17 to be registered should be received in evidence in

any civil proceeding in any Court unless it had been registered. On behalf of the respondent it is argued that Ex. B-1 is a mere assignment of the simple debt due under Ex. B, that the "vendor's lien" is not assigned thereunder and that it is a mere security which passes to the assignee under S. 8, T. P. Act, as a "legal incident" of the transfer; and as such Ex. B-1 does not require registration. S. 8, T. P. Act, runs as follows :

" Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interests which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include where the property is a debt or other actionable claim, the securities therefor"

Before dealing with the main question of law raised by the appellant, I shall first dispose of the argument of the respondent that what was conveyed under Ex. B-1 was only the simple debt due under Ex. B and that the vendor's lien has not been assigned thereunder except impliedly as an incident of the transfer. The material portions of the assignment deed run as follows :

" Deed of assignment executed on 20th October 1915 I have this day assigned to you the simple debt bond for Rs. 200 executed on 13th October 1915 to me by Kuppuswami Ayyangar The amount including the principal and interest due thereon is Rs. 200-5-0 and I have this day received the said sum from you and have assigned to you the said debt bond. As I have, in the manner aforesaid, assigned to you all my rights in respect of the said document, I have hereby assigned the right to you to collect the said amount either amicably or through Court"

The terms of the document make it clear that what was transferred under it was not a simple debt of Rs. 200 alone; all the rights in respect of the debt-bond were clearly assigned to the plaintiffs' father and these rights will include the right of enforcing the unpaid vendor's lien existing with reference to the property. That the plaintiffs understood the document thus appears to be clear from para. 7 of the plaint wherein they state that their father acquired :

" the entire right possessed by the said Saranadha Ayyangar to recover the balance of the sale consideration with interest on the liability of the properties covered by the said sale-deed and on the personal liability of defendant 1 according to the terms of the said debt-bond : see also para. 6 of the plaint."

The Subordinate Judge also came to the conclusion that the intention of the par-

ties to Ex. B-1 was to assign the unpaid vendor's lien along with it : see para. 21 of the judgment. I have no doubt that under Ex. B-1 the assignor expressly conveyed to the father of the plaintiffs the unpaid vendor's lien which existed in his favour with respect to the suit property. The question is whether the document assigned such a right when the property with respect to which the right exists is worth more than Rs. 100 in value and requires registration under S. 17, Cl. 1 (b), Registration Act. No authority directly bearing on the question has been brought to my notice. In *Kunchithapatam Pillai v. Palamalai Pillai* (1), it is pointed out that the vendor's lien for unpaid purchase money can be transferred :

" if the vendor executed a proper conveyance in this behalf. But until such a transfer is made, the right inheres in the vendor and in him alone."

The question whether the conveyance should be by a registered document or not, did not arise for consideration in that case. In *Perumal Ammal v. Perumal Naicker* (2) it was held that in consequence of amendments made in 1900 to the Transfer of Property Act, mortgage debts have been excluded from the definition of actionable claims and can only be transferred together with the security as immovable property and therefore only by a registered instrument. The learned Judges observed that this rule is subject to the exceptions one of which is

"that where the law still admits of the separate transfer of the mortgagedebt as by the endorsement of a promissory note secured by deposit of title-deeds or by the attachment and sale in execution of a mortgage debt under the Civil Procedure Code, S. 8 still operates to carry the security with it,"

meaning thereby that such transfers need not be by a registered instrument. This observation regarding a promissory note was clearly an obiter dictum and was dissented from in *Elumalai Chetty v. Balakrishna Mudaliar* (3), which held "that the endorsee for value of a negotiable instrument, the amount of which had been secured by a mortgage by deposit of title-deeds, cannot claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage right to him."

1. (1917) 39 I C 405.

2. A I R 1921 Mad 137=61 I O 461=44 Mad 196.

3. A I R 1922 Mad 344=66 I C 168=44 Mad 965.

As we have not got to deal with the transfer of legal or equitable mortgage debts, but only with the transfer of a "charge," these decisions do not help us much in deciding the present case. The respondent relies strongly on a decision of Ramesam, J., in *Sambasiva Aiyar v. Venkatarama Aiyar* (4) in support of his contention. In that case the facts were as follows as will appear from the head-note:

"P owed plaintiff a sum of money on a promissory note. P sold some of his properties to D, the father of the defendants, and left a portion of the purchase money in D's hands with instructions to remit the same to plaintiff towards his promissory note debt. D remitted the sum to plaintiff but the latter refused to accept the amount on the ground that more was due to him. Plaintiff thereupon obtained a decree against P on the note, and in execution of that decree, he attached the debt due to P from D consisting of the unpaid purchase money with interest, and purchased it himself. Subsequently the plaintiff instituted the suit out of which the appeal arose to recover the amount from the defendants claiming also a lien upon the properties sold to D, their father. The question was whether the plaintiff was entitled to the lien claimed by him."

The learned Judge held that the plaintiff was entitled to the lien and that under S. 8, T. P. Act, P's lien as regards the unpaid purchase money passed to the plaintiff by virtue of the sale certificate along with the debt. In the course of his judgment, the learned Judge after pointing out the distinction between a "mortgage" and a "charge" made the following observations which are relied on strongly by the respondent:

"If there is no transfer of immovable property, the assignment of the charge need not be made by a registered instrument. The right of the debt being an actionable claim can be transferred only by an instrument in writing under S. 130, T. P. Act. In the present case we have an instrument in writing, namely, the sale certificate issued by the Court. It is conceded by the learned vakil for the respondents that the sale certificate need not be registered with reference to the exceptions of S. 17, Registration Act. It seems to follow that the right to the charge passes along with the debt. The learned vakil for the respondents relies on a dictum in *Subbaraju v. Seetharamaraju* (5), and contends that S. 8, T. P. Act, does not apply to Court sales. The passage relied on is not quite intelligible to me. I do not see why, under S. 8, T. P. Act, the vendor's lien does not pass with the right to the money."

There is no doubt that some of these observations seem to help the respondent. But regard must be had to the

fact that the assignment of the unpaid vendor's lien in that case was by virtue of a sale certificate which is expressly excluded from registration under exception 12, S. 17, Registration Act. The decision itself cannot therefore be applied to the present case; and the observations are mere obiter dicta; and further, there is no discussion whether the assignment by a document requires registration under S. 17, Cl. 1 (b), Registration Act, as the point did not obviously arise for decision in that case. In this connexion attention may be drawn to the decision of the Privy Council in *Dayal Singh v. Indar Singh* (6), which I think affords considerable help in deciding the question.

In that case it was held assuming that the document under construction was an agreement for sale and not a conveyance, as the buyer had paid the earnest money and had been pressing for completion which the vendor refused, the document created, under S. 55, Cl. 6 (b), T. P. Act, "an interest in the property" within the meaning of S. 17, Registration Act, and was accordingly compulsorily registrable. If the right which the buyer has under S. 55, Cl. 6(b), T. P. Act, can be described to be an interest in the property, I think the "lien" which the seller under S. 55 (4) has, may also be described as an interest in property. If so it must follow that Ex. B-1 containing as it does an assignment of such a right in property worth more than Rs. 100 must be held to be compulsorily registrable under S. 17 Cl. 1 (b), Registration Act. The decision in *Sambasiva Aiyar v. Venkatarama Aiyar* (4) was prior to the decision of the Privy Council in *Dayal Singh v. Indar Singh* (6). Another Privy Council decision, *Imperial Bank of India v. The Bengal National Bank* (7), referred to by the appellant, may also be referred to with advantage in this connexion. In that case after pointing out that "debt" and "security" are separate, the Privy Council held that when both "debt" and "security" are transferred and the transfer of the security only fails for some reason—in that case for non-registration of the deed—the transferee can have no

4. A I R 1926 Mad 903=95 I C 447.

5. (1916) 39 Mad 283=28 I C 232.

6. A I R 1926 P C 94=98 I C 503=53 I A 214 (P C).

7. A I R 1931 P C 245=134 I C 651=58 I A 323 (P C).

right or interest in the security, but the transfer of the debt still subsists, etc.: see head-note. This would show that the transfer in the present case, so far as it relates to the security being unregistered, will be ineffectual.

For these reasons, in my opinion, the unpaid vendor's lien under the Transfer of Property Act is an "interest in immovable property," and as Ex. B-1 assigns such an interest in immovable property of the value of over Rs. 100 which is compulsorily registrable under the Registration Act, and as it has not been registered, the assignment is invalid and unenforceable against the suit property. S. 8, T. P. Act, no doubt says that when a debt is transferred the security therefor is also transferred as a legal incident of the transfer, but it does not prescribe the manner or method of the assignment of the security and cannot override the provisions of the Registration Act in cases where under that Act an assignment to be valid requires registration.

In the result the decree of the lower appellate Court in so far as it relates to the suit property is set aside and the decree will be modified accordingly. The parties will pay and receive proportionate costs in this and in the lower appellate Court. The order of the first Court as regards costs will stand.

P.R.S./R.K.

Decree modified.

A. I. R. 1933 Madras 184

CURGENVEN, J.

V. H. R. Subbaraya Chettiar and others—Defendants—Appellants.

v.

Sellamuthu Asari—Plaintiff—Respondent.

Second Appeal No. 757 of 1930, Decided on 28th August 1931, against decree of Sub-Judge, Trichinopoly, in Appeal Suit No. 4 of 1930.

(a) Evidence Act (1872), S. 35 — Oral admission acted on and recorded by Court in its judgment is admissible in evidence.

Where a deposition of a witness, had been recorded in the ordinary way that record and not an abstract of the evidence in the judgment is the proper evidence of the statement. But where the Court has acted upon an oral admission and recorded it in its judgment which constitutes the only official record of it, it is admissible in evidence under S. 35: *A I R 1931 Mad 207* and *A I R 1922 Mad 71, Dist.*; *A I R 1925 Mad 1019, Appl.*; *15 Mad 378, Ref.*

[P 184 C 2]

(b) Easements Act (1882), S. 13 — Natural rights.

Where a razinama stipulates that the cross wall shall be shifted to a point further south and that the defendants shall only be allowed to enter the lane for the purpose of executing repairs, it does not deprive the defendant of his natural rights to put doors or windows in his wall although it may restrict his use of them.

[P 185 C 1]

T. M. Krishnaswami Ayyar and K. V. Ramachandra Iyer—for Appellants.

N. S. Rangaswami Ayyangar — for Respondent.

Judgment.—This second appeal is taken upon three points. The first is whether the room A (2) is the exclusive property of the plaintiff or is common to him and the defendants. The lower Courts have relied upon an admission by defendant 1 in *O. S. No. 877 of 1924*. That was a suit brought by the plaintiff for an injunction to include amongst other things the use of this room. It is true that the admission is not to be found in the written statement filed in that suit but it is recorded in the judgment, and the only inference which I can draw is that the record is based upon an oral admission made by the defendant in the course of the trial. It is objected that this record of an admission contained in a judgment is not admissible as evidence of it. I am unable to agree. The case cited to me as authority for this position, *Saradamba v. Pattabhiramayya*, *A. I. R. 1931 Mad 207*, to which I was a party, only decided that where a deposition of a witness had been recorded in the ordinary way that record, and not an abstract of the evidence in the judgment was the proper evidence to give of the statement.

Here if the Court acted upon an oral admission and recorded it in its judgment, which constitutes the only official record of it, I think it would be admissible in evidence under S. 35, Evidence Act. This was the view taken in *Thama v. Kondon* (1). The Full Bench case *Seethapathi Rao v. Venkanna Dora* (2) related to judgments not inter partes, and as has been observed by Madhavan Nair, J., in *Nalupuratatol Ibraine v. Parmeswara Bavanavar* (3) the observations with regard to recitals in judgments inter partes to be found in the judgment

1. (1892) 15 Mad 378.

2. *A I R 1922 Mad 71=66 I C 280=45 Mad 332 (F B).*

3. *A I R 1925 Mad 1019=85 I C 996.*

in that case are mere obiter dicta. In the case last cited, Madhavan Nair, J., held that a judgment inter partes, which contains a recital of the pleadings, is admissible in a subsequent suit to prove an acknowledgment, and on the same principle it appears to me that the recital here of defendant 1's admission is equally evidence of it. It can hardly, I think, be disputed that proof may be adduced of the oral admission made in the prior suit, and if the only official record is not to afford means of proof it is difficult to see how it can be proved. It would be absurd to prefer to such a record the oral evidence of some person who heard what was said. I think there is no substance in this objection. I should also be prepared to hold with the learned Subordinate Judge that the finding in the previous suit operates as res judicata. It is clear that the Court decided the issue upon the defendant's admission and in view of that admission refrained from giving the plaintiff an injunction but dismissed his suit. It is surely not open to defendant now to re-agitate that issue.

The second point relates to the door D. The lower Courts consider that the plaintiff is entitled to a mandatory injunction directing the defendant to remove this door. It has been found that part of the lane south of the cross-wall TU is the property of the plaintiff. The learned District Munsif admits that this finding would not in itself afford sufficient ground for an injunction because there is no such right to privacy as would justify it, but he thinks that the terms of the razinama contemplated that such privacy should be ensured. I cannot find anything in this razinama beyond the stipulations that the cross-wall shall be shifted to a point further south and that the defendants shall only be allowed to enter the lane for the purpose of executing repairs. It does not in fact take the matter further than the finding with regard to the plaintiff's title to the lower portion of the lane and I cannot hold that it deprives the defendant of his natural right to put door or windows in his wall, although it may restrict his use of them. The learned Subordinate Judge thinks that an injunction should follow from the agreement that, except for purposes of repair and then only by entry from the north end of the

lane, the plaintiff is to have the exclusive benefit of the lane. It is not clear how the mere act of placing a door in the defendant's wall would run counter to this right although different questions will of course arise the moment he endeavours to take advantage of the door as a means of access to the lane. I think therefore that the fourth term in the decree "that defendants do remove the doorway at the point D in the wall FE at their cost" must be expunged.

The third point relates to the wall NX (2). The plan shows that this wall is built upon the plaintiff's property and that must be the ground upon which the decree directs its removal at the defendants' cost. There is no reason to interfere with this direction. I allow the second appeal in part and in other respects dismiss it. The parties will pay and receive proportionate costs.

P.R.S./K.N. *Appeal partly allowed.*

* A. I. R. 1933 Madras 185

MADHAVAN NAIR, J.

N. R. M. M. M. Muthiah Chettiar—Appellant.

v.

Official Receiver of Tinnevelly and another—Respondents.

Appeal No. 217 of 1927 and Civil Mis. Petn. No. 4485 of 1932, Decided on 28th September 1932, against order of Dist. Judge, Tinnevelly, D/- 26th April 1927.

(a) Provincial Insolvency Act (1920), Ss. 53 and 54—Order under—Second appeal—Civil P. C. (1908), S. 100.

No second appeal lies from an order passed under Ss. 53 and 54, Provincial Insolvency Act. [P 186 C 1]

* (b) Provincial Insolvency Act (1920), S. 54—Period of three months should be calculated from date of registration.

In applications under S. 54, the period of three months should be calculated from the date of registration of the document and not three months from the date of execution. [P 189 C 1, 2]

K. V. Krishnaswami Ayyar—for Appellant.

R. Krishnaswami—for Respondents.

Judgment.—Respondent 2 in O. P. No. 29 of 1925 is the appellant. This civil miscellaneous second appeal arises out of an application filed by the Official Receiver for a declaration that a mortgage deed, dated 9th March 1922 executed by respondent 1, the insolvent in I. P. No. 26 of 1922, in favour of the appellant, one of his creditors, is void as

against him both under Ss. 53 and 54, Provincial Insolvency Act. The application was dismissed by the learned Subordinate Judge of Tuticorin. His decision was set aside in appeal by the learned District Judge of Tinnevely. He held that the transaction in question is bad under both Ss. 53 and 54 of the Act. The present second appeal is against the decision of the learned District Judge. A preliminary objection is taken by the respondent, the Official Receiver, that no second appeal lies in this case. This objection is accepted by the learned counsel for the appellant; but he argues that the decision of the case involves a decision on a question of jurisdiction and that therefore the case should be dealt with under S. 115, Civil P. C. His argument is twofold; (1) the alienation in question being in favour of a creditor, the petition to annul it does not fall under S. 53, Provincial Insolvency Act but falls only under S. 54; (2) and when treated as a petition under the latter section it will be found that the Court has no jurisdiction to annul it inasmuch as the alienation complained of was made more than three months before the date of presentation of the insolvency petition; or, in other words, that the petition for insolvency was presented after the expiry of three months after the date of the transaction. In support of his first argument the only decision relied on by Mr. Krishnaswami Ayyar is *Appathorai Odayar v. The Official Receiver, Tanjore* (1), but that decision does not support him; in fact the question now raised was not raised in that case at all. Two other decisions were also referred to by him, *Ramanna v. Official Receiver Godavari* (2) and *Jawanmull v. Sripathi Rao* (3); but these have hardly any bearing on the question. But I shall assume for the purpose of this case that the above argument is good and deal with the next argument, viz., whether the Court has jurisdiction to annul the alienation under S. 54. S. 54 runs as follows:

“(1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference

over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.”

One of the conditions required to bring a case within the operation of the section is that the transfer complained of should have been made within three months before the date of the presentation of the insolvency petition. Mr. Krishnaswami Ayyar contends that in this case the insolvency petition was presented after the expiry of three months from the date of the mortgage Ex. 1, and therefore the Court had no jurisdiction to deal with the application under the section. To appreciate the arguments on this point it is necessary to state the following facts. The mortgage was executed on 9th March 1922. The Court closed for the summer recess on or about 9th May 1922. The document was registered on 9th June 1922. The Court opened after the summer recess on 10th July 1922. The petition was presented on 10th July 1922. It is argued that since the petition was presented on 10th July 1922, admittedly after the expiry of three months from the date of the transaction, 9th March 1922, the case does not fall within S. 54 of the Act. To this argument the learned counsel for the respondent offers three answers: (1) that the period of three months for presenting the petition should be calculated from 9th June 1922, the date when the document was registered as it was only then that a complete transfer of property was made under the document; (2) that even if the date is to be calculated from 9th March 1922, since the Court was closed at the time when three months expired from that date, the Official Receiver is entitled to file the petition on the reopening of the Court; (3) the third answer has reference to S. 9 (c), Provincial Insolvency Act.

In this case this alienation, that is the mortgage transaction in question, was itself the act of insolvency on which the insolvency petition was admitted. The Court acting on that petition has adjudicated respondent 1 an insolvent. Under S. 9 of the Act the insolvency petition, if by a creditor—and the petition in this case is by a creditor—must be filed within three months of the act of insolvency. One of the conditions

1. A I R 1927 Mad 412=39 I C 683.

2. A I R 1927 Mad 1090=101 I C 153.

3. A I R 1927 Mad 1144=101 I C 563.

required for the avoidance of transfers under S. 54 is that such person (the transferor) should be "adjudged insolvent on a petition presented within three months after the date thereof" (that is the date of the transfer.) Having regard to the language used in S. 9 and in S. 54 it is argued that if the insolvency petition in this case has been filed properly within three months after the date of the transfer which is the act of insolvency, then for the purposes of S. 54 it may well be held that the transferor, that is the insolvent, is adjudged insolvent on a petition presented within three months after the date of the transfer; or in other words, that the petition of insolvency was presented within three months after the transfer; and that therefore the condition under S. 54 which is in question has been strictly complied with. All these three alternative arguments of the respondent deserve serious consideration, but I propose to deal only with the first point raised, by him, that is should the period of three months be calculated from the date of the execution of the documents or from the date of its registration? If the period may be calculated from the date of registration, then in this case the document having been registered on 9th June 1922 and the petition of insolvency having been presented on 10th July 1922, the petition was clearly presented within three months after the date of the transfer and the requirement referred to in S. 54 of the Act has been complied with.

The alienation in this case is a mortgage. The consideration for it is more than Rs. 100. That being so the mere execution of the document does not make it a valid transfer of property. Under S. 59, T. P. Act:

"Where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested at least by two witnesses."

Registration of the document is therefore essential to make it a valid transfer and when registered

"the document shall operate from the time it would have commenced to operate if no registration thereof had been required or made;" that is, in this case from the date when the document was executed, namely 9th March 1922. In a case like the present up to the date of registration there can be no valid transfer or mortgage of land within the meaning of S. 59, T. P. Act.

If the time was to run from the date of execution of the document the object of S. 54 could easily be frustrated. A mortgage or sale of immovable property may be registered up to four months after its execution. As pointed out by the learned Judge a dishonest insolvent has only therefore to date such fraudulent transfers with a date more than three months prior to the filing of the petition and then they cannot be avoided under S. 54. For the above reasons I would hold that even if the petition for the annulment is to be treated solely as one falling under S. 54, the Court had jurisdiction to deal with it as the conditions required under that section have been fully complied with. In this view the other points raised by the respondent need not be discussed.

If the petition can be dealt with under S. 53 of the Act also, as it has been dealt with by the lower Courts and as I think it can well be, then having regard to the findings it is clear that no question of jurisdiction arises. It therefore follows that in any event this civil miscellaneous second appeal should be dismissed. Respondent 1 will get his costs from the appellant.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 187

MADHAVAN NAIR, J.

(*Rachakonda*) Narayanamurti —
Plaintiff—Appellant.

v.

Darmana Ramalingam and others —
Defendants—Respondents.

Second Appeal No. 181 of 1927, Decided on 17th August 1931, against decree of Dist. Judge, Ganjam, in A. S. No. 278 of 1925.

(a) Civil P. C. (1908), O. 6, R. 8—From evidence Court noticing that consideration for suit transaction illegal — No objection raised by defendant—Still Court should look into facts and give proper decision.

When it comes to the notice of the Court that the real consideration for the suit transaction is not the consideration alleged and proved, but is one which is distinctly immoral and illegal, it cannot shut its eyes to the true state of affairs disclosed by the evidence and give a decree to the plaintiff as if the transaction between the parties was one which could not be impeached. If the illegality of a transaction is brought to the notice of the Court the Court should not assist the person who invokes its aid even though the defendant has not pleaded the illegality and does not wish to raise the objection.

This is based on grounds of public policy. A transaction submitted for adjudication may appear prima facie to be harmless; but if it appears to the Court that it has grown out of illegal or immoral circumstances it is the duty of the Court to take notice of such circumstances and give adjudication accordingly: *Connolly v. Consumers' Cordage Co.*, (1904) 89 L T 347; A I R 1920 Cal 704 and A I R 1920 Mad 547, *Rel. on*; *Hyams v. Stuart King*, (1908) 2 K B 696 and *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*, (1914) A C 461, *Dist.* [P 189 C 1, 2]

(b) Civil P. C. (1908), O. 41, R. 23—From evidence appellate Court noticing that consideration for suit transaction immoral—No issue and finding by trial Court on that point—Case should be remanded for such finding.

When it comes to the notice of the appellate Court from the evidence on record that the consideration for the suit transaction is of an illegal and immoral character, but no issue on that point has been framed by the trial Court nor has the defendant raised any objection to that effect, the appellate Court should remand the case for a finding on that point: *Connolly v. Consumer's Cordage Co. Ltd.*, (1904) 89 L T 347, *Rel. on.* [P 190 C 1]

G. Lakshmanan—for Appellant.

B. Satyanarayana—for Respondents.

Judgment.—The plaintiff is the appellant. This second appeal arises out of a suit to recover from defendant 1 and his son defendant 2 Rs. 3,740 due on a promissory note executed by them in favour of defendant 3. Defendants endorsed the note in favour of the plaintiff who is his son-in-law. The contesting defendants pleaded want of consideration for the promissory note and also for the transfer in favour of the plaintiff. The two issues in the case were: (1) Whether the suit promissory note is not supported by consideration; and (2) Whether the endorsement of transfer is genuine and supported by consideration. On these issues both the Courts found that the consideration for the suit note was, as alleged by the plaintiff, the withdrawal of the sale deed, Ex. E, from registration and that the transfer of the suit promissory note was not for consideration. The learned Subordinate Judge on these findings gave a decree to the plaintiff treating him as a transferee for collection. Though the promissory note was found to be supported by consideration the learned District Judge declined to pass a decree in favour of the plaintiff because he held having regard to the facts disclosed in the evidence, that:

"the sole consideration for the suit pronote was an undertaking to forgo the fruits of systematic procurement, and this is not a form of consideration that any Court can take cognizance of."

In the last paragraph of the judgment he says:

"I find that the consideration for the suit pronote was nil, and that it was obtained by a disgraceful kind of blackmail."

His opinion apparently was that the history of the transaction which led to the execution of the promissory note showed that the real consideration for the promissory note was immoral and therefore the suit was not enforceable. In this view he set aside the decree of the Sub-Judge and dismissed the plaintiff's suit. To understand the conclusions arrived at by the learned Judge a few facts have to be mentioned and they are referred to in detail in the third and succeeding paragraphs of the appellate judgment. It would appear that defendant 1 is a rich raiyat and that defendant 2 is a young man addicted to drink and women and that defendant 3 gaining control over him by pandering to his weakness, persuaded him, to execute a sale deed in his favour, Ex. E, for Rs. 9,000. The document recites that a sum of Rs. 3,000 had been paid in cash to defendant 2 and that the balance of Rs. 6,000 would be paid at the time of registration. Defendant 3 is a pleader. When the document was presented for registration by his clerk, defendant 2 objected, alleging that it was executed by undue influence and while he was under the influence of drink and also that the consideration of Rs. 3,000 had not been paid. The document was therefore returned unregistered. During the inquiry before the Registrar a compromise was arranged between the parties at the intercession of one Venkateswarulu, a pleader, and defendants 1 and 2 executed the suit note, Ex. A, for Rs. 2,750 in favour of defendant 3 and he then withdrew the suit deed without pressing for its registration. It was in these circumstances that the learned District Judge came to the conclusion that the suit note was unenforceable. His reasoning may be put in his own words:

"What after all was the consideration for the suit pronote? Defendant 3 in Ex. E says that he paid defendant 2 Rs. 3,000 in cash. Defendant 2 denied this in Ex. 2. If it were true, then I do not see why defendant 2 was willing to accept a pronote for Rs. 2,750 and give up in return not only his own Rs. 3,000, but also the chance of buying valuable property. The fact that the property was valued and coveted is shown by the circumstances that Ex. E has not yet been returned." I am not satisfied that there was any consideration for the first sale

deed Ex. E, other than housing defendant 2 and procuring for him women and drink. If this is so, then the sole consideration for the suit prostrate was an undertaking to forgo the fruits of systematic procurement, and this is not a form of consideration that any Court can take cognizance of. From the history of the transactions between defendants 3 and 2, I have no hesitation in believing the evidence of D. W. 1, viz., that the only consideration for Ex. E was an immoral one and in disbelieving the recital in Ex. 3 that it was a cash transaction. Defendant 3 has not given any evidence in this case and he was at pains to avoid doing so."

In second appeal Mr. G. Lakshmananna argues that the main question for decision being whether the promissory note was not supported by consideration and that point having been found in his favour by the District Judge he should have given the plaintiff a decree for the amount claimed as was done by the Sub-Judge; he also argues that the compromise which led to the execution of the promissory note, and the consideration for the first sale deed Ex. E not being impeached before him, it was not open to the District Judge in the absence of specific issues on those points to arrive at the conclusion that the consideration for the promissory note was immoral and to dismiss the plaintiff's suit on a point which was not raised and on which there was no issue. In an ordinary case I should have accepted this contention; but having regard to the special facts appearing in the evidence in this case on which the learned Judge has relied for his conclusions, I cannot accept the appellant's contention. It is true that no issue was raised regarding the immoral nature of the consideration, but an indication of the point is distinctly given in the beginning of para. 3 of the written statement of defendants 1 and 2 and the evidence on the facts relating to it has also been given. When it comes to the notice of the Court that the real consideration for the suit transaction is not the consideration alleged and proved but is one which is distinctly immoral and illegal, is it to shut its eyes to the true state of affairs disclosed by the evidence and give a decree to the plaintiff as if the transaction between the parties was one which could not be impeached? Mr. Lakshmananna would unhesitatingly say "yes"; but his contention appears to be untenable from the decisions which have been brought to my notice. What should be the duty of a Court in a case like this

was pointed out by the Privy Council in *Connolly v. Consumers' Cordage* (1). In that case Lord Halsbury observed:

"that it is the right and duty of the Court at any stage of the cause to consider, and, if it is sufficiently proved, to act upon, an illegality which may turn out to be fatal to the claims of either of the parties to the litigation."

He adds further that:

"their Lordships however do not doubt that the learned Judges had a right and that it was their duty, if they thought the facts were established, to take care that the process of the Court should not be used for the purpose of establishing a claim that ought not to be permitted to be enforced in a Court of Justice."

In that case as no evidence was offered on the question of illegality, and as the Supreme Court of Canada assumed the existence of an illegality from the circumstances fraught with suspicion, the case was remanded for a new trial to decide the issue as to illegality after taking evidence. The principle enunciated by the Judicial Committee has been followed in many cases in England and America and in this country also. The English and American cases are referred to in the judgment of Mukerjee, J., in *Atikulla v. Habibulla* (2). As pointed out in that judgment, it may be taken to be well settled that if the illegality of a transaction is brought to the notice of the Court, the Court should not assist the person who invokes its aid even though the defendant has not pleaded the illegality and does not wish to raise the objection. This is based on grounds of public policy. A transaction submitted for adjudication may appear prima facie to be harmless; but if it appears to the Court that it has grown out of illegal or immoral circumstances it is the duty of the Court to take notice of such circumstances and give adjudication accordingly. The decision in *Atikulla v. Habibulla* (2) was followed in this Court by Curgenvin, J., in *D. Lakshmiayya v. O. Murahari* (3). The decisions relied on Mr. Lakshmananna, viz. *Hyams v. Stuart King* (4) and *North Western Salt Co., Ltd. v. Electrolytic Alkali Co. Ltd.* (5), dealing with transactions arising out of wagering contracts under the English law, do not really help him as wagering

1. (1904) 89 L T 347.

2. A I R 1920 Cal 704=53 I C 773.

3. A I R 1930 Mad 547=128 I C 512.

4. (1908) 2 K B 696=77 L J K B 794=99 L T 424=52 S J 551=24 T L R 675.

5. (1914) A C 461=83 L J K B 530=110 L T 552=58 S J 338=30 T L R 313.

contracts are not immoral or illegal but have only been declared to be void by statute. I do not think the considerations applicable to those cases can be successfully urged in support of the contention that if a contract, ostensibly good, is really based upon an immoral consideration and this is clearly brought to the notice of the Court, the Court should ignore it and proceed to give a decree to the plaintiff who desires to enforce the contract.

It is argued on behalf of the respondents that the conclusion arrived at by the Judge as regards the immoral consideration should be accepted, and that his decree should be upheld. As the point under consideration was not specifically raised in the case, I think the learned Judge should have given an opportunity to the plaintiff to meet the objection when it came to his notice that the suit transaction was of a questionable character, as was done in *Connolly v. Consumers' Cordage Co.* (1). I would therefore call upon the lower Court to submit a finding on the question

"whether the consideration for the suit note is tainted with immorality."

In deciding this point the Court will have to consider the validity of the sale transaction Ex. E and of the compromise which immediately preceded the execution of the suit promissory note. Before I conclude I must point out that I have not expressed any opinion as regards the evidence relating to the alleged immoral nature of the transactions brought to light in this suit, nor do I desire to express any opinion lest any opinion of mine might embarrass the lower Court in arriving at its own conclusion. The lower Court is at liberty to consider the entire evidence afresh and arrive at its own conclusion. As the point is a new one it is open to the parties to adduce fresh evidence. The finding is to be submitted within three months after the receipt of this order and ten days for objections. (In pursuance of the order contained in the above judgment, the District Judge of Ganjam submitted the following)

Finding. — I find therefore that the consideration for the suit note was illegal, and of such a character that a contract based on it could not be enforced. (This second appeal coming on for final hearing after the return of the above

finding, the Court delivered the following)

Judgment. — The finding that is now submitted is covered by my order calling "for a finding." The pronote now being found to be illegal cannot be made the basis of the suit. The finding is accepted and the second appeal is dismissed with costs.

P.R.S./B.V.

Appeal dismissed.

A I. R. 1933 Madras 190

WALLACE AND STONE, JJ.

Collector of Chingleput—Appellant.

v.

Krishnaveni Ammal—Respondent.

Appeals Nos. 333 and 365 of 1929 and 77 of 1930, Decided on 5th March 1931, against decree of Sub-Judge, Chingleput, in C. R. O. P. Nos. 11 of 1924 and 13 of 1925.

Land Acquisition Act (1894), S. 23—Value to be paid is value to owner as it exists at date of taking—Old owner taking property subject to restrictions—It is necessary to inquire how far these restrictions affect value.

In considering the claim of the owner, the value to be paid for is the value to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Then again the value which has to be assessed is the value to the old owner who parts with his property and not the value to the new owner who takes it over. Where the old owner takes the property subject to restrictions, it is necessary to inquire how far these restrictions affect the value. In determining the burden of the restrictions one circumstance to consider is the chance of such a restriction being determined and it may therefore become a relevant part of the inquiry as to by whom the restriction can be determined. When there was evidence to show that the area acquired was so situate as to make it possible that within a reasonable period some of it would become a building site, some allowance was made for such a possibility: *Lucas and Chesterfield Gas and Water Board* (1909), K.B. 516; A. I. R. 1914 P. C. 199; 25 Cal. 194 (P.C.) and A. I. R. 1924 Mad. 19, Rel. on; A. I. R. 1919 Mad. 222; A. I. R. 1929 All. 525 and 10 Bom. L. R. 657, Dist.

[P 192 C 1, 2]

*Govt. Pleader—*for Government.

*S. Varadachariar, C. Narasimhachariar and M. E. Rajagopalachari—*for Respondent.

Judgment.—This is an appeal from the decree of the Subordinate Judge of Chingleput in a matter wherein the claimant, the respondent to the present appeal, is claiming compensation under the Land Acquisition Act for the acquisi-

tion by Government of 377.55 acres of land. As to 366 acres 23 cents the claimant has melwaram rights. As to the remaining 11 acres 32 cents the claimant claims as owner of the land. Of this land 11.32 acres are burdened by ponds, and 3 acres 50 cents are burdened by roads or pathways. The lands are all situate in Mambalam village and the notification is dated, 25th May 1920 which is before the passing of the Amending Act of 1923, so that the critical date in determining the market value of the rights acquired is the date of the notice under S. 6 which is 25th May aforesaid. The land acquisition officer, as to the item for roads and pathways, has allowed nothing for the reason, stated by him at pp. 11 and 12 of the pleadings, that the pathways are in public use and are to be used for the public. As regards the kuttas or ponds he finds that when they are silted up the zamindar, the claimant herein, has been granting them on patta. He accordingly awards compensation at varying rates: for S. No. 70/4 and 86, Rs. 450 an acre and for S. No. 106/1-A and 1-O, 114/1 and 131/24 at Rs. 500 an acre. S. No. 109 being on a higher level he values it at the same rate as the adjoining fields less Rs. 200 an acre, that is at Rs. 1,000 an acre. As regards the melwaram rights he takes the estimated annual value, but deducts the outgoings and gives 20 years' purchase. The Subordinate Judge largely increased this award and valued pathways at Rs. 2,700 an acre, the ponds at Rs. 2,250 an acre; and as to the melwaram rights, as to three quarters of the area he gave the same; as to one quarter he held that these were building sites and fixed the value at what he calls the mean between the maximum and the minimum rates, viz. Re. 1-8-0 per ground.

Before examining the law and the evidence in this case it is desirable to advert to the form in which the claim is framed. By letter dated 4th December 1923 a claim is put forward on behalf of the zamindar, then a minor, for compensation for all poramboke such as pathways, ponds, channels, etc., in the Mambalam zamindari. From this time onwards it appears quite clear that the claim in respect of rights in the land as distinct from melwaram rights over the land are made in respect of pathways and ponds in the area in question. It

was urged before us that the true way of viewing this case was to take the market value of the whole area as land and deduct the value of interest other than that of the claimant and award the claimant the balance. In support of this proposition two cases, *Rajah of Pittapuram v. Revenue Divisional Officer, Cocanada* (1), at p. 646 of 42 *Mad.* and *Rohan Lal v. Collector of Etah* (2) at p. 768 of 51 *All.* et seq., were chiefly relied upon. It was urged that, if the principle laid down by these cases, which follows the decision in *Collector of Belgaum v. Bhimrao* (3), be followed one can regard the whole land as potential building sites, one can treat a pathway as adjacent to the land on either side of it so as to be saleable with the land on either side of it, and having arrived at that position one can say that the pathway has the same value as the land on either side of it and therefore that a pathway is a potential building-site. We see no reason to dissent from any of the observations made in the cases above mentioned; but those cases proceed on an entirely different set of facts and type of claim than is here made. Here a claim is made for compensation for the acquisition of three separate things: (1) land now used as pathways, (2) land now burdened with ponds, and (3) melwaram rights. We do not know what compensation has been paid to other persons admittedly interested in these separate things.

The three things are claimed for separately, evidence relating to them is taken separately, and there is no hint until the argument before us that the case was framed along the lines now indicated. We therefore decline to alter the nature of the claim at this stage and accordingly treat the claim as being in respect of three separate things. The result is that so far as the pathways are concerned one is concerned with a strip of land which from its very nature is not of a size or type that would render it likely to be marketable as a building site, quite apart from the question whether it is or is not burdened with an easement. As regards the ponds, we are concerned with

1. A I R 1919 Mad 222=51 I C 656=42 Mad 644.

2. A I R 1929 All 525=117 I C 612=51 All 765.

3. (1908) 10 Bom L R 657.

claim for land covered by water and accordingly land that is not so likely to have a marketable value as buildingsite as land not covered. As regards the melwaram rights, we are not concerned with land at all but with what is in effect a rent charge.

Before considering the evidence in this particular case, it may be desirable to indicate some of the principles which we conceive should be borne in mind when valuing land. And first we refer to the proposition first enunciated in *In re Lucas and Chesterfield Gas and Water Board* (1) and cited with approval in *Cedars Rapids Manufacturing & Power Co. v. Lacoste* (5) at p. 576, viz.:

"the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker; (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

Secondly, in calculating the value of the land you do not take into account changes due to the acquisition but consider the land as it was prior to the acquisition. Thus, for example, if you find the land burdened by a public road, but acquired for a purpose that will abolish the road, so that the land when used for such a purpose ceases to be a road and becomes unencumbered land, yet since that condition is due to the acquisition that condition cannot be regarded. Examples of this latter principle can be found in *Stabbing's case* (6) and in the Privy Council decision of *Manmatha Nath Mitter v. Secy. of State* (7). In both these cases it was either held or indicated by way of example that a roadway that ceased to be a roadway as a consequence of the acquisition could not be treated as having at the time of the acquisition a market value was considered by the Full Bench in *Rajagopala Naidu v. Ramasubramania Ayyar* (8) at p. 789 (of 46 Mad.), where the English meaning, viz., the value that it would fetch in the market under the state of of things existing at the time, was ad-

opted. This definition is consonant with the principle enunciated above. Thirdly, and as a branch of the rule that the value which has to be assessed is the value to the old owner who parts with his property and not the value to the new owner who takes it over, where the old owner takes the property subject to restrictions, it is necessary to inquire how far these restrictions affect the value. In determining the burden of the restriction one circumstance to consider is the chance of such a restriction being determined and it may therefore become a relevant subject of inquiry as to by whom the restriction can be determined. Two extreme cases can be put: (1) where the restriction can be determined at any moment (as in the case of a revocable license) by the claimant; and (2) where the restriction is imposed by an Act of Parliament for the benefit of the public generally. In the first case the restriction, though grave, would have practically no effect upon the value. In the second case the restriction, since it is one not likely to be removed, would burden the property to the full extent of the restriction.

Applying those principles to the facts of this case we find the circumstances are as follows: These pathways are not, save as one small pathway, given any separate paimash number. They appear to have been used by the cultivators of the fields or other occupiers of these lands for a great number of years. They are narrow, and, even if unburdened, quite unsuited from their shape for use as building sites. It is not established that the claimant can change the direction or close them or in any way remove the burden created by them. In these circumstances we find it difficult to see how they could have any value at all either as building sites or as agricultural land. On this point we accordingly restore the award of the land acquisition officer. As regards the ponds the position is somewhat different. There is evidence to show that in the past grants have been made by the zamindar of these ponds to the extent to which they have silted up; that is to say, there is evidence to show that the zamindar is under no obligation to maintain the ponds as ponds, and, if this be so, then the value to the zamindar of this part of the land is the value of the land less the cost

4. (1909) 1 K B 16 = 77 L J K B 1009 = 99 L T 767 = 72 J P 437 = 6 L G R 1106 = 24 T L R 858.

5. A I R 1914 P C 199 = (1914) A C 569 = 83 L J P C 162 = 110 L T 873 = 30 T L R 293.

6. (1881) 6 Q B 42.

7. (1898) 25 Cal 194 = 24 I A 177 = 1 C W N 698 (P C).

8. A I R 1924 Mad 119 = 74 I C 198 = 46 Mad 782 (F B).

which he would have to incur before he could make that land available for any productive purpose. This is the basis adopted by the land acquisition officer and we see no reason to disturb his findings and award on this head and accordingly restore it. Finally as to melwaram rights. It may well be that a preferable way of arriving at the melwaram rights would have been to value the land over which these rights extend as land in a contest between the acquirer and all the persons whose rights were acquired, assigning to each interest its several proportion of the compensation given. This however has not been done and cannot now be done. We must therefore arrive at such a figure as we best can, not in the manner above indicated, but by taking the melwaram rights as a separate species of property or interest in land within the meaning of the Land Acquisition Act, that is, as a separate marketable interest in land. What is the marketable value of melwaram?

In our opinion it is that sum which that melwaram would fetch in the open market. In determining that figure we think that the fundamental question is how much is the melwaram? That question is the one which the land acquisition officer put to himself at p. 12 and he found it to be the admitted present figure of Rs. 1,020-6-5. He found that the peishkush on that sum payable was Rs. 413-11-7, and the net income accordingly was Rs. 606-10-10. Subject to one correction hereafter to be mentioned, this appears to us to be the correct method of determining the value of this right. As however an entirely different method of valuing this right was strongly pressed before us and was accepted by the Subordinate Judge, we consider shortly the alternative method of assessing the compensation put forward. It is, so far as we understand it, as follows:

The zamindar claims that when land over which he has melwaram rights is occupied as building-site, he is in the habit of charging an extra ground rent of Re. 1 per ground for the land actually built upon and he averages that area at a quarter of the total area. That is to say, if four grounds are granted as building site, one ground will be occupied by the house and for that ground he gets

Re. 1. The remaining three grounds, though within the ambit of a building-site, are treated for this purpose as agricultural land. This, as we understand, is the case put forward on his behalf and is certainly the case which is supported by the evidence led on behalf of the claimant. It is not the test which appears to have been accepted by the Subordinate Judge who appears to have treated building sites as falling within two categories (1) those on which a building was put up, which he takes the ground rent at the rate of a rupee per ground for the whole site and (2) those which were granted as building-sites but kept vacant, in which he takes the rate at half a rupee. He accordingly treats the two limits at Re. 1 and half a rupee as the maximum and minimum for the whole area, thus assuming (1) that the whole area is a building-site and (2) that the rupee is charged not over the area occupied by the building but over the whole area sold as a building site. We do not consider it necessary further to examine this part of the case excepting to say that we find no reason to show why, apart from the Mambalam building scheme (which is an element we are not entitled to take into consideration), the particular area should be regarded as though it were a building site. It had not hitherto been built upon to any extent.

It is however a matter for consideration whether, consonant to the principles above enunciated, some allowance should not be made for the possibility of a portion of this area within a reasonable period becoming a building site, even apart from the land acquisition purpose. From the very nature of the case one can only roughly calculate the prospects. There is some evidence that this area was so situate as to make it possible that within a reasonable period some of it would become a building site. Bearing this fact in mind we are prepared to regard one quarter of it as potential building site and three quarters of it as agricultural land. This will increase the award of the land acquisition officer under this head by an amount. We estimate that this, in the zamindari's own method of calculation, would give him an increased income of Rs. 349 which at 20 years' purchase amount to a capital sum of Rs. 6,980.

There remains the question raised as to whether there was here a sufficient specific claim for the purposes of S. 9, Land Acquisition Act. If not, it is urged that S. 25 (2) prevents the award exceeding the amount awarded by the Collector. The point only relates to the claim for paths and ponds and accordingly does not now arise. In the result the appeal is allowed, and the land acquisition officer's award increased by the sum of Rs. 6,980 is restored. Costs will be proportionate in both cases in both Courts. Appeal No. 77 of 1930 is dismissed with costs. The statutory increase of 15 per cent will be allowed on the Rs. 6,980. Interest at 6 per cent allowed on the total increase from date of the land acquisition officer's award. Same statutory percentage and interest will be allowed on the increase if any found due in 365/1929.

P.R.S./P.N. *Order accordingly.*

A. I. R. 1933 Madras 194

MADHAVAN NAIR, J.

(*Marneni*) *Kondapanaidu* and others
—Defendants—Appellants.

v.

(*Pamidimarri*) *Mahalakshmamma* and
another—Plaintiffs—Respondents.

Second Appeals Nos. 1159, 1265 and 1266 of 1928, Decided on 31st August 1931, against decrees of Sub-Judge, Nellore, in A. S. No. 120 to 122 of 1926.

(a) **Madras Estates Land Act (1908), S. 3 (2) (d)—Grant of melwaram right only—It is estate.**

Where a grant in inam is a grant of both the landlords and the tenant's right in the land or as they are called the melwaram and the kudivaram, the land is not an estate; but if the grant is of the landlord's right or melwaram alone it is an estate. [P 194 C 2]

(b) **Grant—Shrotriem grant—Significance, explained.**

A shrotriem grant may be a grant of kudivaram as well as melwaram. [P 195 C 2]

(c) **Deed—Construction.**

A deed should be construed as a whole and not in isolated parts. [P 195 C 2]

(d) **Deed—Construction—Grant of village—"M" does not necessarily mean mauza.**

In construing a grant of a village in the absence of any evidence on the point it would be unsafe to act on a mere surmise that "M" stands for mauza: *A. I. R.* 1920 *P. C.* 115; *A. I. R.* 1923 *Mad.* 1 and *A. I. R.* 1915 *Mad.* 727, *Ref.*

[P 196 C 1, 2]

B. Somayya—for Appellants.

Ch. Raghava Rao—for Respondents.

Judgment.—The defendants are the appellants. These second appeals arise

out of suits filed by the plaintiffs for the recovery of sums of money due for rent in respect of lands in the possession of the defendants. One of the contentions raised by the defendants was that the civil Court had no jurisdiction to entertain the suits, their contention being that the lands in respect of which the suits have been filed form an estate within the meaning of Cl. (d), sub-S. 3, Madras Estates Land Act. S. 3 (2) (d), Estates Land Act, defines an estate

"as a village of which the land revenue alone has been granted in inam to a person not owning the kudivaram, provided that the grant has been made, confirmed or recognized by the British Government or any separated part of such village."

The law is settled that where a grant in inam is a grant of both the landlord's and the tenant's right in the land or as they are called the melwaram and the kudivaram, the land is not an estate; but if the grant is of the landlord's right or melwaram alone it is an estate; so that the question to be decided is whether the grant is of the land itself or only of the right to the revenue from the land. If it is the former the civil Court has jurisdiction to try the suits. If it is the latter, then the jurisdiction to try them will lie in the Revenue Court. Both the lower Courts held that the grant in this case consisted of both the melwaram and the kudivaram and hence that the civil Court has jurisdiction to try the suits. In second appeal the defendants-appellants contend that this conclusion is wrong and that the lower Court should have held the lands form an estate as contended by them, and this is the only question argued before me. The grant in favour of the plaintiffs' predecessors is evidenced by Ex. A. The terms of the grant are as follows:

"Gift deed dated nil. Deed of gift of shrotriem executed and given by Mallavarapu Venkatachellam Garu to Pydimari Dikshatulu on 15th Makha Sudha of Manmatha year, corresponding to the glorious era of Salivahana 1698. Fixing a total annual shrotriem beriz of 120 (one hundred and twenty) Madras star pagodas in respect of M. Chintalapalem Paragane Gudlur inclusive of Sadarvar, Deeva, Tahariar, Divani, Va Nazr, etc., we have settled the shrotriem and made a gift of it in propitiation to God on this auspicious occasion of lunar eclipse with the pouring of water with gold from Fasli 1185. You shall get the lands cultivated extensively year after year, and make them yield, pay as aforesaid, the sircar beriz year after year and enjoy the entire produce realized therefrom as long as the sun and the moon last from son to grandson

and so on in succession and be happy. Here enter usual Sanskrit slokas.

(Signed) Venkatachellam."

Both parties agree that the word "fruits" or "usufruct" would better represent the original Telugu word than the word "produce" appearing in the last sentence in the translation. In *Somayajulu v. Seethayya* (1), when a grant somewhat resembling the present one in its features, came before this Court for construction the Full Bench held that the words of the grant were equally consistent with the grant of the revenue or of the land itself and that being so, according to the decision in *Muthu Goundan v. Perumal Iyer* (2), the presumption was that the grant was of both warams and that therefore the civil Court had jurisdiction to try the suits with respect to the "grant" in question. This decision was taken in appeal to the Privy Council: see the decision in *Seethaya v. Somayajulu* (3). By the time the case was disposed of the Privy Council had held in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi* (4), that there was no presumption either way and that each case must be decided on its own circumstances and on examining the circumstances of the case before them the learned Judges came to the conclusion that the grant in that case was of the melwaram only and that therefore the civil Court had no jurisdiction to try the suits. The decision of the Full Bench was accordingly set aside. This decision of the Privy Council was not in existence when the lower Courts dealt with the present case. Mr. Somayya argues that the lower Courts based their conclusions on the decision in *Somayajulu v. Seethayya* (1), and that since the presumption that the grant would consist of both the melwaram and the kudivaram which was the basis of that decision was not accepted by the Privy Council in appeal, the lower Courts' decision in the present case should be set aside following the Privy Council decision in *Seethayya v. Subramanya Somayajulu* (3). I am not satisfied that the lower Courts

have based their decision on the decision in *Somayajulu v. Seethayya* (1).

Though there is a reference to it in the first Court's judgment with regard to the meaning of the word "mouja" which will be referred to later, in the judgment of the appellate Court there is no reference to it at all. It appears to me that both the lower Courts have decided these cases after an examination of the terms of the "grant" and the circumstances of the case, without in any way being influenced by the now exploded presumption that the grant consists of both the warams which is just what should be done according to the Privy Council decision in *Seethayya v. Somayajulu* (3). I have referred to this matter at some length as Mr. Somayya's main argument was, that these cases are like the case of *Somayajulu v. Seethayya* (1), and as the decision in that case was set aside by the Privy Council, the decisions in these cases also should be set aside following *Seethayya v. Subramanya Somayajulu* (3). This result does not necessarily follow.

According to *Seethayya v. Somayajulu* (3), each case should be decided on its own merits. As was done by their Lordships in the appeal before them, I shall now proceed to examine the terms of the document.

The grant purports to be a "gift of shrotriem." It refers to a total annual "shrotriem beriz" of 120 Madras star pagodas and says "we have settled the shrotriem and made a gift of it." A shrotriem grant may be a grant of kudivaram as well as melwaram. Mr. Somayya argues that in this document the word "shrotriem" means only a melwaram of 120 Madras star pagodas and that was what was constituted or "settled" as the shrotriem and gifted to the shrotriem-dars. It is difficult to accept this argument. We have to construe the document as a whole. It is clear from the last sentence that the "shrotriem beriz" referred to at the commencement is the "beriz" or the net revenue which the shrotriemdar has to pay year after year to the sircar. In the context it cannot refer to the "melwaram" which is now stated to be the subject of the grant. The last sentence in the document gives a clue as to the meaning of the word "shrotriem" used in the gift deed. The grantee is directed to get the lands culti-

1. A I R 1923 Mad 1=70 I C 729=46 Mad 92 (FB).

2. A I R 1921 Mad 145=63 I C 790=44 Mad 588 (FB).

3. A I R 1929 P C 115=117 I C 507=56 I A 141=52 Mad 453 (PC).

4. A I R 1922 P C 292=63 I C 538=49 I A 285=45 Mad. 586 (PC).

vated, pay the sircar beriz year after year and then enjoy the entire "fruits" realized "therefrom." I take it that this means that after paying the sircar beriz what remains of the fruits realized from the village should be enjoyed by the grantee. The expression "you shall get the lands cultivated" does not necessarily show that the lands were already in the possession of the tenants and the grantee is to get them cultivated by them as contended for by Mr. Somayya. It is quite consistent with the meaning that it was the entire village that was granted under the deed. The grantee being a Brahmin, who does not generally cultivate lands the grantor may well say he should get the lands cultivated by them. However, it is not safe to rely on it as an absolute test.

It is next argued that all doubts regarding the nature of the grant are removed because of the letter "M" used with reference to Chintampalem, the name of the village, the argument being that "M" stands for mauza; and mauza according to the decision of the Privy Council in *Seethayya v. Somayajulu* (3), means a village in which there are present proprietors owning cultivable lands. This argument would be conclusively in favour of the appellants' case if we could so understand the letter "M." In the document under construction in *Seethayya v. Somayajulu* (3) no doubt the letter "M" appeared in the description of the village and the Privy Council gave it the above interpretation; but it must be remembered that it was "agreed to" between the parties in that case that the letter "M" meant mauja: see the judgment of the learned Chief Justice in *Somayajulu v. Seethayya* (1) at p. 97 (of 46 Mad.), wherein he says:

"it is agreed that the letter "M," is an abbreviation for the word "mauza" or "mouja."

In the case in *Venkata Sastrulu v. Sitaramudu* (5), in which the word "mauja" was first judicially interpreted by Sadasiva Ayyar, J., the village Billapadu was called by the full name "a mauja or mauza," and so there was no dispute about the word. In the present case the parties are not agreed as to what the letter "M" stands for. As the learned Subordinate Judge points out:

"in the absence of any evidence on the point it

would be unsafe to act on a mere surmise that "M" stands for mauza."

The present case comes from Nellore whereas the case in *Somayajulu v. Seethayya* (1) came from the Guntur District. If the full word "mauza" had been prefixed, then the appellants' argument would have considerable force. As it is, in the absence of evidence much weight cannot be given to it, especially so when the other contents of the document give a different indication as to the nature of the grant. Mr. Somayya requests that an opportunity may be given to the appellants to give evidence as to the meaning of the letter "M" used in the document; but no attempt was made in the lower Courts to give evidence on the point; and in second appeal I do not think it would be right to grant the request, especially so as the document taken as a whole leaves no doubt in my mind that what was granted as shrotriom was the entire village and not the melvaram alone.

Another circumstance of some importance in construing this document is the fact that the grant was made by Venkatachallam Garu who was at the time of the grant a Foujedar Diwan of the Nellore Taluk under the Nawab Walajah. Foujedar is an officer in charge of the police and criminal Judge; and he was also the chief officer and representative of the Nawab in the district with headquarters at Nellore: see p. 482 of the District Manual. He was also the head renter under the Nawab for the district: see p. 490 of the District Manual. In *Seethayya v. Somayajulu* (3), the grantors were Despandyas who were merely revenue officers or farmers of revenue. The Privy Council pointed out that that being so, the strong probability is that

"they granted that which in their position as Despandyas they would possess, namely, the rights over the revenue."

In this case no such inference can be made as the foujedars were not only farmers of revenue, but also executive officers representing the Nawab. Their position would show that they may well have possessed entire villages as their own. No doubt the grant was made to a non-resident Brahmin, but, as pointed out by the Privy Council, this circumstance is by itself by no means conclusive. It has to be understood along with the other circumstances in the case.

Reading the document as a whole I think that what was granted under Ex. A was the entire village including the kudi-varam in it and not only the melwaram as contended for by Mr. Somayya. The last sentence in the document clearly shows that the shrotriem beriz referred to in the beginning of the grant is only the revenue that the grantee has to pay to the sircar and that the entire village saddled only with the responsibility of paying this revenue was granted to the grantee to be enjoyed for ever.

On the whole I agree with the opinion of the lower Courts regarding the construction of Ex. A. The meaning of the grant being clear, I do not think it necessary to examine the documents subsequent to the grant to find out its true nature. The lower Courts have however considered these documents and have come to the conclusion that the inference derived therefrom support the construction of the grant adopted by them. Some of these documents have been brought to my notice also and I may say that I agree generally with the view of the lower Courts in this matter. For the above reasons I hold that the view of the lower Courts that the civil Court has jurisdiction to try these cases, is correct and that the second appeals should be dismissed with costs. Before I conclude I must refer to a statement in the last paragraph of the learned Subordinate Judge's judgment referred to by the learned counsel for the appellants. In that paragraph it is stated :

"It has not been shown how the defendants have acquired permanent occupancy rights by any other means."

It is clear, and this is conceded also by Mr. Raghava Rao appearing for the respondents, that this sentence should be deleted as the defendants did not raise this question in the appeal before the lower Court and the plaintiff also did not appeal with respect to it.

P.R.S./B.V. *Appeal dismissed.*

*** A. I. R. 1933 Madras 197**

SUNDARAM CHETTY, J.

(*Bukkapatnam*) *Triumala Narasimhacharyulu*—Appellant.

v.

(*Sree Rajah*) *Sabhnadri Appa Rao Bahadur Zamindar Garu*—Respondent.

Second Appeal No. 886 of 1929, Decided on 18th August 1932.

(a) **Decree—Execution—Executing Court cannot go behind decree—Civil P. C. (1908). O. 21, R. 17.**

An executing Court cannot go behind the decree and allow an objection as to the validity or binding character of the decree by anyone who was a party to the suit. Such a question must be made the subject of a separate suit: *A I R 1932 Mad 7, Ref.*

It may be that the contention that the decree is a nullity may be decided by the executing Court. [P 198 C 2]

* (b) **Limitation Act (1908), S. 14—Proceedings attacking validity of decree under S. 47, Civil P. C., on the ground of fraud of guardian—Subsequent suit on the same ground and for the same relief—Prior proceedings prosecuted under legal advice—Such period to be excluded for limitation.**

Misconception of the remedy sought in the previous action may be taken as criterion for deciding the existence of good faith but cannot be added for the necessary conditions in S. 14.

A suit was filed against A who was represented by a guardian. Through the gross negligence and fraud of the guardian a decree was passed against A and his property was attached on 19th September 1920. Upon which under the legal advice A started proceedings in the execution Court to set aside the decree on the above mentioned grounds. He went up to the High Court which on 14th September 1926 decided that the executing Court was incompetent to decide this question. A brought the present suit praying for same relief on the same grounds and claimed exclusion of time from 19th September 1920 to 14th September 1926 under S. 14.

Held: that A was entitled to exclude the period spent in the prosecution of the prior proceedings for computing the period of limitation: *A I R 1929 P C 103, Foll.* [P 200 C 1]

V. Govindarajachari—for Appellant.

P. Satyanarayana Rao—for Respondent.

Judgment.—The plaintiff is the appellant. This appeal arises out of a suit brought by him to set aside on the ground of fraud and gross negligence of his former guardian, the decree in O. S. No. 188 of 1906 in which he was impleaded as defendant 5. The preliminary question that was taken up for consideration by both the Courts below is one of limitation. One of the grounds urged by the plaintiff to save the suit from the bar of limitation is, that the fraud alleged in the plaint became known to him only on 19th September 1920, when his properties were attached in execution of the decree in the former suit. On that footing he seeks to have the period from 19th September 1920 to 14th September 1926 excluded under S. 14, Lim. Act, from computation of the period of limitation for this suit, as he was prosecuting the proceedings in

I. A. No. 1328 of 1920 (Ex. B) in good faith. The Courts below held that the afore-said period of time could not be excluded under S. 14, Lim. Act, and as a consequence of this finding, the suit was barred even assuming that the starting point of limitation was 1st September 1920 on account of the fraud alleged in the plaint.

The main point for consideration in this second appeal is, whether the plaintiff is entitled to the exclusion of time under S. 14, Lim. Act, or not. In order to apply the aforesaid section, it must be found that the former proceeding was founded upon the same cause of action and was prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. Another aspect for consideration under that section is whether the previous proceeding was for the same relief although not founded upon the same cause of action. In para. 5 of the lower Court's judgment, the learned District Judge has set forth the allegations which can be deemed to be common in the former application and in the present plaint. That application was presented under S. 47, Civil P. C., for certain relief to be obtained from the executing Court. If regard be had to the common allegations in the former petition and in the present plaint, I should observe that the grounds set forth by the plaintiff in order to obtain the reliefs required by him are substantially the same. Some of the allegations in the former application clearly indicate fraud on the part of the plaintiff in O. S. No. 188 of 1906 by reason of the suppression of the fact of adoption of the present plaintiff and also the gross negligence of his natural mother appointed as his guardian ad litem, though fraud and gross negligence are not stated specifically, there is enough indication that these are the grounds on which the present plaintiff attacked the validity of the decree passed against him. It is true that he went so far as to allege that he was not a party to that suit at all in the sense that there was no representation of him as the adopted son which, according to him, is his real status. In para. 6 of his application, he expressly says that the said decree cannot legally bind him or his property. It is on this basis he sought for a declara-

tion that the properties of his adoptive family were not liable to attachment in execution of that decree and the proceedings in execution taken against him are not valid. In the present suit, after setting forth all the previous allegations with some embellishments, the relief asked for by him is a declaration that the former decree is not valid and binding on him.

The point to be considered is whether the present relief sought for in this suit and based upon substantially the same allegations as affording a cause of action was one which the executing Court had jurisdiction to grant on the former application. It is settled law that an executing Court cannot go behind the decree and allow an objection as to the validity or binding character of the decree by anyone who was a party to the suit. Such a question could not be gone into by the executing Court, but it must be made the subject of a separate suit: vide *Gorindan Nadar v. Natesa Pillai* (1). It may be that, if the decree sought to be executed is attacked as a nullity, such a contention may be decided by the executing Court. In the present case, though one of the objections taken by the present plaintiff was that he was not to be considered as a party to the former suit, he did raise several other objections which would only go to show that the decree could not be valid and binding on him. As his application was deemed to cover this kind of relief also, it was observed by Wallace, J., in the second appeal connected with the former application, that, if the petitioner's contention was, as it really seemed to be, that his natural mother did not properly look after his interests in the suit, he should get the decree set aside by proceedings ad hoc and could not resist the execution of the decree on that ground. On a due consideration of the allegations in the present plaint and those in the former application, I am of opinion that the material facts constituting the cause of action in the present suit were also alleged in the former application. I therefore hold that the former proceedings may be deemed to have been founded upon the same cause of action. It can even be said that this relief which is asked for in the present suit was in a way asked for in the former proceeding.

as ancillary to the main relief or reliefs claimed.

That being² so we have to see whether the former proceeding was prosecuted in good faith or not. Even the lower appellate Court does not seriously dispute this position and says that it may be assumed that the plaintiff prosecuted the prior proceeding in good faith since he acted under legal advice. The observation of the Privy Council in the case reported as *Ramdutt Ramkishan Das v. F. D. Sassoon & Co.* (2) is to the effect that S. 14, Lim. Act, was intended to protect a bona fide plaintiff from the consequence of some mistake which was made by his advisers in prosecuting his claim. If under the wrong advice given to the plaintiff, he believed that he could get the decree declared to be not valid and binding on him by an application to the executing Court, and under that belief he prosecuted the former proceeding right up to the High Court, it would be difficult to say that he was not acting in good faith in the conduct of that litigation. Some of the reliefs asked for by him were no doubt within the jurisdiction of the executing Court, although this particular relief was beyond the competency of that Court.

Granting the existence of good faith in the plaintiff, the next point to be considered is whether the executing Court was unable to entertain the application in respect of the aforesaid relief on account of defect of jurisdiction or other cause of a like nature. The word "jurisdiction" occurring in S. 14, Lim. Act, should in my opinion be interpreted liberally and this is the view taken in some of the authorities. The decision in *Dhansingh v. Basantsingh* (3) deals with this question elaborately. As observed by Mahmood, J., on p. 527, adopting the meaning given in Wharton's Law Lexicon, "jurisdiction" means "legal authority, extent of power, declaration of the law." "Extent of power" may mean the territorial limits of jurisdiction or the pecuniary limits of jurisdiction. There is another category which has reference to the nature of the class to which the case belongs. For the purposes of the present appeal, it is enough to observe

that the executing Court had no jurisdiction to grant the relief asked for in the present plaint, which was also one of the reliefs sought for in the former application. Several decisions have been cited by the learned advocate for the appellant as to what would be defect of jurisdiction or other cause of a like nature, within the meaning of S. 14, Lim. Act. It is unnecessary to deal with those decisions. Suffice it to say, that in the present case the executing Court had no jurisdiction to grant the particular relief or at any rate, was unable to grant it from a cause of a like nature.

It is strongly contended by the learned advocate for the respondent that inasmuch as the former proceeding was a misconceived remedy the case is taken out of S. 14, Lim. Act. Reliance is placed upon the decision in *Ganupathi Mudaliar v. Krishnamachari* (4) which is the same as the decision in 70 I. C. 733 referred to by the lower appellate Court. If a suit or proceeding by reason of any inherent defect in it should fail before any Court, it cannot be said that the Court before which it was presented was unable to entertain it from defect of jurisdiction. If a suit or proceeding which is otherwise competent was presented before a wrong forum, then that Court could not entertain it for want of jurisdiction. If the present plaintiff had only sought for this relief by means of a suit, the Court would not be unable to entertain it for want of jurisdiction but as the same relief was asked for in an application under S. 47 to be decided by the executing Court, that Court was unable to entertain it for the express reason mentioned in S. 14 of the Act. In *Ganapathi's* case (4) above referred to, the learned Judges have considered the applicability of S. 14 as a question of secondary importance. The finding that that case was governed by Art. 167, Lim. Act, was sought for the disposal of that case. However, they considered the question relating to S. 14 also, and in the circumstances of that case they held that the former action was entirely misconceived.

If the misconception was of such a nature and so patent as to indicate to any Court want of due care and attention or want of ordinary diligence, then

2. A I R 1929 P C 103=115 I C 713=56 I A 128=56 Cal 1048 (P C).

3. (1886) 8 All 519=(1886) A WN 182.

4. A I R 1922 Mad 417=70 I C 743.

it may be said that the plaintiff cannot be deemed to have prosecuted the former action in good faith. In the decision reported as *Murugesu Mudaliar v. Jatharam Dary* (5), which was also referred to in the above case there is no express finding that the former action was not prosecuted in good faith. It may be that the learned Judges thought that the remedy was so glaringly misconceived as to amount to lack of good faith. In *Ganapathi Mudaliar v. Krishnamachari* (4) there is no doubt an observation that the plaintiff acted in good faith. I am however of opinion that we cannot add to the conditions set forth in S. 14, Lim. Act, as the requisites for the exclusion of time. The misconception of the remedy sought for in the previous action, may in my opinion, be taken as a criterion for determining the existence of good faith. But if all the requisites mentioned in S. 14 are found to exist, it seems to me that the benefit given by that section cannot be taken away on the mere ground that, in the opinion of the Court, the course adopted before was not a well-conceived one. However that may be, I do not consider that the former application by the plaintiff was entirely misconceived, as was the case considered in *Ganppathi Mudaliar v. Krishnamachari* (4).

For this reason I am of opinion that the period from 19th September 1920 to 14th September 1926, should be excluded from the computation of the period of limitation under S. 14, Lim. Act. That being so, the suit cannot be dismissed on the preliminary ground adopted by the Courts below. I may point out that the question whether the starting point of limitation for this suit is 19th September 1920, or not, is still an open question which has to be decided hereafter. The decrees of the Courts below are set aside and also the finding on issue 3, and the suit is remanded to the Court of first instance to be disposed of according to law. The appellant's costs in this appeal should be paid by the respondent, and the other costs will abide the final result and should be provided for by the first Court. The court-fee paid by the appellant in this Court and in the lower appellate Court will be refunded to him.

P.R.S./K.S.

Suit remanded.

5. (1900) 23 Mad 621.

A. I. R. 1933 Madras 200

MADHAVAN NAIR, J.

(Peria) Syed Levvai Rowther and another—Defendants—Appellants.

v.

Syed Ammal—Plaintiff—Respondent.

Second Appeal No. 92 of 1930 and Civil Revn. Petn. No. 1508 of 1929, Decided on 12th August 1931, against decree of Sub-Judge, Madura, in A. S. No. 23 of 1929.

Limitation Act (1908), Art. 120 — Mahomedan family—Partition suit — Female asking for accounts from managing cosharer of property for ten years, i. e., for period prior to six years of suit — Demand for accounts within one year of suit—Suit is within time.

In a partition suit between the cosharers of a Mahomedan family, a female cosharer asked for accounts and profits of her share from the managing cosharer for a period of ten years.

Held : that in the circumstances of the case, the right to sue was a continuing one and arose when there was a demand and a refusal for accounts and profits. In this case the refusal was before one year of the suit and hence the suit was not barred under Art. 120. That the plaintiff could claim an account for the whole period of ten years. This was so because if such a suit had been brought within six years after the demand and refusal then the person liable may be asked to account for the entire period of his management even if it exceeds six years : *Case law discussed.* [P 202 C 1, 2]

K. Rajah Ayyar, V. Ramaswami Ayyar and K. Venkateswaran — for Appellant.

S. R. Muthuswamy Ayyar — for Respondent.

Judgment.—Defendants 2 and 4 are the appellants. This second appeal arises out of a suit for partition of the estate of one Syed Kalai Syed Levvai now deceased. He died leaving him surviving his widow, two daughters and his brother and sister. The widow is the plaintiff. The daughters are defendants 6 and 7 and the brother's heirs are defendants 1 to 5. The sister Bathammal is not a party to the suit. Syed Levvai died in February 1909. His brother Peria Narain Levvai died in October 1911. It has been found by the lower Courts that after that time defendant 4 has been in management of the estate. The plaintiff was given her share in the immovable properties. A decree was also given to her against defendant 4, her brother's son, to account for her share of the collections and income from the estate commencing from October 1911. She was also given a decree with respect

to the mortgage amount in Ex. 21-a and in respect of Rs. 500 under Exs. D and D-1. Defendant 2 was made liable to account for the income of the lands till 1915 as admitted in his written statement. The suit has been preferred in 1922.

In this second appeal objection is taken as regards the period during which defendant 4 has been made liable to account for the income and collections, and also with regard to his liability to account for the amount due under Exs. 21-a and D and D-1. As regards the first point that is the period for which defendant 4 was made liable to account, which I shall deal with first, the argument of the learned counsel for the appellant is that Art. 120, Limitation Act, applies to the case and that the learned Subordinate Judge was wrong in giving a decree to the plaintiff for the income and collections arising out of the estate for more than six years prior to the suit. The lower Courts found, as already stated, that defendant 4 was in management from the death of his brother in October 1911. It was also found that the plaintiff's demand for her share of the property was refused only in 1921, about a year before the suit. It is conceded that Art. 120 is the article of the Limitation Act applicable to the case. The article prescribes a period of six years for a suit for which no period of limitation is provided in the Limitation Act, the period being calculated from the time when the right to sue accrues. In applying this article it is argued that since the plaintiff's claim is for an account against defendant 4 for the income and collections made by him, it must be held that his cause of action for each year's income and the collections arose on the receipt of such income, and so, in taking the accounts the appellant should not have been asked to account for more than six years, (that is, for years prior to 1916) in this case. On behalf of the respondent, it is argued that the suit is for partition, that the right to sue is a continuing one and accrues in such a case only, when there has been a demand and a refusal and that if the suit has been brought within six years after the demand and refusal then the person liable may be asked to account for the entire period of his management even if it exceeds six years.

The claim for an account, though made in a partition suit, being in the nature of a suit for an account, it is pointed out that the respondent's argument is open to the criticism that by calling the suit a suit for partition, which, no doubt it really is, in one sense, the essential nature of the claim is overlooked and the claimant is enabled to keep alive his cause of action indefinitely which in many cases may be a source of hardship to the co-heir who is in management of the estate. This argument is not without some force, but this Court has in a series of cases allowed accounting in partition suits brought against co-heirs for more than six years. In *Abdul Rahiman v. Pathumal Bivi* (1), a case like the present between Mahomedan one of the reliefs claimed by a Mahomedan lady against her co-heir was in respect of the amount of a mortgage debt collected by the defendant more than six years before the suit and it was held that Art. 120 applied to the case and as the right to sue accrued from day to day the action was not barred. In arriving at their conclusion the learned Judges relied on the following remarks of Sankaran Nair, J. and Oldfield, J., in *Marian Bivi Ammal v. Kadir Meera Saheb* (2) :

"The defendants having taken up possession of the property as tenants-in-common they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to say that so far as the plaintiff is concerned the character of the possession was changed six years before the date of the suit."

In that case which was similar to the one before them the learned Judges held that the plaintiff's claim was not barred though the moveables for which she claimed a share had come into the defendant's hands more than 20 years before suit. In *Subba Row v. Rama Row* (3), the plaintiff and the defendant were cosharers in a jaghir which was originally granted to their ancestor. The defendant had been appointed by the Government as the manager thereof in 1886 and was liable to account to the plaintiff for his share of the net income accruing due in every year. In 1913 the plaintiff sued for the recovery of his share of the income due for the

1. (1916) 32 I C 83.

2. (1915) 29 I C 275.

3. (1917) 40 Mad 291=32 I C 829

years 1905 to 1907, for a period prior to six years before the suit.

It was held that under Art. 120 the claim was not barred by limitation. It is argued for the appellant that in these cases the question for decision was whether Art. 62 or Art. 120, Lim. Act, would apply and not if, whether Art. 120 applied, a person liable to account should be called on to account for more than six years prior to the suit. It is true that this particular point did not arise for decision in those cases but the reasoning on which the learned Judges held that Art. 120 applied and not Art. 62 clearly shows that the liability to account would extend for more than six years prior to the suit, the right to partition being a continuing one. This appears to be clear from the observations regarding suits for partition in *Mohabarat Shaha v. Abdul Hamid Khan* (4) relied on by the learned Judges in *Abdul Rahiman v. Pathumal Bivi* (1) which are as follows:

"We might possibly hold that such suits are not beyond the scope of the Limitation Act, but that in each case the right to sue accrues every moment during the whole of the time, that the right to the property continues to exist; for instance, the liability to be partitioned is one of the incidents of joint property and a co-owner has the right to sue for partition at every moment of the whole period during which he continues to be co-owner."

The decisions which I have referred to are relied on in the Full Bench decision in *Yerukola v. Yerukola* (5). In that case which was also one for partition and an account, the Full Bench held that Art. 120 would apply and not Art. 89 and 109 or Art. 127 unless from the facts of the case it could be inferred that the person receiving the moneys, rents and profits acted as an agent in which case Art. 89 would apply. In holding that Art. 120 would apply, the learned Sir Walter Schwabe, C. J., dealt with the question as to whether (see p. 664 of 45 *Mad.*) the right to sue is to be deemed to accrue on the receipts of the profits or when the account is called for and refused, and his observations on that question deal with the point now pressed by the learned advocate for the appellant. The learned Judge observed as follows:

"In my judgment—and I have the support of the authority already referred to, *Marian Biri Ammal v. Kadir Meera Saheb* (2), the right to sue arises in this kind of cases when there is a

demand and a refusal for account, or, it could be put as, when there is in fact, an ouster. It really follows from what I have already said there is no cause of action on the mere receipt by one of the brothers of any particular amount, and it is clear to my mind that the period of limitation cannot run until the cause of action arises. That cause of action does not come into being until, at any rate, there is something done which shows that the man who got the money into his possession is holding it adversely to the plaintiff."

This case was followed in *Ayyakutti Thevan v. Sigappi Achi* (6), in which case the plaintiff was given a decree for an account for the period mentioned in the plaint which appears from the papers was for 13 years, i. e. 1910 to 1923. So according to the trend of the decisions of this Court, having regard to the findings that the demand for the income and its refusal in this case was only in the year 1921 the plaintiff's right to demand from defendant 4 an account of the income from October 1911 to the date of the suit though the period is for more than six years cannot be held to be barred under Art. 120, Lim. Act.

The appellant has not been able to cite any decision of this Court in support of his contention, but he has referred to a few decisions of the other Courts and a decision of the Privy Council which I shall now consider. In *Biswambar Halder v. Giri Bala Dasi* (7) the present point did not arise for decision. That suit seems to have been treated mainly as a suit for an account, but however that may be, the only question that was decided was that Art. 10, Lim. Act, would not govern a suit for account against a karta and that Art. 120 is the article applicable. In *Maung Po Nyun v. Ma Saw Pin* (A. I. R. 1931 Rang. 150) the suit in which the claimants were decreed six years' profits was a suit for the recovery of rents and profits and not a suit for partition, the share of the property and the income to which the respondents were entitled having been already settled in a prior suit, and further the question whether, if Art. 120 applied, the suit would be barred for the recovery of profits for more than six years was not considered, the only question for decision being which of the articles, 109, 62 or 120, would apply. The appellant very strongly relied on the order of their Lordships of the Privy Council reported

4. (1905) 1 C L J 73.

5. A I R 1922 Mad 150=71 I C 177=45 Mad 648 (F B).

6. A I R 1928 Mad 1286=114 I C 364.

7. A I R 1921 Cal 571=58 I C 877.

in *Midnapore Zamindari Co. v. Naresh Narayan*, A. I. R. 1925 P. C. 93, overruling their decision in *A I R 1924 P C 144*. In the main case the plaintiff obtained a decree for the partition of certain lands in which he and the Midnapur Company were cosharers and the company was ordered to pay compensation to the plaintiff for his exclusive use of the land from 20th June 1908 until the partition has been effected and possession of the lands falling to plaintiff has been delivered. It is pointed out in *Midnapur Zamindari Co. v. Kumar Naresh Narayan*, A. I. R. 1925 P. C. 93, that the above judgment was subsequently amended by their Lordships by inserting the date 8th August 1906 in the place of 20th June 1903, the suit having been filed on 8th August 1912.

It is argued that this amendment shows that compensation for only six years under Art. 120 was allowed by the Privy Council and not for more than six years. The amendment no doubt justifies the argument urged by the appellants' counsel but the reasoning of their Lordships does not appear in the report and from the bare fact that the previous order was amended in the way indicated in the report I am not prepared to hold that the decisions of this Court which I have noticed require reconsideration. For the above reasons, following the decisions of this Court I agree with the lower Court, in holding that the plaintiff is entitled to claim from defendant 4 her share of the income and collections made by him for the full period commencing from October 1911 and not merely for a period of six years prior to the suit. The next argument relates to the mortgage amount in Ex. 21-A and Rs. 500 under Exs. D and D-1. The arguments urged in connexion with these items, deal with the findings of fact arrived at by the lower Courts which cannot be questioned in second appeal. In the result the second appeal is dismissed with costs.

P.R.S./B.V.

Appeal dismissed.

A. I. R. 1933 Madras 203

SUNDARAM CHETTY, J.

T. S. Sitarama Ayyar—Petitioner.

v.

G. Ramanuja Mudaliar — Respondent.

Civil Revn. Petn. No. 109 of 1931, Decided on 8th April 1931.

(a) **Court-fees Act (1870), Sch. 1, Art. 1—Term "set-off" may include equitable set-off—Civil P. C. (1908), O. 8, R. 6.**

There is nothing to show that the set off mentioned in Art. 1 is confined only to legal set off coming under O. 8, R. 6, Civil P. C.; prima facie the expression "set-off" used in this article may well nigh include an equitable set off also: *A I R 1923 All 118, Foll.* [P 204 C 2]

(b) **Court-fees Act (1870), Sch. 1, Art. 1—Suit on promissory note—Claim for specified amount by way of set-off by reason of breach of covenant of contract of sale out of which transaction in suit arose—Claim came under Art. 1.**

Where on a suit brought on the basis of a promissory note the defendant claimed in his written statement a specified amount by way of damages, setting out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note in favour of the plaintiff and by reason of the breach of covenant alleged to have been committed by the plaintiff:

Held: that the claim by way of set-off came under Art. 1, Sch. 1. [P 204 C 2]

V. Balasundaram Ayyar—for Petitioner.

A. V. Vishwanatha Sastri—for Respondent.

Judgment.—The question involved in this petition is whether the defendant-petitioner has to pay the court-fee under Art. 1, Sch. 1, Court-fees Act, on the amount of Rs. 2,000, which he has claimed as against the plaintiff in his written statement by way of damages in a suit brought by the plaintiff on a promissory note. The learned District Munsif has disposed of this question, which is not after all free from difficulty, in a single sentence, namely:

"I think the defendant must pay the court-fee due on the set off claimed by him as damages against the plaintiff."

It is amazing that he has not chosen to give his reasons for the conclusion arrived at by him. It is therefore difficult to know what reasons were operating on the mind of the learned District Munsif when he passed this order that the court-fee must be paid. This sort of deciding a contested petition should, to say the least, be deprecated. However I had the advantage of the arguments of the learned counsel on both sides on this question. O. 8, R. 6, Civil P. C., deals with set-off claimed by a defendant in his written statement. The amount so claimed should be an ascertained sum of money legally recoverable by him from the plaintiff. The question now is whether the claim of the present defendant made in his written statement is for any

ascertained sum of money legally recoverable by him from the plaintiff within the meaning of R. 6, O. 8. No doubt, judicial decisions have recognized subtle distinctions between what is called a legal set-off and an equitable set-off. It is argued on behalf of the petitioner, that what is contemplated by R. 6, O. 8, Civil P. C., is only a legal set-off. Claims by way of equitable set-off are said to be outside the scope of this rule. One test applied for distinguishing the two sorts of set-off is whether the claim is for an ascertained sum of money or only for unliquidated damages. It will be going too far to contend that the moment the claim for a certain amount is stated to be by way of damages, it must be treated as a claim for an unliquidated sum and therefore it comes under equitable set-off only. The observations in the decision in *Narasimha Rao v. Zamindar of Tiruvarur* (1) go to show that the claim of the present defendant in his written statement would not strictly come under equitable set-off. In that case, the defendant asked for ascertainment of the amount due to him from the plaintiff on account of dealings between them and for the passing of a decree in his favour for any sum found to be due to him on such ascertainment, in excess of what is found due to the plaintiff.

In that case the defendant did not even fix a certain amount as due to him from the plaintiff. Strictly speaking, such a case would be one of equitable set-off. In the present case, the defendant sets out the particulars of the claim made by him as one arising from the transaction of sale which led to the execution of the promissory note in favour of the plaintiff. By reason of the breach of the covenants alleged to have been committed by the plaintiff, it is stated that the defendant sustained damages to the extent of Rs. 2,000, which he claimed to set off against the amount claimed by the plaintiff. In the first place the defendant himself claimed a specific amount alleged to be due to him on account of damages and as such it cannot be said that his claim is only for unliquidated damages. Even stretching the point in favour of the defendant and holding that his claim in the present case is not one

strictly within the purview of O. 8, R. 6, Civil P. C., I am doubtful whether he can escape the liability of paying the court-fee on the sum of Rs. 2,000, fixed in his written statement as due from the plaintiff. In Art. 1, Sch. 1, Court-fees Act, it is stated that a written statement pleading a set-off or a counter-claim is liable to stamp duty as in the case of a plaint.

There is nothing to show that the set-off mentioned in this article is confined only to legal set-off coming under O. 8, R. 6, Civil P. C. Prima facie the expression "set-off" used in this article may well nigh include an equitable set-off also. As observed in the decision of the Allahabad High Court in *Chhakkan Lal v. Kanhaiya Lal* (2), at p. 220 (of 45 *All.*) the rulings of the High Courts before the date of the amendment of Art. 1, Sch. 1, Court-fees Act, may no longer be applicable in the matter of determining whether a written statement pleading a set-off is liable to stamp duty or not. It is only when the aforesaid article of the Court-fees Act was amended at the time of the enactment of the present Civil Procedure Code that a written statement pleading a set-off or a counter-claim was placed on a par with the plaint in the matter of payment of court-fee. I am therefore of opinion, taking into consideration the nature of the claim by way of set-off made in the written statement in the present case, that it certainly comes under Art. 1, Sch. 1, Court-fees Act, and the order of the District Munsif directing the payment of the necessary court-fee has to be upheld. This revision petition is therefore dismissed, but in the circumstances without costs. One month's time is allowed from this date to the defendant for the payment of the court-fee in the lower Court.

P.R.S./V.B.

Order accordingly.

2. A I R 1923 All 118=69 I C 921=45 All 218.

A. I. R. 1933 Madras 204

CURGENVEN AND CORNISH, JJ.

Krishnaswami Sastrigal—Appellant.

v.

Avayambal Ammal and another—Respondents.

Appeal No. 286 of 1928, Decided on 5th February 1931, against decree of Sub-Judge, Tiruvarur, in O. S. No. 41 of 1925.

(a) Hindu Law—Will—Construction of—To decide whether it creates trust or mere

1. A I R 1920 Mad 819=53 I C 234=42 Mad 873.

charge on estate, will must be taken as a whole.

In determining whether the will of a Hindu gives the testator's estate to an idol subject to a charge in favour of heirs or makes the gift to the idol a charge upon the estate there is no fixed rule depending upon the use of particular terms in the will; the question depends upon the construction of the will as a whole: *A I R 1921 P C 20, Ref.* [P 206 C 1]

A will provided that the testator's sister shall enjoy the immovable property and from its income shall expend annually certain quantities of paddy and of cash towards the upkeep of the specified ceremonies and charities and shall give the testator's wife a certain quantity of paddy for maintenance and contained the following clause: 'In this manner my sister and her male heirs and their descendants from generation to generation shall defray the afore-said expenses and take the balance of the income for themselves:

Held: that the intention of the testator was to place the two charges on the same footing and this itself afforded a strong argument against the view that he was desirous of creating a trust. The will bequeathed the property to the sister subject to the charges specified.

[P 206 C 2]

(b) Hindu Law — Will — Two or more donees, when tenants-in-common and when joint tenants stated.

Except in a case where the donees in the absence of any testamentary disposition would have taken the property as ancestral property, they would take as tenants-in-common, unless a contrary intention is shown by the testator. If the property was in terms given to a joint Hindu family the family will take it with all the incidents of ancestral or joint family property; but if the gift is not to a joint family but to members of it individually, they would take it in severalty. Even in a case where a life estate is interposed the property will be taken by the eventual donees as tenants-in-common and not as joint tenants: *A I R 1924 Mad 273 and 27 Mad 300 (FB), Ref.* [P 206 C 2]

(c) Hindu Law—Will—Tenancy is common or joint—Incidents of possession same—Onus to waive separate rights is on him who asserts it.

Where the incidents of possession of the property are the same whether the tenancy is in common or joint, the onus of establishing a clear intention to waive the separate rights to the property is upon the party who asserts it: *A I R 1929 Cal 636 and A I R 1925 Mad 303, Ref.* [P 207 C 1]

K. Narasimha Ayyangar—for Appellant.

T. L. Venkatarama Ayyar—for Respondents.

Curgenvén, J.—The decision of this case is dependent upon the construction to be placed upon a will, Ex. A, executed by one Venkatarama Ayyar in 1902 bequeathing certain properties to his sister Parvati, who died in February 1923. Parvati was the mother of defendant 1 and of Sitarama Sestri, who died

in March 1924 and whose widow is the plaintiff. Together the two brothers formed a co-parcenary. Defendant 1 resists the plaintiff's claim to partition of the properties devised by the will firstly on the ground that it created a trust; and secondly, if that contention does not succeed, upon a claim of survivorship, it being argued that the brothers took the property as joint tenants and not as tenants-in-common. The learned Subordinate Judge of Tiruvarur has held in favour of the plaintiff upon both points and defendant 1 appeals.

We think the lower Court is correct in holding that the provisions of the will did not constitute a trust, and that Parvati took the devised property subject to charges in favour of certain charities and of an allowance for maintenance. Our attention has been drawn to two cases decided by the Privy Council, *Sonatun Bysack v. Juggutsoon-daree Dossee* (1) and *Ashutosh Dutt v. Doorga Churn* (2), in which it was held to be sufficient to rebut the construction of a trust that the instrument in question contained a bequest of surplus property for the use and benefit of private persons. In the latter of these two cases a Hindu lady left certain lands to her sons by will to support the daily worship of an idol and to defray the expenses of certain other religious ceremonies, with a provision that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family. Their Lordships held that the property was therefore not wholly debutter and that appears to have been the ground upon which they rejected the contention that it was trust property. We cite these cases to make it clear that the principles of construction to be applied in the case of a will or a gift deed executed by a Hindu are quite different from those which are appropriate in the case of a wakf, some attempt having been made before us to apply such a case as *Ramanathan Chettiar v. Lervai Marakkayar* (3), which expressly applies the Mahomedan law relating to trusts of

1. (1859-61) 8 M I A 66=2 Suth. 37=1 Sar 721 (P C).

2. (1880) 5 Cal 438=6 I A 182=4 Sar 53 (P C).

3. A I R 1916 P C 86=39 I C 235=44 I A 21=40 Mad 116 (P C).

that character. An instance of a trust created by a Hindu deed of endowment is furnished by *Jadu Nath Singh v. Thakur Sita Ramji* (4), which will be found referred to and distinguished by the Privy Council in *Har Narayan v. Surja Kunwari* (5). In the last mentioned case it was observed that in determining whether the will of a Hindu gives the testator's estate to an idol subject to a charge in favour of heirs or makes the gift to the idol a charge upon the estate, there is no fixed rule depending upon the use of particular terms in the will; the question depends upon the construction of the will as a whole.

Applying these principles to the will Ex. A we find that it provides at the beginning that the testator's sister Parvati shall enjoy the immovable property and from its income shall expend annually certain quantities of paddy and of cash towards the upkeep of the specified ceremonies and charities. She is also to give the testator's wife Alamelu a certain quantity of paddy for maintenance. The learned Subordinate Judge estimates the yield of the property at not less than 350 kalams of paddy per annum. Of this the charities, etc., would absorb 95, and the widow Alamelu another 75, leaving 180 kalams as balance at the disposal of the beneficiary. This calculation omits a certain undefined quantity to be devoted annually to the feeding of Brahmins, but it is not probable that this would amount to a very substantial figure. Accordingly the amount to be devoted to religious and charitable purposes is only about one half as great as the surplus available from the property. It can scarcely be said therefore that the predominant purpose of the testator was to endow these charities, even if, as has been argued for the appellant, such a test would be appropriate. After making these dispositions the will continues:

"In this manner my sister Parvati and her male heirs and their descendants from generation to generation shall defray the aforesaid expenses and take the balance of the income for themselves,"

and concludes by naming certain of the lands as security, firstly, for the conduct

4. A I R 1917 P C 177=42 I C 225=44 I A 187=20 O C 200=29 All 553 (P C).

5. A I R 1921 P C 20=63 I C 31=18 I A 113=43 All 291 (P C).

of the charities and, secondly, for the payment of the maintenance to Alamelu. It seems therefore to have been the testator's intention to place these two charges upon the same footing, and this in itself affords a strong argument against the view that he was desirous of creating a trust. We agree with the lower Court in the view it has taken that the will bequeathed the property to Parvati subject to the charges specified. It seems clear further that on Parvati's death the two brothers inherited the property as tenants-in-common and that that would be so whether the will gave Parvati an absolute estate or only a life interest. The question of the nature of the estate taken in such cases has been very fully discussed by Kumaraswamy Sastri and Krishnan, J.J., in *Janakiram Chetty v. Nagamony Mudaliar* (6). The learned Judges except the case where the donees in the absence of any testamentary disposition, would have taken the property as ancestral property, and hold that in all other cases they would take as tenants-in-common, unless a contrary intention was shown by the testator. Krishnan, J. puts it in this way, that if the property was in terms given to a joint Hindu family the family will take it with all the incidents of ancestral or joint family property; but if the gift is not to a joint family but to members of it individually, they would take it in severalty. It is pointed out that even in a case where a life estate is interposed the property will be taken by the eventual donees as tenants-in-common and not as joint tenants. The principles upon which this case was decided may be compared with those which influenced the Full Bench in *Karuppai Nachiar v. Sankaranarayanan Chetty* (7), in deciding that the sons, although forming an undivided Hindu family, take their mother's stridhanam property as tenants-in-common without the benefit of survivorship.

It is then said that, granting this to be so, the suit property was blended with their joint family property by the two brothers. The authorities which have been cited before us upon this question are of little assistance, because they all deal with the blending of property ex-

6. A I R 1926 Mad 273=93 I C 662=49 Mad 98.

7. (1904) 27 Mad 300 (FB)

clusively owned by one member of a coparcenary. In such cases where property which would ordinarily be enjoyed separately is thrown into the common stock, the intention becomes clear enough. But in the present instance, in spite of the technical difference of title, the incidents of possession of the property would be the same whether the tenancy is in common or joint. As has been held in *Rajani Kanta v. Bashiram*, A. I. R. 1929 Cal 636 and *Mayandi Servai v. Santhanam Servai* (8), the onus of establishing a clear intention to waive the separate rights to the property is upon the party who asserts it and it is clear that there is no sufficient evidence for such a conclusion in the present case. Sitarama Sastri only survived his mother by one year and no accounts have been produced to show how the property was treated during that period. Defendant 1 asserts that the income from all their property was kept together, but even if that be true, such a course is hardly incompatible with the nature of the ownership. We agree with the learned Subordinate Judge that the letters produced throw no light upon this question and in general that there are no grounds for holding that the property, acquired in severalty, was converted into joint property.

We accordingly dismiss the appeal with costs. (Cross-objections were also dismissed).

P.R.S./K.N. Order accordingly.

8. A I R 1925 Mad 10 — 81 I C 1031.

**** A. I. R. 1933 Madras 207**

BEASLEY, C. J. AND STONE, J.

Mercantile Bank of India, Ltd.—Appellant.

v.

Official Assignee of Madras — Respondent.

Original Side Appeal No. 67 of 1930, Decided on 30th March 1932, against original judgment of Waller, J., D/- 7th January 1930.

**** (a) Presidency Towns Insolvency Act (1909), S. 52 (2) (c) — Person before adjudication borrowing money and assigning railway receipt to Bank—Official Assignee after adjudication claiming goods of insolvent under S. 52 (2) (c)—As assignment of railway receipt effects valid pledge of goods Official Assignee cannot succeed — Assignment of railway receipt coupled with letter of lien**

over goods passed constructive possession to Bank—Contract Act (1872), S. 178.

Where a person, dealing in extensive trade of ground-nuts, before he was adjudicated an insolvent, used to borrow money from a certain Bank before doing which he had to endorse and assign the railway receipt and sign and give a letter of lien over the goods, if after his adjudication as an insolvent the Official Assignee claims the goods under the reputed ownership clause of Presidency Towns Insolvency Act (1909), S. 52 (2) (c), Official Assignee cannot succeed in that there was a pledge of railway receipt and such pledge had the effect of pledging the goods, or even otherwise, there was good pledge of a railway receipt as a document and the effect of that was to give to the Bank as against either the insolvent or the Official Assignee the right to receive from the carrier those goods.

Construction of S. 178, Contract Act, thoroughly discussed: *Case law discussed.*

[P 209 C 1, 2]

Moreover, the endorsement of the railway receipt coupled with the letter of lien to the effect that the goods were deposited with the Bank by way of security had the effect of passing the goods in the constructive possession of the Bank irrespective of the fact that there was no notice to the carrier.

[P 209 C 1, 2]

(b) Transfer of Property Act (1882), Ss. 137 and 4 — S. 137 is made part of the Contract Act.

Section 137, T. P. Act, is part of a chapter which relates to contracts, and accordingly by S. 4, T. P. Act, it is made part of the Contract Act.

[P 209 C 2]

(c) Contract Act (1872), S. 178—"Person"—Not restricted to "mercantile agent"—Includes owner not in possession of goods.

The term "person" in S. 178 includes the owner of the goods not in possession of the goods and is not restricted only to "mercantile agent."

[P 210 C 1]

(d) Interpretation of Statutes—Some rules stated.

(1) In construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnancy or inconsistency with the rest of the statute. Even if the result of the construction were absurd that is no reason to depart from clear and unequivocal language capable of only one meaning.

[P 210 C 1]

(2) The duty of a Court is not to draft laws so that they may be just or reasonable or consonant to accepted principle. Its duty is to expound the laws as they stand giving to all words used the meaning they have either according to common usage or, if defined, according to the meaning given therein in the Act in question or in the interpretation Act.

[P 210 C 2]

(3) Where one finds words included in one section and excluded in another, one must assume either carelessness or intention and unless the latter results in an impossible position the legislature must be assumed to be using its language intentionally.

[P 211 C 1]

Nugent Grant and Vere Mockett — for Appellants.

Advocate-General—for Respondent.

Stone, J.—The facts in this case are simple and can be stated as follows: The

appellants who I shall hereafter refer to as the Bank lent one C. K. N., now an insolvent, money by various loans. These loans were arranged in order to finance the purchase by C. K. N., of groundnuts. C. K. N., was a large buyer of groundnuts. He purchased on credit. Sometimes he received delivery in the various centres in the mofussil; sometimes he received delivery in Madras. In the former case he was the consignor and the consignee; in the latter case he was the consignee mentioned in the various railway receipts relating to these various consignments during their transit by rail. Transit was by a carrier hereafter referred to as the Port Trust. The immediate destination in all cases was the Port Trust godowns at Madras. The goods were first placed in Port Trust godowns to await orders. The goods in question were there or en route at the time of the act of bankruptcy. That was the course of business pursued by C. K. N., his sellers; and his carriers in relation to the purchase, transport and delivery of these goods.

As regards C. K. N. and the Bank the following are the material acts done; C. K. N., having obtained railway receipts in respect of these goods bought on credit took or sent the railway receipt in respect of any particular consignment to the Bank to arrange a loan. Before a loan was granted the borrower was required: (1) to endorse and assign the railway receipt; (2) to sign and give a letter of lien: see documents at p. 49; (3) make and deliver a promissory note. The letter of lien is a document whereby the borrower

acknowledges to have deposited with the Bank the property hereunder mentioned as a collateral security for the due payment of

the promissory note. There are many other terms the general purpose of which is to enable the Bank to make up the security if there appear to be a deficiency, to hold in respect of charges or expenses, to sell and appropriate, or, if necessary, to obtain such further documents as may be found necessary to vest in the Bank the property to enable the Bank to sell and to prevent the borrower from doing anything to revoke or avoid any authority given or to be given to enable the Bank to sell. The hereunder-mentioned property is shown in the schedule. The schedule mentions bags

of groundnuts and refers to the number of the loan, particulars of which appear in the loan register. The precise bags of groundnuts can be identified from the information given in the schedule or the loan registers through the railway receipt. The railway receipt is by the bank stamped with the bank stamp and endorsed on behalf of the bank by the manager. It is handed to the bank's head godown keeper and by him entered with particulars in a book. In the past many of those railway receipts had been handed by him to the godown keeper employed by the bank who worked at the Port Trust outside godowns (i. e. the godowns bearing the Bank's board) and by him handed to C. K. N.'s representative to enable him to obtain, on paying freight, the goods which, up to then, were in the Port Trust's inside godowns. It is unnecessary to complicate this narrative with a reference to various frauds, which were thereby committed, the goods, title to which is in dispute in this case, being at all material times (i. e. up to the date when the act of bankruptcy occurred, viz. 7th February 1929) either in course of transit by rail, or in the Port Trust's inside godown awaiting orders as to delivery.

As to the course of business between the bank and the Port Trust, the Port Trust were aware of the Bank's board on the outside godown but were not given actual notice by the Bank until after the adjudication of either the lien created by the letter of lien or the pledge created by the assignment by way of security of the railway receipts. At that stage the Bank notified the Port Trust but the Port Trust declined delivery to the Bank pending communication with the Official Assignee. The Official Assignee claimed the goods. Subsequently under order of Court the goods were sold by the Bank for the account of whosoever may be found entitled. The question of substance is "Who is entitled, the Official Assignee or the Bank?" The learned trial Judge on the issues as framed has held that the Official Assignee is entitled. From that decision this appeal is brought.

In considering the law involved in the determination of the above questions it is very desirable to make it clear that the issues and consequently the judgment appealed from do not raise directly

a question as to the effect of the letter of lien. It is conceded however by the Advocate-General that (apart from the order and disposition clause) if either, (1) the letter of lien creates a charge on these goods, or (2) the railway receipt by endorsement transfers not merely a title to receive but constructive possession of the goods, then the Official Assignee's title is postponed to that of the Bank, the Bank having in the first case a charge for the amounts advanced against these goods and in the second case a pledge of the goods for the amount advanced. But it is urged that (a) a railway receipt unlike a bill of lading, though a document of title, is a document giving title to receive but not giving constructive possession, possession being a necessary ingredient of the transaction of pledge, there being no possession there is no perfected pledge; or (b) granted a perfected pledge, the goods have remained in the order or disposition of the insolvent so as to pass to the Official Assignee under the reputed ownership section of the Presidency Towns Insolvency Act, S. 52 (2)(c). The argument addressed to us hardly glances at the effect of the letter of lien.

On the other hand it is urged that the railway receipt has, by Statute, been assimilated for this purpose to a bill of lading, alternatively has been treated by the custom of merchants in Madras as equivalent to a document passing possession of the goods by delivery of the document itself. It is also urged that in the circumstances here present, granted that the Bank is to be deemed the true owner of these goods for the purpose of S. 52, they have not so acted as to make the insolvent the reputed owner. No argument has been addressed to us dealing with the consequences flowing from the fact that these goods are the subject-matter of letters of lien. As to custom: this is a question of fact and as there was some evidence on which the learned Judge could find as he did, his finding cannot be disturbed.

The most difficult question is as to the consequences which in law flow, in India, from the endorsement and delivery, by way of security for a loan, or a railway receipt. If, for this purpose, a railway receipt constructively passes possession, then it is not contested the insolvent pledged his goods; if on the other hand the railway receipt passes

the title to receive goods in future and on presentation of the railway receipt and a pledge of documents of title do not (save in the case of bills of lading) operate as a pledge of the goods then it is conceded there was no pledge of the goods. This still leaves outstanding the question whether there was a pledge of the railway receipts and if so what effect in law that has. Issue 1, it is to be observed, relates to the transfer, the delivery and the pledging of railway receipts and mentions nothing about goods. The material statutory provisions are as follows :

By S. 137, T. P. Act, a railway receipt is declared to be included in the expression "mercantile document of title to goods." That section is part of a chapter which relates, and the section relates, to contracts, and accordingly by S. 4, T. P. Act, it is made part of the Contract Act. By S. 178, Contract Act, applicable (it has since been substantially amended so as to be brought in line with the English Factors Act and Sale of Goods Act) it is provided that (the words that create difficulty are italicized) :

"a person who is in possession of any goods, or of any bill of lading order for delivery, or any other document of title to goods, may make a valid *pledge* of such goods or document: provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; provided also that such goods or documents *have not been obtained from their lawful owner*, or from any person in lawful custody of them, by reason of an offence or fraud."

It is to be observed that this provision occurs in that part of the Contract Act which is headed "Bailments of Pledge" and that by S. 172 :

"the *bailment of goods* as security for payment of a debt or performance of a promise is called "*pledge*."

So in a part which, by transposition of terms is purporting to deal with bailments of goods (whatever that may be) we have a provision which speaks of "a valid bailment of goods of such goods or documents." This, of course, is an impossible reading. The question is : (1) Is the expression "may make a valid pledge of such goods or documents" to be construed without reference to S. 172 or (2) as the words "of such goods or documents" to be deleted as redundant; or (3) should the expression be read as follows : "may make a valid pledge by the pledging of such goods or

documents?" If the last alternative be chosen, then a pledge of the described documents has the same effect as pledging goods because "a valid pledge" means "a valid bailment of goods." If the second alternative be chosen, one is left in doubt how one may make the valid pledge, but one would have to assume the addition of the words "by pledging such goods or documents" and so arrive at the same meaning as in the third alternative. If the first alternative be chosen one has to consider what is the effect of pledging a document as distinct from pledging goods.

Next what is meant by "person?" This term can hardly be restricted to "mercantile agent." Can it in view of the words italicized, in the proviso be restricted to mean "a person other than the owner?" In construing this difficult Act I think it is well to bear in mind the so-called golden rule for the interpretation of statutes. It is thus stated in Maxwell, Edn. 5, at p. 4:

"In construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnancy or inconsistency with the rest of the (statute):"

Thus Lord Wensleydale in *Grey v. Pearson* (1), Lord Ellenborough in *Doe v. Jessop* (2), described it as "a rule of common sense as strong as can be." Lord Cranworth in *Gundry v. Pinniger* (3), called it the cardinal rule and Jervis, C.J., in *Mattison v. Hart* (4) described it as the golden rule. Applying that rule to S. 178 one asks first: Does the phrase "person not in possession of goods" include (giving the words their ordinary meaning) the owner of the goods not in possession of goods? The answer is: It does. Next does that result in repugnancy or inconsistency with the rest of the instrument? Looking at S. 103 where the owner is expressly mentioned as a person having power to pledge (i. e., make a bailment of goods) by pledging documents of title the answer is that it does not. Looking at S. 108 one sees a difference, but neither a repugnancy nor an inconsistency. On the contrary the legislature when enacting the provisions of

S. 108 expressly excludes the owner from rights X (relating to sale); when enacting S. 178 includes the owner in the class having rights Y (relating to pledge). That is not inconsistent or repugnant. The argument founded on a supposed carelessness must be rejected; as must that founded on the supposition that India must necessarily follow at a respectful distance England in its legislative advances. Even if the result of the construction were absurd, that is no reason to depart from clear and unequivocal language capable of only one meaning: see Maxwell at p. 5, Op. Cit. The words in the proviso assist neither construction. They are neutral. Whether "person" includes owner or not, it clearly includes persons who are not owners and accordingly provision has to be made for them, and some classes of such persons have to be excluded. The provisos describe such excluded classes. The proviso relates, it should be observed, to pledges of goods as well as to pledges of documents.

The duty of a Court is not to draft laws so that they may be just or reasonable or consonant to accepted principle. Its duty is to expound the laws as they stand giving to all words used the meaning they have either according to common usage or, if defined, according to the meaning given therein in the Act in question or in the Interpretation Act. It is of course in the last degree unfortunate that an Act should be drafted and then that definitions should be added which result in most curious results, but however curious the results a Judge must give effect to them. The legislature must use the pruning knife if it is to be used at all. In deference to the argument addressed to us based upon other parts of the same Act and the state of the law as it stood when this Act in 1872 was passed, those arguments are now examined.

If Excep. 1, S. 108, is referred to, it will be seen that, when dealing with the contract of sale, persons in possession of these documents of title may give a better title than they have. Here the Act says "when any person is, by consent of the owner, in possession, etc." It is urged that as in S. 108 the inclusion of the words "by the consent of the owner" excludes the owner from the class covered by the word "person," so in S. 178 it was the intention of the legislature to

1. (1857) 6 H L C 61=26 L J Ch 473 = 3 Jur (n s) 823=5 W R 454.

2. 12 East 293.

3. (1852) 1 De G M & G 502=21 L J Ch 405=16 Jur 483.

4. (1854) 14 C B 357=2 C L R 314=23 L J C P 108=18 Jur 386=2 W R 327.

exclude "owner" from the term "person." I know however of no such rule of construction. It pre-supposes carelessness on the part of the legislature. The fact that owner is thus excluded from person in S. 108 suggests that it was not intended to exclude him in S. 178; otherwise, what could be easier than to use the same language in both cases? Where one finds words included in one section and excluded in another, one must assume either carelessness or intention and unless the latter results in an impossible position (and who is to say this position is impossible?) the legislature must be assumed to be using its language intentionally. Then there is S. 103. This speaks of the assigning of a

"bill of lading or other instrument of title to any goods by the buyer by way of pledge."

In such a case, the unpaid vendor cannot stop except on satisfying the pledgee. Unless one is to use the word "pledge" here in one sense and in S. 172 in another, this section means that one may make a bailment of goods by pledging instruments of title. In *Ramdas Vithaldas v. S. Ameerchand & Co.* (5) at pp. 169 and 170 (of 43 I. A.) the Judicial Committee treated the effect of this section read with S. 102 as enabling a pledge of the goods to be effected by pledging not only bills of lading (which in English law operate, unlike all other documents of title, to pass constructive possession of goods) but also "instruments of title." Their Lordships also held that instruments of title and documents of title are terms having, for the purpose of this Act, similar meanings. For similar reasons, it may be concluded that the "mercantile documents of title" referred to in S. 137, T. P. Act, are documents which are included in the wider expression "documents of title" and that documents of title or instruments of title include railway receipts.

Now if under the provisions of S. 103, the pledging of a railway receipt effects a pledging of the goods, it is not desirable so to construe S. 178, if the rules of construction so permit, as to enable that section to be so read as to provide also for the pledging of goods by the pledging of documents of title? Otherwise, of course, very curious results flow. In this case this results. If here the un-

5. A I R 1916 P C 7=35 I C 954=43 I A 164=40 Bom 630 (P C).

paid vendor of the goods had exercised his power to stop, a power which arises on insolvency by S. 99, he could have defeated the Official Assignee, but he would have to pay off the bank; but if he does not exercise this power then (because S. 178 and not S. 103 applies, we are for the sake of the analysis assuming a different effect of pledging documents under S. 178 from that which flows as from S. 103) the pledge is only of the document, the goods are not pledged, the possession of the goods as distinct from the documents does not pass and the Official Assignee can claim as against the bank. This appears to result in the impossible position that the bank's position is entirely altered according to whether an independent third party does or does not exercise a power against the Official Assignee: improving if he does exercise the power and declining if he does not. This difficulty immediately disappears if one choose the third alternative reading of S. 178 above referred to. As no other reading appears necessarily to follow from the language used, this reading appears to be the one most consonant to the other provisions of the Act. There remains the difficulty caused by the use of the word "person." This difficulty may be expressed thus:

"At Common law a pledge of goods could only be effected by parting with the possession actually or constructively of the goods. By the Law Merchant bills of lading but no other documents of title were treated as equivalent for this purpose to goods. The transfer of a delivery order operated only as a token of authority to take possession and not as a transfer of possession: see *M^r Ewan v. Smith* (6)."

This position was altered by the Factors Act which eventually enabled a restricted class of agents (but not the principal) to pledge goods by pledging documents of title to goods. This entirely changed the effect of a pledge of a document of title when, but only when the pledgor was a mercantile agent. The law in England did not reach even this stage until the Factors Act of 1877. The Indian Contract Act on the other hand was passed in 1872 and the law previously applicable was that enacted by the Indian Factors Act of 1844, the provisions of which are textually the same as the English Factors Act of 1842. This gave to the owner no such power to pledge goods by pledging documents. Therefore an owner cannot pledge goods by pledging docu-

6. (1849) 2 H L C 309.

ments unless delivery of the documents operates as constructive possession of the goods and this is so only in the case of bills of lading. That appears to be the argument based on the history of this legislation. Thus if the word "person" includes "owner," and if that section is read as above construed, it results in this: that in 1872 the Indian Legislature went far beyond the position arrived at in England even today for it made pledges of documents the same as pledges of goods not only when the document was pledged by a mercantile agent but where it was pledged by anybody (subject to the provisos) including the owner. Although this may seem improbable, it is not impossible and whether "person" does or does not include owner it certainly includes a wider class than the class of mercantile agents so that some extension of the English position on any reading must be involved. This being so, no reason is seen for giving to a word which appears to be unambiguous a meaning other than its ordinary meaning. That "person" in such a collocation includes "owner" *prima facie* appears to be clear.

But there is in my opinion a conclusive consideration to be derived from S. 103. This section, as the Judicial Committee in the above cited case have held, enables goods to be pledged by pledging documents of title. But the pledgor there referred to is left in no doubt. It is the buyer of the goods. That is to say, the owner may under S. 103 pledge goods by pledging documents. Why then is it necessary to do violence to the use of words by excluding him from the class of persons who may pledge goods by pledging documents when one is considering S. 178? If as is urged by the Advocate-General S. 178 relates to (a) the pledging of goods and (b) the pledging of documents, then, as also urged by him, no provision such as is contained in S. 3, English Factors Act, contained in the Indian Contract Act and so a pledge of a document of title has no other effect than pledging the document. For the reasons above assigned S. 178 should be so construed, i. e., it should not be construed so as to distinguish between pledge of goods and a pledge of documents. It is purporting to deal with pledges and pledges are defined as bailments of goods.

I am therefore of the opinion that here there was a pledge of railway receipts and such pledge had the effect of pledging the goods. Alternatively if I am wrong in regarding a pledge of a railway receipt as a pledge of the goods there was in my opinion a good pledge of a railway receipt as a document and the effect of that was to give to the pledgee as against either the insolvent or the Official Assignee the right to receive from the carrier those goods. There being no notice, assuming the alternative opinion is the correct one, had the Port Trust parted with actual possession to a third party, or had a third party lawfully seized the goods as in the Scots case of *Inglis v. Roberston* (7), it might well be that owing to the Bank's failure to notify the person having custody of the existence of the pledge the Bank would have no remedy either against the carrier or the person obtaining possession. No such question however here arises in my opinion.

It is necessary before parting with this branch of the case to advert to the practice of the Port Trust of delivering against indemnity bonds to persons without production of the railway receipts. This power is said to be derived from S. 57, Railways Act. It is said that such a power shows that a railway receipt is not a document of title capable of passing possession when pledged. I do not think so. The effect of so delivering is that the Port Trust, if held liable, have their remedy over against the person giving the indemnity. That is to say they have a right, derived from the indemnity bond, to claim to be indemnified. Indemnity only arises where the person to be indemnified suffers a loss. The loss arises because such person is made liable. Having been made liable and having suffered loss the carrier proceeds on the indemnity bond. If the person giving it is insolvent, that is the carrier's misfortune. Further the fact that it was considered necessary to give this statutory right to the carrier to refuse delivery suggests that apart from such statutory power he would have been bound to deliver and this appears to be so whether one regards a railway receipt as a document of title passing constructive possession (as a bill of lading) or a document

of title giving the right to receive (as a delivery order).

The next question that arises is : Assuming that there was a pledge of the goods and that accordingly constructive possession had passed to the Bank, were the goods in the order and disposition of the bankrupt ? The material dates and facts are as follows : The goods in question were despatched in various parcels from various places between 13th January and 4th February; the act of bankruptcy occurred upon 7th February. At that date some of the goods were on rail, some were in the Port Trust's inside godown, i. e., freight charges had not been paid and the carrier was either carrying them or holding them in warehouse pending delivery. Such warehouse was the railway goods-shed or godown. The dates on which the various parcels arrived at the Port Trust godowns are shown at p. 41 of the document. In the case of items Nos. 7, 10, 12, 13, 14, 16, 17, 18, 23, 24 and 25 the goods had arrived on or before 7th February. In all the other cases the goods arrived on or after 7th February, i. e., were in transit at the time of the act of bankruptcy. The learned trial Judge has expressed the opinion that in the circumstances here present the goods were in the order and disposition of the insolvents with the Bank's consent. He adds:

"It has always been held that the absence of notice by the true owner of his title to the bailee is evidence of such consent."

Now of course the reputed ownership clause is generally resorted to where the possession is in the insolvent and the ownership in a third person. Here the custody is in a carrier, the constructive possession is in the Bank, and the ownership in the insolvent. "True owner" for the purpose of S. 52 can have a very special meaning and can include a person having a lien, or an equitable charge, as well as a person having the legal title. But is the section applicable where, as here, not only are the documents of title transferred but the insolvent has given a letter declaring that the goods are deposited with the Bank by way of security and where the goods are not in any place or warehouse over which the insolvent has control but in a carrier's railway waggon or goods shed ? A case which in my opinion is similar to this came before the Courts in England in 1905. In that

case *In re Hamilton Young & Co. Ex parte Carter* (8) the Bank advanced moneys to traders for the purchase, preparation and shipment of goods to the East. The course of business was for the traders to send the goods to bleachers who bleached them and sent them to packers to be packed for shipment. The Bank was handed bleacher's receipts. Prior to the act of bankruptcy the Bank gave notice to the bleachers and to traders claiming the goods. Here no notice was given to the Port Trust. Whether that makes all the difference on this point I shall consider. The first question was whether the letter of lien amounted to a bill of sale. No such question arises here. The next question was, assuming the letter of lien was not void were the goods in the actual possession of the bleachers in the order and disposition of the bankrupt as being held by their bailees (the bleachers) with the consent of the "true owner" (the bank as persons having a charge created by the letter of lien)? Bigham, J., at pp. 389 and 390, observes:

"It was said that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy. That is a question of fact and there can be no doubt as to the answer to be given to it. The goods were no doubt the goods of the bank in the sense that they had a charge on them; but the bank never consented to the goods being in the order and disposition of the bankrupts in their trade or business, and certainly did not do so under such circumstances that the bankrupts became the reputed owners of the goods."

In re William Watson & Co., Ex parte Atkin Brothers (9) was followed. That case decided, what I believe has never since been doubted, that whether the clause applies depends upon the circumstances of the case and whether these circumstances necessarily lead to the inference of ownership. The inference of ownership must, not might, arise: see at pp. 756 and 757. On appeal in *Hamilton Young's* case (8) at p. 788 Vaughan Williams, L. J., does not put the matter on the ground of notice at all, and with respect, I think for a very good reason. He considers the documents, the letter of lien and the bleachers' receipts. He points out that the goods as from the moment of the giving of the letters of

8. (1905) 2 K B 391 and on appeal 772=93 L T 591=54 W R 260=12 Manson 365=21 T L R 757=74 L J K B 905.

9. (1904) 2 K B 753 = 73 L J K B 854 = 11 Manson 256=20 T L R 727=73 L J K B 854.

lien (not from the date of the notice) were subject to a good lien on the part of the bank. Coupled with the receipts he came to the conclusion (though I find p. 788 somewhat difficult to follow unless there is a misprint) that the bank had possession and control: see as to this Cozens-Hardy, L. J., at p. 790. The test there applied at p. 785 and at p. 790 was:

"Would the Bank have been entitled to an injunction restraining the traders if the traders had attempted to take the goods out of the control of the Bank by dealing with them for a purpose other than that contemplated, viz., preparing, packing and shipping."

The answer being yes, it followed that the bank had control. The question there was of course whether the letter of lien coupled with the bleachers' certificate were documents "used in the ordinary course of business as proof of the possession or control of goods" within the meaning of the Bills of Sales Act. But if that is so, how can it be said that in the circumstances here present with a pledge, and a letter of lien, with the goods on rail or in a carrier's warehouse, how can it be said that the goods were in either the possession, or order or disposition of the insolvent? And even if that were so, what is the evidence that it was with the consent of the true owner unless consent is to be assumed necessarily to follow from absence of notice to the carrier of the assignment of railway receipts or of the granting of letter of lien? In my opinion the appellants here are in the same case as the plaintiffs in *C. Simeons and Co. v. Durand's Trustee* (10). They did not by their conduct in any way induce a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof. I do not apprehend that the learned trial Judge made a finding of fact to the contrary, but rather that he arrived at his conclusion because the Bank had not notified the Port Trust that the Bank held the railway receipts and that "it had always been held" that absence of notice proved consent to the goods being in the order or disposition of the bankrupt as reputed owner. This appears to be a finding of law, and with great respect I think it goes too far.

Absence of notice is one circumstance. It is a circumstance that might make all the difference if, apart from notice, the possession remains in the insolvent; but here whether one regards the pledge or the lien, possession had constructively passed to the Bank. It might make a difference if the order or disposition remained in the insolvent, but without the railway receipts he could not demand delivery of these goods. S. 67, Railways Act, gives a right to the carrier; it gives no right to the consignee. Without those railways receipts, had the carrier so chosen, the consignee was powerless to touch the goods. Whether or not delivery under general indemnity bonds is authorized by S. 57, there is no evidence that the Bank either knew of such practice in general or that C. K. N. was on the general indemnity list. The Bank had no reason to imagine that delivery would be made to anyone in the absence of the railway receipts. The previous course of business had been, so far as the Bank knew, that delivery was made on railway receipt to any outside godown bearing the Bank's name. If a bona fide person had demanded these goods from the Port Trust and the Port Trust, not having notice of any other claims, had delivered, without production of the railway receipt, then the absence of notice would probably be a matter of great importance when considering the liability of the Port Trust or the title as against the Bank of the person to whom delivery had been made; but I cannot think it concludes the question as to whether the goods are in the possession, order or disposition of the insolvent by the consent of the true owner under such circumstances that he is the reputed owner thereof.

Again the absence of notice might be a critical matter in a contest between a pledgee or a lienee and the Official Assignee where the pledge or lien to be made effective require a third party in custody of the goods to alter his position from that of a bailee possessing on behalf of the insolvent to that of a bailee possessing on behalf of the pledgee or lienee, because until that change in possession had occurred the pledge or lien might be deemed imperfect. Where however, as here, the pledges of the documents are as though they were pledges of goods the pledge is perfect and there

10. (1928) 2 K B 66 = 97 L J K B 537 = 138 L T 612 = 44 T L R 310 = 72 S J 155 = 1928 B & Cr 19.

is constructive transfer of possession from the pledgor to the pledgee apart from notice. And even though I may be wrong in attributing this effect to the pledging of a document of title and such a pledge of a document of title does not operate as constructive possession of the goods, yet in this case one cannot ignore in this connexion the letter of lien. In my view, as between the insolvent and the Bank, as from the moment any good letter of lien was completed and handed to the Bank, from that moment the Bank is to be deemed in any contest between the Bank and C. K. N. or C. K. N's representative-in-title as having possession of the goods, the subject matter of the letter of lien. Were it otherwise, one would not be giving effect to the plain words of the letter which are to the effect that the goods in question are deposited with the Bank by way of security. It is true that they are not deposited actually upon the Bank's premises, but I think the clear intention of the parties is that as from that moment those particular goods are to be deemed to be held by either the insolvent or any bailee from the insolvent not from the insolvent but for the Bank and insolvent's possession or the possession of a bailee from the insolvent is to be deemed in any contest between the Bank and the insolvent or his representative in interest as the possession of the Bank. It might well be that the absence of notice of this arrangement come to between the Bank and the insolvent would enable a third party who has in the absence of such notice altered his position for the worse to raise a plea of estoppel based on the absence of such notice.

It might well be that a bailee who in the eye of the law would be deemed a bailee for the insolvent would be able to defend himself against a claim founded in a wrongful delivery to a person other than the Bank on the ground that the Bank had not notified him of that lien. In all such contests as these absence of notice might be critical, but I do not think that absence of notice to the carrier in itself renders the conclusion inevitable that the goods were in the order or disposition of the insolvent as reputed owner with the consent of the true owner. I think any member of the public finding that the document of title to

receive these goods were not with the insolvent would arrive at the conclusion that the goods were not in his order and disposition. I am clearly of the opinion that they would not be compelled to come to the conclusion that they were in the insolvent's order and disposition simply because on inquiry of the carrier the carrier informed them that no notice of any assignment or other dealing with the railway receipts had been received. Very different considerations would arise if the circumstances were that the goods had been delivered to outside godowns whence the insolvent could remove them without the railway receipt. In such a case notice to the warehouse keeper might in some circumstances I think be necessary to prevent the goods being in the order and disposition. That however is a question to be decided when it arises. It does not in my opinion arise in this case.

In my view accordingly the appeal succeeds with costs here and below.

Baxley, C. J.—I agree.

P.R.S./K.S. *Appeal allowed.*

A. I. R. 1933 Madras 215

ANANTAKRISHNA AYYAR, J.

M. R. Srinivasa Ayyangar—Defendant—Petitioner.

V.

Venkatarama Ayyar — Plaintiff—Opposite Party.

Civil Revn. Petns. Nos. 1774 and 1775 of 1930, Decided on 24th April 1931, against orders of the Sub-Judge, Tanjore, D/- 27th June 1930.

(a) **Civil P. C. (1908), O. 21, R. 18—Right to set off cannot be claimed unless both decrees are before same Court for execution.**

The right to set off cannot be claimed unless both the decrees which are sought to be set off against each other are before the same Court for execution: 32 *Mad* 336, *Foll.* [P 216 C 2]

(b) **Civil P. C. (1908), S. 49—Equities have to be enforced though assignee is assignee without notice.**

For the purpose of S. 49 the equities have to be enforced even though the assignee might in fact have been an assignee without notice. Otherwise the very object of S. 49 would be in effect frustrated and its provisions rendered nugatory: 7 *I C* 55, *Rel on.* [P 217 C 1]

(c) **Civil P. C. (1908), S. 49—Right of set off can be available against assignee of decree.**

Where the right of set-off is available to a judgment-debtor against his assignor decree-holder, it is also available against the assignee of the decree: *A I R* 1930 *Lrh* 508, *Dist.*

[P 217 C 2]

D. Ramaswami Iyengar — for Petitioner.

K. Swaminathan for *A. V. Viswanatha Sastri*—for Opposite Party.

Judgment. — These are two revision petitions filed by the decree-holder (Srinivasa Ayyangar) in S. C. S. No. 883 of 1926 on the file of the Subordinate Judge's Court of West Tanjore. He obtained a decree for Rs. 216 against one Manicka Thevar. Manicka Thevar however obtained a decree against the petitioner Srinivasa Ayyangar in the same Court in S. C. S. No. 1101 of 1926 for Rs. 66. The decree-holder in S. C. S. No. 883 of 1926 applied for satisfaction being entered in respect of the amount of Rs. 66 odd due by him under the decree in S. C. S. No. 1101 of 1926. The lower Court refused to grant that request and accordingly the decree-holder in Suit No. 883 of 1926 had preferred one of the two revision petitions. The decree-holder in S. C. S. No. 1101 of 1926 assigned his rights under the decree to one Venkataramaier. Venkataramaier applied to the Court which passed the decree, namely, the Subordinate Judge's Court of West Tanjore, under O. 21, R. 16, for recognizing him as assignee decree-holder and for execution of the decree in 1101 of 1926. In spite of the protest raised by the decree-holder in Suit No. 883, the learned Subordinate Judge, recognized the assignment and allowed the assignee to take out execution for the amount due under the decree in 1101 of 1926. Against that order the decree-holder in 883 of 1926, who is the judgment-debtor in 1101 of 1926, has filed the second of the two revision petitions before me.

It would appear that the decree-holder in 883 of 1926 applied on a former occasion to execute his decree. That was at a time when the decree-holder in 1101 of 1926 had his decree transferred from the Tanjore Court to the Court of Mannargudi. In these circumstances the decree-holder in 883 of 1926 did not apply for a set off and his execution petition was subsequently dismissed for some reason not affecting the merits and not material for the present. Subsequently the decree-holder in 1101 of 1926 having assigned his decree as observed above, to Venkataramaier, Venkataramaier applied to the said Court of West Tanjore for recognizing his assignment

and for executing the decree in S. C. S. No. 1101 of 1926. When that application was pending before the Tanjore Court, the decree-holder in 883 of 1926 applied to the same Court for execution of his decree and for setting off the amount due under the decree in 1101 of 1926 towards the larger amount due under the decree in 883 of 1926. The learned Subordinate Judge, while passing orders in the two connected matters, held that the decree-holder in 883 of 1926 was not entitled to the set off claimed by him, for two reasons: (1) not having applied for the set-off in January 1930 when he first applied for execution he had lost his right; and (2) as the decree in 1101 of 1926 had been assigned to a third person the right to set off, which the decree-holder in 883 of 1926 had, had ceased to exist thereafter.

I am of opinion that the decision of the learned Subordinate Judge on both these points is erroneous. From what has been stated above, it is clear that, when the decree-holder in 883 of 1926 applied for execution in January 1930 the decree in 1101 of 1926 was not available for execution in the Subordinate Judge's Court of Tanjore, having been transferred to the Mannargudi Court for execution. It is clear that, unless both the decrees are before the same Court for execution, the right to set off could not be claimed: see *Ponnuswamy Nadar v. Doraiswamy Ayyar* (1). That being so, the first reason is not in my opinion sound. Nor do I think that there is anything in the second of the reasons mentioned by him. The learned Subordinate Judge observes that this right to set off could not be available against an assignee of the decree. If we refer to S. 49, Civil P. C., it is seen that

"every transferee of a decree shall hold the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder."

That this was an equity available to the decree-holder in 883 of 1926 against the decree-holder in 1101 of 1926 is clear, as both were decrees passed by the same Court; and subject to the other conditions, this right of set off would be applicable in respect of the said decrees. Attention may be drawn also to the provisions of O. 21, R. 18 (2), which indicate that the rule laid down by O. 21,

1. (1909) 32 Mad 336=1 I C 247.

R. 18, shall be deemed to apply even when either party is an assignee of one of the decrees, as well in respect of judgment-debts due by the original assignor as in respect of judgment debts due by the assignee himself. The learned advocate for the counter-petitioner-respondent before me argues that R. 18 (2) could not be availed of by the petitioner in the present case. I think in one sense his contention may be right; but in the face of the provision contained in S. 49, namely, that the transferee-decree-holder shall hold the same subject to the equities which the judgment-debtor might have enforced against the original decree-holder, I am not able to see how the transferee Venkataramaier in this case could claim the higher right that he puts forward before me which his assignor had not. Then the learned advocate argued that the question of notice has to be inquired into and that it is only when it is found that Venkataramaier was an assignee with notice that S. 49 and the equities mentioned therein could be applied as against him. The first answer to this is that no plea of bona fide assignee for value without notice seems to have been put forward in the lower Court, and I am not able to find anything in the order of the lower Court which indicates that such a point was raised before it. Further, the ruling in *Monmohan v. Dwaraka Nath* (2) is clear that for the purpose of S. 49 the equities have to be enforced even though the assignee might in fact have been an assignee without notice. Otherwise the very object of S. 49 would be in effect frustrated and its provisions rendered nugatory.

Finally the decision of the Lahore High Court in *Salig Ram v. Ishar Das Dharam Chand*, A. I. R. 1930 Lah. 508, p. 511, was relied on. As I understand the facts of that case that decision in no way supports the assignee decree-holder's contention urged before the lower Court. In that case at one point of time both the decrees were before the Court at Amritsar for execution, and though an order was passed that it would be open to one of the decree-holders to take advantage of the provisions of set off, the said decree-holder did not in fact try to take advantage of the same, but subsequently had the

2. (1910) 7 I C 55.

decree transferred from the Court at Amritsar to the Court at Karachi. It was held in those circumstances that as no advantage was taken of the order declaring a right to set off the execution Court at Amritsar could not be effectively moved to pass orders in this respect after the other decrees were withdrawn from it and transferred to the Karachi Court for execution. I do not understand that judgment to lay down anything which would prevent a right of set off on the facts stated by me in the present case before me.

The result is that I allow the revision petitions and direct in respect of the decree in Suit No. 1101 of 1926 that the amount of the same should be set off against the amount of the decree in 883 of 1926 and satisfaction to that extent entered in respect of the decree in 883 of 1926 and that the decree-holder in 883 of 1926 would be entitled to proceed in execution with reference to the balance only. The transferee's application to execute the decree in 1101 of 1926 will stand dismissed and satisfaction entered in respect of the decree in Suit 1101 of 1926. I allow costs in C.R.P. 1774 of 1930, but I do not allow any costs in the connected revision petition as the matter is practically one and the same.

P.R.S./P.N.

Petition allowed.

A. I. R. 1933 Madras 217

CORNISH, J.

(*Nekkanti*) *Seeramma* — Plaintiff —
Petitioner.

v.

(*Nekkanti*) *Seshamma* — Defendant —
Opposite Party.

Civil Revn. Petns. Nos. 1046 of 1928, and 124 of 1929, Decided on 29th January 1932, against orders of Dist. Munsif, Ramachandrapur, D/- 25th April 1928.

(a) Civil P. C. (1908), O. 47, R. 4 (2) (b) — Under O. 47, R. 4, "Strict proof" means formal proof.

It would be a contravention of R. 4 to grant an application for review on the discovery of new matter alleged not to have been within the applicant's knowledge without strict proof of such allegation. "Strict proof" means formal proof. Where the applicant for review supports his application with an affidavit, the requirement as to "strict proof" is satisfied and review should be granted: 42 Cal. 820, *Foll.*

[P 218 C 2]

(b) Civil P. C. (1908). S. 115 — Appeal allowed—Revision should not be granted.

Where the remedy of appeal has been open to the petitioner in revision, the petition for revision should not be entertained. [P 218 C 2]

V. Kiyamma—for Petitioner.

T. Satyanarayana and *T. Ramamurthi*—for Opposite Party.

Civil Revn. Petn. No. 124 of 1929.

Judgment.—The petitioner here was defendant in a suit for maintenance brought by the respondent. The suit was decreed, and the maintenance was made a charge on a particular item of property. The date of the decree was 22nd August 1927. The plaintiff afterwards discovered that this item of property had been misdescribed by her in the schedule to her plaint, and applied on 16th November 1927 to have the mistake rectified in an application under S. 152, Civil P. C. This application was dismissed, the Court suggesting that the proper remedy might be an application for review. The plaintiff then, after a considerable delay, which has been excused by the learned District Munsif on the ground that the time taken up by the plaintiff in obtaining the advice of lawyers and in procuring the necessary funds, filed an application for review under O. 47, R. 1, Civil P. C. This was on 9th March 1928. The ground on which the review was sought was that the discovery of the right survey number of the property charged with her maintenance was the discovery of new and important matter which was excusably not within her knowledge at the time when the decree was made. The learned District Munsif granted the application. It was resisted by the petitioner here on the ground that the application was long out of time and that no sufficient reason had been shown for excusing the delay under S. 5, Lim. Act, and also on the ground that the correct description of the property could have been discovered by plaintiff with the exercise of due diligence. As already observed the learned District Munsif excused the delay and also expressed himself satisfied that the respondent had made out a case for granting a review.

A preliminary objection to the maintainability of the revision petition is made by the respondent, the argument being that the petitioner has a remedy by way of appeal against the Munsif's order. O. 43, R. 1 (w), Civil P. C., gives

a right of appeal against an order under R. 4, O. 47, Civil P. C., granting an application for review. O. 47, R. 7, Civil P. C., gives a right of objection which may be taken by an appeal against an order granting an application to review, on the ground that the application was (a) in contravention of the provisions of R. 2 (b) or in contravention of the provisions of R. 4 (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Now, looking at the language of R. 7 (1), I think that the objection raised by the petitioner being that the application for review was made after the expiration of the period of limitation and with inexcusable delay, the rule clearly gives him the remedy of appeal. With regard to R. 7 (b) it would be a contravention of R. 4 to grant an application for review on the discovery of new matter alleged not to have been within the applicant's knowledge without strict proof of such allegation. "Strict proof" means formal proof: *Ahid Khondkar v. Mahendra Lal* (1). The respondent supported her application with an affidavit which satisfied this requirement as to "strict proof" and was accepted by the Munsif. In my opinion this is a case where the remedy of an appeal was open to the petitioner and consequently this revision petition should not be entertained. The petition is dismissed with costs.

P.R.S./B.V. *Petition dismissed.*

1. (1915) 42 Cal 830=29 I C 282.

A. I. R. 1933 Madras 218

MADHAVAN NAIR AND JACKSON, JJ.

T. A. Mahommad Naina Rowther and others—Appellants.

v.

Muhammad Hehiya Rowther and others—Respondents.

Appeal No. 79 of 1928, Decided on 4th September 1931, against order of Sub-Judge, Madura, D/- 14th February 1927.

Civil P. C. (1908). O. 22, Rr. 4 and 11—**Death of one respondent before decree in appeal—Appeal could proceed without bringing legal representative of deceased on record—Decree of appellate Court is valid.**

Where a respondent dies before the decree of the appellate Court and his legal representative is not brought on record, if the appeal is of such a nature that it can proceed without bringing the legal representative on record, the decree is not invalid for that reason, and it can be executed if it is not barred under Art. 132: *A I R* 1930 *Mad* 719; 39 *Mad* 386 and *A I R* 1925 *Pat* 480, *Foll.* [P 219 C 1]

K. Rajah Ayyar—for Appellants.

Madhavan Nair, J. — The learned Judge's view that the decree of the High Court is invalid because plaintiff 6 (one of the respondents) died before the decree and his legal representatives had not been brought on record, is clearly wrong. The appellants should have brought the legal representatives on record before the decree, but they did not do so. The appeal was dismissed after hearing on merits. That the decree passed in such cases is not invalid is established beyond doubt by the decision of this Court reported in *Suryanarayana Rao v. G. Joga Rao* (1) and *Vellayan Chetty v. Mahalinga Ayyar* (2). In *Kashi Nath Singh v. Kailas Singh* (3), a case very much like the present, it was held that the decree is a valid one and can be executed if it is not barred under Art. 182, Lim. Act. No doubt the decree in that case was a consent decree, but we do not think that this would affect the principle of the decision. In this case the petition is not barred as it falls within three years from the date of the High Court decree. The order of the lower Court is set aside with costs of this Court. The learned Subordinate Judge will restore the petition to file and deal with it according to law.

Jackson, J.—I agree, and am very doubtful if the lower Court could have gone behind our decree which on its face is quite valid.

P.R.S./V.B.

Order set aside.

1. A I R 1930 Mad 719=123 I C 607.
2. (1916) 39 Mad 386=28 I C 83.
3. A I R 1925 Pat 480=89 I C 236=1 Pat 53.

* A. I. R. 1933 Madras 219

MADHAVAN NAIR, J.

Rami Reddi Chinna Vobula Reddi—Appellant.

v.

Kethepalli Gurumurthi and another—Respondents.

Appeal No. 211 of 1927, Decided on 1st September 1932, against decree of Dist. Judge, Cuddappah, D/- 5th February 1927.

* (a) Limitation Act (1908), Arts. 182 and 65—Attachment before judgment — Surety bond executed in pursuance of order under O. 21, R. 43—Limitation for enforcing liability of surety is three years from date of decree—Civil P. C. (1908), O. 21, R. 43.

Where a surety executes a bond under O. 21, R. 43 undertaking to produce the property whenever called upon by the Court failing which he

and his heirs would be bound by such orders as the Court may pass, the limitation for an action on such bond is governed by Art. 182 and not by Art. 65. And the period is three years from the date of the decree and not three years from the date when the surety is called upon and he fails or refuses to produce the property; A I R 1915 Mad 423, *Rel on.* [P 220 C 1]

(b) Civil P. C. (1908), S. 145 and O. 21, R. 43—S. 145 applies to enforce surety bond executed under O. 21, R. 43.

The provisions of S. 145, Civil P. C., apply to security bonds executed under O. 21, R. 43, and invariably resort is had to S. 145 for enforcing the liability of the surety. [P 220 C 2]

* (c) Civil P. C. (1908), O. 21, R. 43—Attachment before judgment and surety bond—Proper procedure for decree-holder to enforce liability of surety is to proceed in execution—Civil P. C., Ss. 145 and 47

Where a surety bond is executed under O. 21, R. 43 the proper procedure for the decree-holder to enforce the liability of the surety is not to get an assignment of the bond and institute a suit, but to proceed in execution: A I R 1926 Mad 1005, *Foll.* [P 220 C 2]

T. R. Arunachalam—for Appellant.

Kasturi Seshagiri Rao — for Respondents.

Judgment.—This civil miscellaneous second appeal arises in connexion with the execution of a decree against a surety. The surety is the appellant. The question in this second appeal is whether the execution application is barred by limitation. The first Court held that it was barred and in appeal this decision was set aside. The facts briefly are as follows:

In the course of a suit prior to its termination an order for attachment before judgment of the judgment-debtor's properties was made by the Court. His moveables were attached by the Amin and were by him entrusted to the custody of the appellant who executed a surety bond. After stating that the bond is executed by the surety, the document ends as follows:

" The said Amin put me in possession of the said items of property of the value of rupees two hundred and fourteen. I shall therefore produce the said items of property whenever called upon by the Court. If I fail to so produce, I and my heirs shall be bound by such orders as may be passed by the Court. To this effect is the security bond written and given."

Then occurs the signature of the surety. The bond is dated 7th November 1921. The decree in the suit was passed on 7th September 1922. An application was put in by the transferee decree-holder respondent to recognize the transfer of the decree in his favour. On 7th November 1925 the present application to

(b) Civil P. C. (1908), S. 115 — Appeal allowed—Revision should not be granted.

Where the remedy of appeal has been open to the petitioner in revision, the petition for revision should not be entertained. [P 218 C 2]

V. Kiyamma—for Petitioner.

T. Satyanarayana and T. Ramamurthi—for Opposite Party.

Civil Reven. Petn. No. 124 of 1929.

Judgment.—The petitioner here was defendant in a suit for maintenance brought by the respondent. The suit was decreed, and the maintenance was made a charge on a particular item of property. The date of the decree was 22nd August 1927. The plaintiff afterwards discovered that this item of property had been misdescribed by her in the schedule to her plaint, and applied on 16th November 1927 to have the mistake rectified in an application under S. 152, Civil P. C. This application was dismissed, the Court suggesting that the proper remedy might be an application for review. The plaintiff then, after a considerable delay, which has been excused by the learned District Munsif on the ground that the time taken up by the plaintiff in obtaining the advice of lawyers and in procuring the necessary funds, filed an application for review under O. 47, R. 1, Civil P. C. This was on 9th March 1928. The ground on which the review was sought was that the discovery of the right survey number of the property charged with her maintenance was the discovery of new and important matter which was excusably not within her knowledge at the time when the decree was made. The learned District Munsif granted the application. It was resisted by the petitioner here on the ground that the application was long out of time and that no sufficient reason had been shown for excusing the delay under S. 5, Lim. Act, and also on the ground that the correct description of the property could have been discovered by plaintiff with the exercise of due diligence. As already observed the learned District Munsif excused the delay and also expressed himself satisfied that the respondent had made out a case for granting a review.

A preliminary objection to the maintainability of the revision petition is made by the respondent, the argument being that the petitioner has a remedy by way of appeal against the Munsif's order. O. 43, R. 1 (w), Civil P. C., gives

a right of appeal against an order under R. 4, O. 47, Civil P. C., granting an application for review. O. 47, R. 7, Civil P. C., gives a right of objection which may be taken by an appeal against an order granting an application to review, on the ground that the application was (a) in contravention of the provisions of R. 2 (b) or in contravention of the provisions of R. 4 (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Now, looking at the language of R. 7 (1), I think that the objection raised by the petitioner being that the application for review was made after the expiration of the period of limitation and with inexcusable delay, the rule clearly gives him the remedy of appeal. With regard to R. 7 (b) it would be a contravention of R. 4 to grant an application for review on the discovery of new matter alleged not to have been within the applicant's knowledge without strict proof of such allegation. "Strict proof" means formal proof: *Ahid Khondkar v. Mahendra Lal* (1). The respondent supported her application with an affidavit which satisfied this requirement as to "strict proof" and was accepted by the Munsif. In my opinion this is a case where the remedy of an appeal was open to the petitioner and consequently this revision petition should not be entertained. The petition is dismissed with costs.

P.R.S./B.V. *Petition dismissed.*

1. (1915) 12 Cal 830=29 I C 282.

A. I. R. 1933 Madras 218

MADHAVAN NAIR AND JACKSON, JJ.

T. A. Mahommed Naina Rowther and others—Appellants.

v.

Muhammad Hehiya Rowther and others—Respondents.

Appeal No. 79 of 1928, Decided on 4th September 1931, against order of Sub-Judge, Madura, D/- 14th February 1927.

Civil P. C. (1908), O. 22, Rr. 4 and 11—Death of one respondent before decree in appeal—Appeal could proceed without bringing legal representative of deceased on record—Decree of appellate Court is valid.

Where a respondent dies before the decree of the appellate Court and his legal representative is not brought on record, if the appeal is of such a nature that it can proceed without bringing the legal representative on record, the decree is not invalid for that reason, and it can be executed if it is not barred under Art. 132: *A I R* 1930 *Mad* 719; 39 *Mad* 386 and *A I R* 1925 *Pat* 480, *Foll.* [P 219 C 1]

K. Rajah Ayyar—for Appellants.

Madhavan Nair, J. — The learned Judge's view that the decree of the High Court is invalid because plaintiff 6 (one of the respondents) died before the decree and his legal representatives had not been brought on record, is clearly wrong. The appellants should have brought the legal representatives on record before the decree, but they did not do so. The appeal was dismissed after hearing on merits. That the decree passed in such cases is not invalid is established beyond doubt by the decision of this Court reported in *Suryanarayana Rao v. G. Joga Rao* (1) and *Vellayan Chetty v. Mahalinga Ayyar* (2). In *Kashi Nath Singh v. Kailas Singh* (3), a case very much like the present, it was held that the decree is a valid one and can be executed if it is not barred under Art. 182, Lim. Act. No doubt the decree in that case was a consent decree, but we do not think that this would affect the principle of the decision. In this case the petition is not barred as it falls within three years from the date of the High Court decree. The order of the lower Court is set aside with costs of this Court. The learned Subordinate Judge will restore the petition to file and deal with it according to law.

Jackson, J.—I agree, and am very doubtful if the lower Court could have gone behind our decree which on its face is quite valid.

P.R.S./V.B.

Order set aside.

1. A I R 1930 Mad 719=123 I C 607.
2. (1916) 39 Mad 386=28 I C 83.
3. A I R 1925 Pat 480=89 I C 236=1 Pat 53.

* A. I. R. 1933 Madras 219

MADHAVAN NAIR, J.

Rami Reddi Chinna Vobula Reddi—Appellant.

v.

Kethepalli Gurumurthi and another—Respondents.

Appeal No. 211 of 1927, Decided on 1st September 1932, against decree of Dist. Judge, Cuddappah, D/- 5th February 1927.

* (a) Limitation Act (1908), Arts. 182 and 65—Attachment before judgment — Surety bond executed in pursuance of order under O. 21, R. 43—Limitation for enforcing liability of surety is three years from date of decree—Civil P. C. (1908), O. 21, R. 43.

Where a surety executes a bond under O. 21, R. 43 undertaking to produce the property whenever called upon by the Court failing which he

and his heirs would be bound by such orders as the Court may pass, the limitation for an action on such bond is governed by Art. 182 and not by Art. 65. And the period is three years from the date of the decree and not three years from the date when the surety is called upon and he fails or refuses to produce the property : A I R 1915 Mad 423, *Rel on.* [P 220 C 1]

(b) Civil P. C. (1908), S. 145 and O. 21, R. 43—S. 145 applies to enforce surety bond executed under O. 21, R. 43.

The provisions of S. 145, Civil P. C., apply to security bonds executed under O. 21, R. 43, and invariably resort is had to S. 145 for enforcing the liability of the surety. [P 220 C 2]

* (c) Civil P. C. (1908), O. 21, R. 43—Attachment before judgment and surety bond—Proper procedure for decree-holder to enforce liability of surety is to proceed in execution—Civil P. C., Ss. 145 and 47

Where a surety bond is executed under O. 21, R. 43 the proper procedure for the decree-holder to enforce the liability of the surety is not to get an assignment of the bond and institute a suit, but to proceed in execution : A I R 1926 Mad 1005, *Foll.* [P 220 C 2]

T. R. Arunachalam—for Appellant.

Kasturi Seshagiri Rao — for Respondents.

Judgment.—This civil miscellaneous second appeal arises in connexion with the execution of a decree against a surety. The surety is the appellant. The question in this second appeal is whether the execution application is barred by limitation. The first Court held that it was barred and in appeal this decision was set aside. The facts briefly are as follows :

In the course of a suit prior to its termination an order for attachment before judgment of the judgment-debtor's properties was made by the Court. His moveables were attached by the Amin and were by him entrusted to the custody of the appellant who executed a surety bond. After stating that the bond is executed by the surety, the document ends as follows :

" The said Amin put me in possession of the said items of property of the value of rupees two hundred and fourteen. I shall therefore produce the said items of property whenever called upon by the Court. If I fail to so produce, I and my heirs shall be bound by such orders as may be passed by the Court. To this effect is the security bond written and given."

Then occurs the signature of the surety. The bond is dated 7th November 1921. The decree in the suit was passed on 7th September 1922. An application was put in by the transferee decree-holder respondent to recognize the transfer of the decree in his favour. On 7th November 1925 the present application to

execute the decree against the surety was filed. The date of the decree being 7th September 1922 it is clear that if Article 182, Lim. Act, applies, the application is barred by limitation. The first Court held that it was so barred. In appeal the learned Judge held that the cause of action against the surety arose only on 5th December 1925 when in response to the application for execution he appeared before the Court and demurred to produce the property by setting up the plea of limitation. The learned Judge says that the cause of action on the bond as against the surety did not arise until 5th December 1925 and therefore the application is not barred by limitation. According to him the question of limitation is governed by Art. 65, Lim. Act, but no authority has been cited in support of that position. The learned Judge's reasoning may be stated in his own words :

"The bond executed by respondent 2 was a conditional one and the cause of action for enforcing the terms thereof would arise only on the breach of its condition, viz., when the respondent fails or refuses to produce the property when called upon by the Court to do so. To an action on such a bond, Art. 65, Lim. Act, would be applicable."

It seems to me that the reasoning of the learned Judge cannot be accepted. The question is not when the cause of action would arise against the surety. In my view the conditional liability to be proceeded against came into existence on the date of the security bond itself. The real question is when that conditional liability may be enforced by the decree-holder. He may enforce it under Article 182, Lim. Act, within three years from the date of the decree or within such other time as is allowed by the various provisions of that article. Now clearly the present application is beyond three years from the date of the decree and no other starting point than the date mentioned by the learned Judge, viz., 5th December 1925, has been relied on before me. In my opinion the case is governed by the decision of this Court in *Venkata Ranga Row v. Venkata Rama Narasimha Rao* (1), (C. M. S. A. No. 62 of 1913 on the file of the High Court). In that case also there was an attachment before judgment and a surety bond was executed under O. 21, R. 43 as in the present case. There was no question as

to the applicability of Art. 182, Lim. Act, in that case. The application in that case being admittedly beyond three years it was assumed that it was barred. The arguments addressed related to the question whether the applications previous to the application in question could be relied upon to claim an extension of the period of limitation. The learned counsel appearing for the respondent seeks to distinguish this case by saying that the terms of the security bond in *Venkata Ranga Row v. Venkata Rama Narasimha Rao* (1) are different from those of the security bond in the present case. It is true that in *Venkata Ranga Row v. Venkata Rama Narasimha Rao* (1) the surety explicitly makes himself responsible for the discharge of the decree. In the present case there is no such explicit statement that he makes himself liable for the decree, but the words used are :

"I and my heirs shall be bound by such orders as may be passed by the Court."

I cannot see any distinction between this statement appearing in the present security bond and the statement in the security bond in *Venkata Ranga Row v. Venkata Rama Narasimha Rao* (1). "Any orders that might be passed by the Court" would certainly include the decree which may eventually be passed in the course of the suit. Then it is argued that the provisions of S. 145 will not relate to security bonds executed under O. 21, R. 43. No authority in support of this position has been quoted. On the other hand invariably resort is had to S. 145, Civil P. C., for enforcing the liability of the surety. The learned Judge also holds that the proper procedure for the decree-holder is to get an assignment of the bond and institute a suit instead of proceeding in execution. According to the recent decision of this Court in *Sankunni Variar v. Vasudevan Nambudripad* (2) this position is no longer tenable. For the above reasons I set aside the order of the lower appellate Court and restore that of the District Munsif with costs here and in the Court below. The memorandum of objections is dismissed. I make no order as to costs.

P.R.S./K.S.

Order set aside.

1. A I R 1915 Mad 423=21 I C 842=38 Mad 509.

2. A I R 1926 Mad 1005=97 I C 787.

A. I. R. 1933 Madras 221

RAMESAM AND MADHAVAN NAIR, JJ.

(Sri Mirja Raja Sri Pushavati) Alakh Narayan Gajapathiraj—Petitioner.

v.

Konda Chinna Jogudu and others—
Opposite Parties.

Civil Misc. Petn. No. 1477 of 1928, Decided on 1st October 1931, for a certificate to appeal to His Majesty in Council, against decree of High Court in Appeal Suit No. 311 of 1923.

(a) Civil P. C. (1908), S. 110—Substantial question of law as between parties to the case, and not merely of general importance, must exist to give right of appeal to Privy Council.

The existence of a point of law by itself does not give a right of appeal to the Privy Council under S. 110. There must be a substantial question of law. The words "substantial question of law" do not mean a question of general importance but a substantial question of law as between the parties in the case. The question must be one in respect of which there may be a difference of opinion.

A village A was granted, some time after the permanent settlement, by a zamindar C to D and others on condition of rendering service as palanquin bearers and the profits of the village were to be enjoyed in lieu of the wages payable in respect of such service. Subsequently C by a deed sold his zamindari "bearing boundaries, extents and other particulars detailed in the schedule annexed hereto" (the village in question not being mentioned in the schedule) to K, C thus not being at the time of sale owner of the village but only possessing a right of resumption in respect of the village. Later on C sold to S the entire remaining village of A assigned to D and others addressing a letter to them directing them to render service to S. Later on R purchased the village A in execution of a decree against S, and subsequently called upon D and others to render service to him properly and gave them notice to quit. The Subordinate Judge and the High Court in appeal, on construction of the deed in favour of K, held that the whole zamindari was sold to K and there was nothing for R to purchase. During the pendency of the suit some of the defendants tried to compromise the suit with R and the petitions were filed in the first Court. The High Court held that defendants being tenants under the Estates Land Act, any agreement by which rent was enhanced was not lawful under S. 187, Estates Land Act and hence the compromise was illegal. R applied for leave to appeal to the Privy Council.

Held: that the petitioner R had a fairly arguable question of law to argue before His Majesty in Council, that the deed in favour of K and subsequent transactions had been misconstrued by the High Court as also the question whether the compromise filed in the suit were illegal and were not valid in view of the Estates Land Act: A I R 1927 P C 110; A I R 1928 P C 172; 23 All 227 and A I R 1928 All 61, *Foll.*

[P 222 C 2]

(b) Grant—Service grant—Sale of zamindari does not give right to recover possession of village granted to third persons and not resumed.

The sale of a mere zamindari may not cover the right to resume and to recover possession of a village granted to third persons in return for service not in possession of the vendor and as to which no order of resumption has been passed.

[P 222 C 2]

K. Rajah Ayyar and S. Venkatesa Ayyangar—*for* Petitioner.

P. Somasundaram — *for* Opposite Parties.

Ramesam, J.—This is an application for leave to appeal to His Majesty in Council against the judgment and decree of this Court in Appeal No. 311 of 1923. We are under the disadvantage of not being the Judges who disposed of the case. The petition happens to be posted before us as the learned Judges who disposed of the appeal have now ceased to be Judges of this Court. On this ground we have had a fuller argument than usual on the facts of the case, but this was only for the purpose of making up our minds as to whether there is a substantial question of law. The value of the subject-matter of the suit in the Court of first instance is Rs. 12,000 and the value of the subject-matter in the appeal to His Majesty in Council would also be the same amount unless we can come to the conclusion that there is no substantial question of law in respect of a portion of the appeal. As the judgment of this Court is a confirming judgment, the main point for our decision is whether there is a substantial question of law within the meaning of S. 110, Civil P. C., and for this purpose I proceed to state the main facts and the matter in controversy between the parties.

The suit was filed by the Raja of Vizianagaram to resume the village of Annamarajuvalasa in the zamindari of Chemudu from the defendants who were Gadabas. The allegation of the plaintiff was that the village was granted some time after the permanent settlement by the then zamindar of Chemudu to the predecessors-in-title of defendants 1 to 56 on condition of rendering service as palanquin bearers, and the profits of the village were to be enjoyed in lieu of the wages payable in respect of such service. If the allegations of the plaintiff can be made out, a grant under such conditions would be resumable. The Subordinate

Judge of Vizagapatam who tried the suit found that there was a grant for service on terms which make the grant resumable, but he held that it was not the whole village but only the revenue that was the subject of the grant and therefore resumable. But apart from this he dismissed the suit on the ground that the plaintiff has no right to resume. Some facts have got to be stated for elucidating this point. By Ex. 14, dated 12th March 1889, the then zamindar of Chemudu sold his Chemudu zamindari,

"bearing the boundaries, extents and other particulars detailed in the schedule annexed hereto,"

the suit village not being in the schedule (which can only mean all that he then possessed in the zamindari) to the minor Zamindar of Kurupam, another permanently settled estate in the same district. At the time of the sale the Zamindar of Chemudu was not the owner of the suit village, he having granted it to the defendants' predecessors for service. All that he had in respect of the suit village was the right of resumption. But it is not suggested that any order of resumption was passed prior to the sale deed. In 1892 the Zamindar of Chemudu sold to K. Suryanarayana Patnaik and another by Ex. E the entire remaining village of Annamrajuvalasa assigned to 13 palanquin bearers for performance of service, the same being determinable at will and pleasure, and on the same day an order was addressed to the predecessors-in-title of the defendants directing them to render service to the vendees: Ex. E 1. The absence of an order like Ex. E, at the time of Ex. 14, is significant. Later on, the Raja of Vizianagaram purchased it in Court auction in execution of a decree against the said Suryanarayana Patnaik who became the sole owner by sale certificate and further deeds of transfer ending with the sale deed Ex. W dated 8th September 1899. On 30th July 1907 the Raja called upon the defendants to render service to him properly and on 19th December 1907 notice to quit was given. Hence the suit. The Subordinate Judge and on appeal the learned Judges of the High Court held on a construction of Ex. 14 that the whole zamindari was sold away to the Raja of Kurupam and therefore there was nothing for the Raja of Vizianagaram to purchase: but it seems to us

that there is at least a fair point for the plaintiff to argue before His Majesty in Council that the Zamindar of Chemudu could not have sold by Ex. 14 what he did not possess at that time and that when he sold the whole of Chemudu Zamindari in 1889 he only sold such part of the zamindari as he possessed and to which he had title to convey. The sale of a mere zamindari may not cover the right to resume and to recover possession of a village granted to third persons, not in the possession of the vendor and as to which no order of resumption had been passed.

It does not appear that the Zamindar of Kurupam ever claimed any rights over the village. It seems to us therefore that the plaintiff has a fairly arguable question of law to urge before His Majesty in Council that Ex. 14 and the subsequent transactions have been misconstrued by the learned Judges of the High Court. In connexion with the same matter the Raja's advocate seems to have argued in appeal that the attornment to Suryanarayana Patnaik, the vendee of 1892, and the Raja of Vizianagaram amounts to recognition of the Raja as the superior landlord of the village. In dealing with this point the learned Judges say that this argument amounted to trying to make out title by adverse possession and estoppel by reason of the attornment, and they disallow the point on the ground that it was not raised in the plaint. The petitioners now complain before us that it is not that they want to raise any case of title by adverse possession but only they want to refer to the non-enjoyment by the Zamindar of Kurupam and the later recognition of Suryanarayana Patnaik and the Raja of Vizianagaram as superior landlords as merely throwing light on the sale deed of 1889 and not as creating separate title and that their contention has been misunderstood by the learned Judges. It seems to us that there is something to be said for the petitioners in this matter also.

Then there is another point. Some of the defendants have compromised the suit with the Raja and petitions of compromise were filed in the first Court. On the ground that the compromise was not beneficial to the minors the Subordinate Judge did not grant sanction for the compromise. The learned Judges of the

High Court on appeal also say that the defendants being tenants under the Estates Land Act, any agreement by which the rent is enhanced would not be lawful under S. 187, Estates Land Act, and therefore the compromise is illegal; but the petitioners urge that the Estates Land Act does not cover cases of land held on service tenure and there is at least 'reasonable doubt as to whether the Estates Land Act covers this case. When there is a doubt as to the applicability of the Estates Land Act and a compromise for the purpose of settling that doubt for ever, the provisions of the Act cannot be applied for the purpose of showing that the terms of the compromise are illegal. If the applicability of the Act is admitted by both the parties a compromise in breach of the provisions of the Act may be illegal, but where the applicability itself is doubtful a compromise to resolve that doubt, being one falling within the well-known principle that compromises of disputed or doubtful claims will not be closely scrutinized by Courts of law, would be valid. It seems to us that this question also is fairly arguable by the petitioners. Undoubtedly, the two points above indicated are not questions of fact. Having regard to the rulings of the Privy Council in *Raghunath Prasad Singh v. Deputy Commissioner, Partabgarh* (1) and *Guran Ditta v. Ram Ditta* (2), we think these are substantial questions of law in the case within the meaning of S. 110, Civil P. C. The orders of the Judicial Committee require us to state the questions of law in the case of a confirming judgment. They are :

(1) Whether having regard to the construction of the document, Ex. 14, the attornment after Ex. E and the subsequent enjoyment, the title to the suit village is not in the Raja of Vizianagaram as opposed to the Raja of Kurupam; and (2) whether the compromises filed in the suit are illegal and are not valid.

Certificate will issue that the case is a proper one for appeal to His Majesty in Council under S. 110, Civil P. C., stating the questions.

Madhavan Nair, J.—I agree. Of the two questions formulated by my learned

1. A I R 1927 P C 110=102 I C 889 = 54 I A 126=2 Luck 93 (P C).
2. A I R 1928 P C 172=109 I C 723 = 55 I A 235=55 Cal 944 (P C).

brother for submission to the Privy Council I have no doubt that the second question is a substantial question of law. As regards the first it has been argued that the question involved is merely the construction of Ex. 14 in the light of the circumstances of the case and that no "substantial question of law" arises in the appeal; but it seems to me that in construing the document a subsidiary question of some importance also arises, namely, whether, having regard to the fact the village in question has not been resumed by the Zamindar of Chemudu, can it be said that he has the power to sell it? and there is the further fact that the learned Judges who heard the appeal, if I may say so respectfully have not properly appreciated, as pointed out by my learned brother, one aspect of the appellant's argument which, I think, has a direct bearing on the question. In these circumstances it is difficult to say that the question of law raised in point No. 1 is merely the construction of title deed, Ex. 14, and nothing more, and is therefore not a substantial question of law. No doubt the existence of a point of law by itself does not give a right of appeal to the Privy Council under S. 110, Civil P. C., as pointed out in *Banarasi Prasad v. Kashi Krishna Narain* (3).

There must be a substantial question of law. In *Raghunath Prasad Singh v. Deputy Commissioner, Partabgarh* (1) the Privy Council has said that these words do not mean a question of general importance but a substantial question of law as between the parties in the case involved. In *Guran Ditta v. Ram Ditta* (2) their Lordships held that the question whether a fixed deposit in a bank in the name of two persons payable to either or survivor was in fact payable to the survivor or belonged to the estate of the person who originally supplied the money was a substantial question of law. In *Mathura Kurmi v. Jagadeo Singh* (4), followed in *Gokul Chand v. Sanwal Das* (5), it was pointed out by the learned Judges that the question contemplated by this section (S. 110) must be one in respect of which there may be a difference of opinion. In the light of these deci-

3. (1901) 23 All 227 = 28 I A 11 = 8 Sar 447 (P C).

4. A I R 1928 All 61=107 I C 33=50 All 208.

5. A I R 1924 Lah 473 = 78 I C 417 = 5 Lah. 260.

sions I am satisfied that question 1 also raises a substantial question of law between the parties.

P.R.S./R.M. *Order accordingly.*

A. I. R. 1933 Madras 224(1)

MADHAVAN NAIR, J.

(Charali) Ramakrishnayya—Plaintiff—Appellant.

v.

(Ycleswarapu) Soorayanarayana Sarma—Defendant—Respondent.

Second Appeal No. 2289 of 1927, Decided on 23rd January 1931, against decree of Sub-Judge, Narasapur, in A. S. No. 35 of 1927.

Civil P. C. (1908), S. 35—Costs are in discretion of trial Court—High Court will seldom interfere unless some principle is involved.

Under S. 35 costs are in the discretion of the trial Court, and unless a principle is involved on which the decision of the point is based the High Court will very seldom interfere with the order in such cases.

The guardian of a minor could not give an effective discharge and was not also a man of property. Hence the defendant on legal advice asked for security from the guardian, which he refused. The guardian filed a suit and got a decree, but no costs were allowed in the lower Court.

Held: that though the guardian's refusal as to security alone was not a proper ground for refusing costs, yet in the above circumstances there was no indiscretion on the part of the lower Court in refusing costs. [P 224 C 1, 2]

G. Lakshmana—for Appellant.

A. Satyanarayana—for Respondent.

Judgment.—The only question in this second appeal is whether the plaintiff should have been awarded his costs of the suit by the lower Courts. The plaintiff is a minor appearing by his guardian. In favour of the plaintiff represented by this guardian a promissory note was executed by the defendant. The guardian asked for the money. The defendant refused to give it unless he executed a security bond. As he refused to pay money this suit was instituted. The plaintiff has been given a decree for the amount, but has not been given his costs. Under S. 35, Civil P. C., costs are in the discretion of the trial Court, and unless a principle is involved on which the decision of the point is based, this Court very seldom interferes with the order made by the lower Courts. In this case both the lower Courts have come to the same conclusion. One of the reasons given by the appellate Court, that the guardian cannot give an effective dis-

charge and therefore the defendant is entitled to ask for security, may not be a proper ground for refusing costs. But the lower Courts on the evidence find that the guardian is not a man of property and the defendant acted upon proper legal advice in insisting that security should be given. Having regard to these circumstances, which are also relied upon by the lower Courts, I cannot say that the discretion of the lower Courts has been wrongly exercised in this case. In these circumstances the second appeal is dismissed. In this Court each party will bear his own costs.

P.R.S./B.V. *Appeal dismissed.*

A. I. R. 1933 Madras 224(2)

LAKSHMANA RAO, J.

Venkatarama Ayyar—Plaintiff—Appellant.

v.

Somasundara Vandayar—Defendant Respondent.

Appeal No. 104 of 1927, Decided on 11th August 1931, against appellate order of Dist. Judge, East Tanjore, D/- 13th December 1926.

Civil P. C. (1908), S. 47, and O. 21, R. 22—Application by legal representative of deceased judgment-debtor to set aside sale for want of notice under O. 21, R. 22—Sale is invalid only to the extent of applicant's share.

Where the legal representative of a deceased judgment-debtor makes an application to set aside an auction sale on the ground that he was not served with the requisite notice under O. 21, R. 22, the sale is not invalid entirely, but only to the extent of the applicant's share: *A I R 1931 Cal 555, Foll.* [P 224 C 2]

A. Ganesa Iyer—for Appellant.

K. Bahshyam and T. R. Srinivasan—for Respondents.

Judgment.—The view of the lower Courts that the sale is void as against all the defendants is erroneous, and as pointed out in *Shrish Chandra Nandi v. Rahat-annessa Bibi* (1) the sale will be invalid only to the extent of the share of the legal representative of the deceased judgment-debtor who was not served with the requisite notice under O. 21, R. 22, Civil P. C. There is, on principle also, no reason for holding that the sale is void in its entirety; and just as a decree may be had proportionate to the shares of those who have been impleaded, a sale too can be upheld to the extent of the shares of those who were duly served.

1. A I R 1931 Cal 555=193 I C 670=58 Cal 825.

O. 21, R. 90, Civil P. C., is not applicable in so far as the petition is based on the absence of notice under O. 21, R. 22, and the sale will be invalid only to the extent of the interest, if any, of the deceased, defendant 7. It is however urged that the sale was impugned on other grounds as well under O. 21, R. 90, and the matter has not been inquired into. The order of the lower appellate Court is therefore set aside and the petition is remanded to the Court of first instance for disposal according to law in the light of the above observations. Costs up to date will follow and abide the result.

P.R.S./R.M.

Case remanded.

A. I. R. 1933 Madras 225

VENKATASUBBA RAO AND REILLY, JJ.

Satrucherla Sivaskandaraju and others
—Appellants.

v.

Narasimha Pattamani and others —
Respondents.

Appeals Nos. 412 and 413 of 1930, Decided on 5th October 1932.

(a) Evidence—Statement given on oath must be believed unless inherently improbable or contradicted.

Where there is nothing to show that a statement is inherently improbable, it would be wrong to hold that a statement given on oath is false, when not only it remains uncontradicted but when the opposite party, who challenges it, deliberately abstains from adducing evidence to the contrary. [P 226 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Irregularity in conduct of sale—Evidence of injury.

When a sale is sought to be set aside on the ground of irregularity in conducting the sale, the applicant can show that the injury is the result of the irregularity not necessarily by direct evidence but by circumstantial evidence also. [P 227 C 1]

(c) Civil P. C. (1908), O. 21, R. 90—Several villages to be sold in one lot—Proclamation affixed in each village showing only that village as subject of sale is material irregularity.

Where several villages were to be sold in one lot but the proclamation affixed in each village showed only the particular village as the subject of the sale:

Held: that there was material irregularity within O. 21, R. 90 but that the sale could not be set aside unless the judgment-debtor proved substantial injury by reason of this irregularity. [P 226 C 2; P 227 C 1]

(d) Civil P. C. (1908), O. 21, R. 90—System of conducting sale from day to day and fixing date for bringing sale to end deprecated.

Conducting a sale from day to day and fixing a date for bringing the sale to an end does not necessarily amount to material irregularity, but the system of conducting sales in such a manner

must be condemned and deprecated. The defects of conducting sales from day to day explained.

[P 227 C 1, 2]

K. Ramanatha Shenai, V. Govindachari, K. Krishnamurthi and B. V. Ramanarasu—for Appellants.

Advocate-General and P. Somasundaram—for Respondents.

Venkatasubba Rao, J.—The first question with which I propose to deal is, whether the judgment-debtors have sustained substantial injury within the meaning of O. 21, R. 90. If this point is answered in the negative, the consideration of the other questions raised becomes unnecessary. In regard to the injury alleged, there is one puzzling feature in the case, to which I shall presently refer. But, apart from that, we have to decide whether the lower Court's finding that no damage has been sustained is correct or not. The sale commenced by order of Court on 27th June 1928; leave to bid was granted to the decree-holders on 12th July and on the lastmentioned date an order was made directing that the sale was to proceed from day to day to the end of July. On 17th July the Zamindar of Andra bid Rs. 2,50,000 for each of the two lots. It may be mentioned that the zamindar is a near relation of one of the judgment-debtors. On 31st July there was no further bid made until the decree-holders offered for each lot a sum of Rs. 1,000 more. At 5 p. m. on 31st July the sale was concluded and the decree-holders were declared the purchasers, their bid for Rs. 2,51,000 for each of the two lots having been accepted by the Court.

The sale proclamation was settled on 17th April 1928. It may be mentioned that this estate had been for several years in the possession of receivers appointed by the Court. At the time when the learned Judge settled the proclamation, he obtained the necessary information from the receiver then in charge and arrived at the reserve price. The income was about Rs. 22,000 a year, and the Judge fixed the value of the property as being 20 times the annual income. On that calculation, the reserve price was fixed at Rs. 2,25,969 for one lot and Rs. 2,12,888 for the other. At the sale by auction the price fetched was slightly higher than these sums. Not only was the sale advertised in the usual manner, but wide publicity was given by an.

nouncements in various leading newspapers. We may adopt another method for testing whether the amounts mentioned in the proclamation as the reserve price were an under-estimate. One of the mortgages in favour of the plaintiff was granted in 1906. The instrument of mortgage describes the property in great detail; the name of each village is shown there and the total income as stated in the deed was Rs. 29,000, less peishcush Rs. 9,000. In other words the net income of the properties as stated in the deed was Rs. 20,000. Adopting this test it cannot be said that there has been inadequacy in the sale price realized at the auction.

But there remains the evidence of P. W. 5, on which very rightly Mr. Ramanatha Shenai, the learned counsel for the appellants, has laid much stress. P. W. 5 is the standing wakil of the Andra Zamindar. He deposes that in his presence the zamindar proposed to the Dewan of Jeypore offering to purchase one of the two lots for four and half lakhs, but the Dewan was unwilling to part with it for less than five lakhs. This witness's statement is direct and unequivocal. If his evidence was untrue, why was not the Dewan of Jeypore called to contradict him? Mr. Ramanatha Shenai says that in the absence of evidence to the contrary we must accept the evidence of P. W. 5. The learned Judge is alive to this difficulty, but gets over it by finding definitely that this witness's evidence is false. I am afraid I must most strongly differ from this view. On what material does the learned Judge hold that this witness cannot be believed? How is he justified in coming to the conclusion that his evidence is perjured? Where there is nothing to show that the statement is inherently improbable, it would be wrong to hold that a statement given on oath is false, when not only it remains uncontradicted but when the opposite party, who challenges it, deliberately abstains from adducing evidence to the contrary. In this case, whatever my conclusion may be, I am definitely of the opinion that the Judge's finding, that P. W. 5 has spoken a falsehood, cannot and ought not to be supported.

But the question still remains: Does the evidence of this witness go far enough to show that there was an under-valua-

tion? If his evidence be carefully read, the point emerges that what was then contemplated was not a direct purchase by the Andra Zamindar. The proposal seems to be that the purchase was to be made at the auction by the Dewan for the decree-holders and that he was in his turn to sell one of the lots to the Andra Zamindar. Thus the sale that was contemplated was to be contingent upon certain events, and, as the evidence shows, it was not to be even for cash. The Andra Zamindar, connected as he was with the judgment-debtors, would be prepared to pay a price, which the property would not fetch in the open market; to him it had a value which it might not have to others. The Dewan of Jeypore was well aware of that fact, and might well have tried to make what profit he could for the mortgagee. We cannot also overlook the fact that the Andra Zamindar was not in a position to then and there complete the purchase. It would not be very safe to act upon the statement of the Dewan of Jeypore as representing his considered opinion as to the price of the property. Although the appellants' learned counsel was entitled to comment and comment strongly on the fact that the Dewan of Jeypore did not venture to go into the witness-box and contradict P. W. 5, I am not prepared to infer from this omission that the statement as to the price in the proclamation was an under-estimate.

This finding would be enough to dispose of these appeals. But I cannot help adverting to certain irregularities in the conduct of the sale brought to our notice in the course of the hearing. In the lower Court several objections were taken by the judgment-debtors, but it is regrettable that a most patent irregularity that occurred has not been noticed. The sale was ordered to be made in two lots, each lot comprising several villages. The proclamation was published in the usual way, and, as I have said, the sale was widely announced also in the leading newspapers. But the decree-holders affixed proclamations of sale in each village, and the fact has now come to light that what was described in each copy as the subject of the sale, was the particular village at which that copy was posted and not the lot of which that village was but a part. That it is a material irregularity within the

rule admits in my opinion of no doubt. If I was satisfied that the judgment-debtors have sustained substantial injury by reason of this irregularity I should without doubt have set aside the sale. I think it necessary in this connexion to notice one contention put forward by the learned Advocate-General. It is argued that only by direct, as opposed to circumstantial, evidence an applicant under O. 21, R. 90 can show that the injury is the result of the irregularity. This contention does not require serious notice. He has cited cases which cannot be held to be authorities on the interpretation of the rule as it now stands. As a matter of fact those very cases, I presume, have led to an important amendment of the rule by the legislature. In the view I have taken, this question of law does not assume any importance, but I have been obliged to refer to it on account of the contention put forward by the learned Advocate-General. As I pointed out in the course of the argument, if the property to be sold is 1,000 acres of valuable wet land, say in the Godavari delta tract, and the proclamation describes it as dry land, would any Court insist upon direct evidence for proving that the injury is the result of this irregularity? Or again, as has happened in one of the cases to which our attention has been drawn, if a sale announced to take place at 11 o'clock is held at 7, can nothing short of direct oral evidence satisfy the Court that the loss is due to that patent and obvious irregularity? It is unnecessary, as I have said, in the view I have taken, to pursue this matter.

Then remains another argument to which I must now advert. Mr. Ramanatha Shenai complains against the manner in which the sale was conducted. I must observe that the learned Judge attended to several matters in connexion with the sale with great care, but allowed the sale to spread over a long period; in fact he made an order, as I have said, that the sale was to continue from day to day from the 27th June to the 31st July. Mr. Ramanatha Shenai contends that it is wrong to fix a date for the terminating of the sale. I entirely agree. It is not only proper, but necessary, to fix the time when the sale is to commence; but what possible purpose can be served by fixing in advance

the time when the sale is to come to an end? The person or authority in control of the sale must be free to decide, as the person most competent to do so, when the sale is to terminate. This fixing of time for the bringing the sale to an end is allied to the pernicious system, to which I have adverted, that of directing the sale to be conducted from day to day. A sale by auction fundamentally differs from a sale by private contract. In a private sale negotiations move slowly, the parties consult and deliberate at leisure; but in the case of an auction-sale investigations are made and inquiries are pursued beforehand; at the moment of the auction, the various bids offered in quick succession are intended to stimulate competition, and rapid decisions have to be made, and are made, on the spot. If the sale is lengthened out (in this case the duration was over a month) the bidders, who are diligent enough to attend on the first day, may not care to attend on the second, and may never dream of waiting till the last; and the very object of adopting this method of sale would be completely defeated. Moreover, what prevents a person, who has made under the stimulus of competition a good bid from holding himself not bound by it when he finds that the sale is protracted and prolonged? It is not my intention to lay down at once that the conducting of a sale in this manner necessarily amounts to a material irregularity, but I must most strongly condemn and deprecate the practice that has grown up.

Lastly, I am not prepared to believe that the Andra Zamindar came to the Court on the 31st July after 5 p. m., with a bona fide desire to purchase the property. In the result the appeals fail and are dismissed. Ordinarily I should direct the unsuccessful party to pay the costs, but in this case to mark my disapproval of the manner in which the case was conducted for the decree-holders, I deprive them of costs. Each party shall therefore bear his own costs.

Reilly, J.—I agree with the result at which my learned brother has arrived, though I have reached it perhaps by a slightly different road. In the first place I should like to say that I agree with what my learned brother has said about the extraordinary prolongation of this sale, which began on 27th June 1928 and

was closed on 31st July of that year, being continued from day to day. That appears to me to be a very bad and unbusiness like way of conducting a Court-auction; and it is not the intention, I think, of the Code of Civil Procedure that an auction should be so conducted. There are many obvious disadvantages in such a method of conducting an auction. Bidders may come at the beginning, as my learned brother has pointed out, and may go away in despair; they cannot wait for weeks. They may change their minds. Some, who have money at the beginning of the auction, may not have money at the end. Nobody at first considers the matter at all as serious: there is plenty of time, and intending bidders need not make up their minds what they are going to bid. I agree that a Court-auction should not be conducted in that way. But in this case I understand that no complaint has been made by the judgment-debtors on the ground of the extraordinary extension of the sale. Their complaint, as put before us, has been rather that it was not extended a little longer. In the circumstances I do not think we can say that the sale is vitiated by the length of time over which it was spread in this case. At any rate we cannot come to such a conclusion in favour of the judgment-debtors.

But it has been urged before us that these two estates, which were put up for auction, were eventually sold much below their real value, that they were very much undervalued in the sale proclamation and that thereby substantial loss was caused to the judgment-debtors. In the sale-proclamation one of the estates was valued at Rs. 2,25,969 and the other at Rs. 2,12,888; and it has not been disputed before us that the two estates are approximately equal in value. The learned District Judge in settling that proclamation appears to have taken a great deal of trouble and to have done his best to arrive at a proper valuation. A receiver had been in charge of these estates for a number of years, and his reports were considered with the details he gave about the rents to be obtained from each village. The judgment-debtors were heard and were able to represent everything they wished against the valuation, which was eventually adopted by the learned District Judge. And besides

this it happens that in the original mortgage deed of 1906 the income of two estates was set out, the total being about Rs. 29,000, of which about Rs. 9,000 had to be paid to the Government as peshcush. And the income so given was not only for the major parts of the estates, which were sold in this auction with which we are concerned, but it also included the income of other parts of the estates, which extended up into the Agency hills and which, we are told, have since been sold for about Rs. 59,000. So far there does not appear to be any reason to suppose that the learned Judge's valuation as given in the sale-proclamation was too low. (After discussing the evidence of P. W. 5, a pleader practising in Vizagapatam, His Lordship concluded). I think we must take it therefore that on the evidence there was an under-valuation of each of these estates in the sale proclamation and a considerable under-valuation.

Does it follow that the sale is vitiated? I do not see any reason to suppose that there was fraud in the under-valuation. The District Judge did his best to arrive at a proper valuation of both the estates after hearing all the judgment-debtors had to say. I do not see how fraud can be made out in that matter. But so seriously to under-value property announced for sale in such a proclamation is undoubtedly an irregularity. Can we say that that irregularity led to the estates being sold for less than what they would otherwise have fetched in this case? That in my opinion the judgment-debtors have been unable to make out. These estates were advertised for sale in Court auction in a number of newspapers all over India. There were repeated publications in April 1928. Those advertisements, which have been exhibited in the case, show that the estates were described sufficiently; it was stated that they were to be sold in two lots, one estate in each lot, and no valuation was given in the advertisements. Now, anybody who wished to bid for these estates or thought that it would perhaps be profitable for him to bid at the auction which was advertised would have to make inquiries as to what the value of the estate was. I do not think it at all probable that people, who would be likely to bid for these estates, would pin their faith in any way to the value mentioned

in the Court's proclamation. They would make, if they were sensible people at all, a very much more careful investigation than that ; they would pursue their inquiries a great deal further. They would inquire not only what was the rent to be obtained from the villages of the two estates but what prospects there were of developing the estates and what difficulties would be likely to face new proprietors, if they purchased them, and a great many other things, which could only be ascertained by local inquiry.

There was ample time, as I have mentioned, for such an inquiry to be made : sale was begun more than two months after it was advertised and it continued, according to the extraordinary procedure followed, for about five weeks. During that time everybody concerned had ample time to find out everything that could be found out about the estates. And I may mention that besides advertising the sale of these estates in newspapers a separate notice was sent to every zamindar in the Presidency. Zamindars would no doubt be the people who would be most likely to bid at the sale, and they would certainly be the persons most likely to know what inquiries to make about the value of such estates and how to push those inquiries through. Although these estates were eventually sold in this auction for comparatively low prices Rs. 2,51,000 in each case, in the circumstances, I am not at all satisfied that that was due to the unduly low values entered in the sale proclamation. It has been suggested for the judgment-debtors also that there was some fraud towards the close of the auction in regard to the Dewan of Andra, who was somehow prevented by the Dewan of Jeypore from bidding more than two and half lakhs for each estate in accordance with his master's directions. There is really no evidence in support of that suggestion, and it is destroyed I think by the fact that the Dewan of Andra was still in the service of the Zamindar of Andra when this case was tried by the District Judge more than a year after the sale.

As my learned brother has pointed out in the course of the hearing before us a very curious feature of the case was discovered, namely, that in every village in the two estates a proclamation in regard to the sale was put up in April or

May, but that proclamation was inaccurate. We find from the specimen proclamations at which we have looked that what was put up in the villages in each case was a proclamation that the sale would be held for the decree-debt. That was correct ; but the property described as for sale in each of those proclamations was the village itself and nothing more. That would undoubtedly be misleading to anybody who paid any attention to it. It was a very curious and careless irregularity. But it has not been denied before us, and it has not been denied at any stage, that a proper proclamation, stating that each estate would be sold as a whole in one lot, was duly published in accordance with law ; it was put up in the District court-house, in the Collector's Office and in the proper place in each of the two estates. Although no doubt there was a proper proclamation made in accordance with all the prescribed rules in regard to the auction as it was actually held, that is to say for the sale of each estate in one lot, there were these superfluous notices in the villages, notices which were both superfluous and inaccurate and would have misled anybody who had paid attention to them. But there is no evidence whatever that anybody, who was at all likely to be a bidder, ever imagined that the villages would be sold individually and not the estate in one lot each.

And in the absence of any such evidence we could not find, I think, that the publication of these superfluous and inaccurate notices, as indeed they were, in the villages had any effect upon the result of the sale. I do not wish it to be understood that the absence of direct evidence in such a case as this, that is the evidence of some witness coming before the Court and saying that he was misled by such a notice as those which were published in the villages, would in all cases prevent a reasonable inference being drawn that by such an irregularity in the publication of the proclamations substantial loss had been caused to the judgment-debtors. Whatever may have been declared in any decision to have been the law before what corresponded to R. 90, O. 21, Civil P. C., assumed its present form, certainly it is not necessary now to rule out reasonable inferences from evidence in order to establish that an irregularity in the conduct and publi-

cation of a sale has caused substantial loss. In this case however there is not only no direct evidence, but I see no sufficient ground for an inference that the result of these sales was affected by the inaccurate proclamations published in the villages. And, as I mentioned, the publication of these notices in the villages was discovered in this Court. The judgment-debtors said nothing about it at any stage and felt no grievance on this account. Indeed it would be a proper objection, which their opponents might well raise, that the point was never taken by the judgment-debtors in their petition to the District Court, that it was not taken in the grounds of appeal here, and that, until it had been noticed by us accidentally during the course of the hearing of this appeal, the judgment-debtors would have known nothing about it. There is no reason to interfere with the sales on that account.

There is one other matter to which Mr. Ramanatha Shenai referred as being of some importance. He objected to the eventual closing of this long-protracted sale at 5 p. m. on 31st July 1928. The Judge had ordered that the sale should be continued until 31st July of that year. That was long enough. But it is suggested by Mr. Ramanatha Shenai that we ought not to understand the order that the sale was to continue till 31st July as meaning that it should stop at the end of court hours on that day, but that it should have been continued until some unspecified hour in the night. I can see no basis whatever for any such suggestion. It is urged that the Zamin-dar of Andra came to the court-house after 5 p. m. on 31st July anxious to make some belated bid for these estates. If he did intend to bid at that hour, he had nothing to complain of when he found that the sale had stopped, as it was obviously intended that it should stop, at the close of the court hours on 31st July. The judgment-debtors can have no reasonable grievance whatever in the fact that the sale at last came to an end when the working court hours for 31st July ended. In my opinion there were irregularities in this case and some very curious irregularities, but there is no sufficient reason why we should interfere with the decision of the District Judge. I agree that these appeals should be dismissed, and I agree also with the

order which my learned brother has proposed as to costs.

P.R.S./K.S. *Appeals dismissed.*

A. I. R. 1933 Madras 230

VENKATASUBBA RAO, J.

Public Prosecutor—Appellant.

v.

Mayandi Nadar—Accused.

Criminal Appeal No. 590 of 1931, Decided on 4th November 1931.

(a) **Criminal P. C. (1898), S. 417—Government must sparingly use right of appeal against acquittal.**

The right of appeal against an acquittal vested in the Crown, should be used sparingly and with circumspection. [P 230 C 2]

(b) **Penal Code (1860), S. 193.—Though perjury is offence every perjurer should not be charged.**

Perjury is a concomitant of a Court of law, the question always being one of degree. Every act of perjury is in strict law an offence, but it does not follow that on that account every perjurer should be charged. [P 230 C 2]

Judgment.—It is an accepted maxim that the right of appeal against an acquittal vested in the Crown should be used sparingly and with circumspection. In the present case, if the Sessions Judge, instead of acquitting the accused, had imposed upon him a nominal fine the requirements of the law would have been satisfied. But on this purely technical ground this appeal should not have been filed. The observations of the learned Judge are no doubt strong but by no means stronger than the facts warrant. I say nothing regarding the conviction of the thief himself, but this prosecution, there can be no doubt, was illconceived. Suppose a man is being tried on a capital charge and his wife is forced into the witness box by the Crown, is she to take her trial for perjury on the score that, in screening her husband she has given false evidence? Perjury is a concomitant of a Court of law, the question always being one of degree. Every act of perjury is, in strict law, an offence but it does not follow, that on that account every perjurer should be charged. The police, I should have expected, would have profited by the remarks of the lower Court, which in my opinion, were pertinent and rightly made. The Government's position is different from that of a private party and this appeal, as I have said, should never have been filed, and it is dismissed.

P.R.S./B.V. *Appeal dismissed,*

A. I. R. 1933 Madras 231 (1)

JACKSON, J.

Zamindar of Khallikote—Petitioner.

v.

Sivaram Bevartha Patnaik and others—
Opposite Parties.Civil Revn. Petn. No. 531 of 1930,
Decided on 2nd November 1931.(a) **Madras Estates Land Act (1908), S. 75**
—Collector deciding rent payable in cash—
Question whether rent is payable in cash or
kind is not *res judicata*.Although a Collector acting under S. 75 de-
cides that the rent is payable in cash, the
question whether the rent is payable in cash
or kind is not *res judicata* in subsequent pro-
ceedings: 32 I C 706, *Foll.* [P 231 C 1](b) **Civil P.C. (1908) Ss. 11 and 115—High**
Court cannot interfere with wrong decision
on point of *res judicata*.A Court has jurisdiction to decide wrongly
and it can decide wrongly over a point of *res*
judicata and the High Court has no jurisdiction
to interfere under S. 115 in such a case: 11 Cal
6 and 11 Bom 488, *Rel on.*; A I R 1921 Mad 195,
Dist. [P 231 C 1]C. *Sambasiva Rao*—for Petitioner.B. *Jagannadha Das* — for Opposite
Parties.

Judgment.—The learned District Judge
has held that the question whether rent
is payable in cash or kind is *res judicata*
since the Collector acting under S. 75,
Madras Estates Land Act, decided in a
previous proceeding that the rent was
payable in cash. Probably in the light
of *Talagapu Tavudu v. Zamindar of*
Tarla (1), this is not *res judicata*; but
the question still remains whether this
Court can interfere under S. 115, Civil
P. C. It is one of those hard cases which
raise the question whether a Court has
jurisdiction to decide wrongly, which
undoubtedly it has, and that it can de-
cide wrongly over a point of *res judicata*
is held in *Amir Hassan Khan v. Sheo*
Baksh Singh (2) and *Amritrav Krishna*
v. Balakrishna Ganesh (3). The peti-
tioner relies upon *The Midnapore Zamin-*
dary Co., Ltd. v. Muthappudayan (4),
but there it was held that this Court
would interfere where an applicant had
been denied *locus standi*. In this case
there was no denial of *locus standi* and
consequent refusal to exercise jurisdic-
tion. It must be found that no petition
lies under S. 115, Civil P. C.

P.R.S./R.M. *Petition dismissed.*

1. (1916) 32 I C 706.

2. (1885) 11 Cal 6=11 I A 237 (P C).

3. (1887) 11 Bom. 488.

4. A I R 1921 Mad 195=62 I C 337=44 Mad.
534.*** A. I. R. 1933 Madras 231(2)**

MADHAVAN NAIR, J.

Thangachi Ammal — Petitioner.

v.

Mohamed Moideen Maricair— Oppo-
site Party.Civil Revn. Petn. No. 365 of 1932,
Decided on 4th October 1932.* **Court-fees Act (1870), Ss. 7 (4) (a) and**
7 (5)—Suit by vendor to set aside sale deed
and for recovery of possession of property—
Court-fee for relief for possession is not
necessary.In a suit by vendor for setting aside a sale
deed and for recovery of possession of the pro-
perty covered by the deed, it is enough if the
plaintiff pays court-fee for cancellation of the
deed under S. (7) (4) (a). The claim with regard
to possession of the property is only ancillary
to the setting aside of the deed and hence no
court-fee under S. 7 (5) need be paid for the re-
lief for possession: A I R 1926 Mad 96, *Rel.*
on; A I R 1932 Mad 605 and A I R 1915 Mad
550, *Ref.* [P 232 C 1, 2]K. S. *Desikan*—for Petitioner.K. S. *Champakesa Ayyangar*—for Res-
pondent.

Judgment.—The plaintiff is the peti-
tioner. The question raised in the case
is whether the court-fee paid by her is
sufficient. The suit was for cancellation
of a sale deed executed by the plaintiff
and for recovery of possession of the land
and mesne profits. The consideration for
the sale deed was Rs. 2,750. The peti-
tioner paid court-fee for the cancellation
of the sale deed on the amount of the
consideration specified in the deed under
S. 7 (4) (a), Court-fees Act. She also
paid court-fee on the mesne profits. The
defendant's contention is that the peti-
tioner should pay court-fee in respect of
the claim for possession of the property
also. The point for decision is whether
the plaintiff is bound to pay court-fee in
respect of the claim for recovery of pos-
session of the land from the defendant.
The lower Court held that the plaintiff
should pay court-fee for possession as
well under S. 7 (5), Court-fees Act. S. 7 (4),
Court-fees Act, has been amended in 1922
and Cl. 4-A has been newly introduced
by the amendment. It states:

“In a suit for cancellation of a decree for
money or other property having a money value,
or other document securing money or other pro-
perty having such value,”

the court-fee should be calculated

“according to the value of the subject-matter of
the suit, and such value shall be deemed to be
etc.”Prior to this amendment suits like the
present one fell under S. 7 (4) (c); that

is, for purposes of court-fee such suits were considered as suits to obtain a declaratory decree or order where consequential relief is prayed. It is not disputed that the plaintiff has to pay court-fee so far as the setting aside of the sale deed is concerned under Cl. 4-A of the section. The only question is whether besides paying court-fee under Cl. 4-A the petitioner should be compelled to pay court-fee under S. 7 (5) also. No decision directly bearing on the point has been brought to my notice. Though the question has not been specifically decided in any case, some decisions of this Court may with advantage be referred to, those being *In re Lakshmi Ammal* (1) and *Venkatasiva Rao v. Satyanarayana-murthy* (2). Of these two the first one, *In re Lakshmi Ammal* (1), is very much like the present case though the particular point now argued does not seem to have been specifically raised in that case. The present suit, as I have already stated, is one by a vendor to set aside a sale deed and for the recovery of possession of the property covered by the deed. The suit *In re Lakshmi Ammal* (1) was by the vendee. That was also for setting aside a sale deed. The relief asked for was the return of the consideration and some damages. It was argued in that case that the suit should be valued as one falling under S. 7 (4) (c), i. e., for the purpose of court-fee it should be treated as a suit for a declaratory decree where consequential relief is prayed. Having regard to the prayer for cancellation of the document and the new amendment introduced by the legislature in 1922, Devadoss, J., held that the suit should be valued under S. 7 (4-A). Should it be valued also under S. 7 (5) with regard to the return of the money does not seem to have been specifically argued. But it was urged that under S. 7 (4) (c) the plaintiff is bound to value the relief sought for at Rs. 1,300, i. e., the amount so claimed. With regard to this argument the learned Judge pointed out: "the main relief claimed is really the setting aside of the conveyance and the claim for money is one ancillary to it. To such cases S. 7 (4) (c) has no application."

And then the learned Judge held that the new clause applied to this case. In the same way it may be said in this case also that the claim with regard to the

possession of the property is ancillary to the setting aside of the document and if so, S. 7 (4-A) is the only provision under which the court-fee has to be levied. In *Venkatasiva Rao v. Satyanarayana-murthy* (2), a decree was sought to be set aside and possession as a result of such setting aside of the decree was also asked for. The learned Judges held that the case fell under both S. 7 (4-A) and S. 7 (5). But they did not say that both the provisions applied to the case and that the plaintiff should pay court-fee under the two provisions. No doubt the point was not specifically raised in the case as I have already pointed out. Some support for the position contended for by the petitioner may be found in *Rajagopal v. Vijayaraghavalu* (3), though the question of court-fee in that case arose before the amendment of the Act in 1922. That was a suit for a declaration that a certain decree was of no legal effect and for possession of the properties. Under the present Act the suit would be one for cancellation of the decree and for possession of the properties. The learned Judges in the course of their judgment pointed out with reference to the claim of possession in that case that

"possession is not asked for on any other ground than that the decree in execution of which it was lost, should be declared invalid; and it is therefore asked for consequently on the grant of declaration."

Using a similar language it may be said in the present case that possession is not asked for on any other ground than that the sale deed by the execution of which it was lost should be set aside and it is therefore asked for consequently on the setting aside of the sale deed; or in other words as mentioned by Devados, J., *In re Lakshmi Ammal* (1) the claim with respect to possession is only ancillary to the main claim which is the setting aside of the sale deed. For the above reasons I am of opinion that in this case the petitioner need not pay court-fee on the relief with regard to possession. The order of the lower Court is set aside with costs here and in the Court below.

P.R.S./K.S.

Order set aside.

3. A I R 1915 Mad 550 = 33 Mad 1184 = 25
I C 633.

1. A I R 1926 Mad 96 = 91 I C 720.

2. A I R 1932 Mad 605 = 139 I C 317.

* A. I. R. 1933 Madras 233

BEASLEY, C. J. AND REILLY, J.

Kallam Narayana — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 98 of 1932, Decided on 25th April 1932.

(a) Evidence Act (1872), S. 27—Statement leading to discovery of articles is admissible.

Statement leading to discovery of hidden articles is admissible under S. 27 even though made in the presence of the police: 14 *Bom* 260 (*F B*) and *A I R* 1926 *Mad* 638, *Rel on*.

[P 234 C 2]

* (b) Evidence Act (1872), S. 114—Duty of Judge or jury drawing presumptions or inferences from evidence explained—Criminal P. C. (1898), Ss. 298 and 299.

In making presumptions of fact or in drawing inference of fact from evidence a Judge or a jury must always have regard to all the known facts of the case. And that they must do because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful mental exercise; but it is wholly out of place in a judicial decision: *A I R* 1932 *Mad* 343, *Foll.*; *A I R* 1926 *Mad* 638, *Expl.*

[P 235 C 2; P 236 C 1]

It is not the law that the Judge or jury must be certain that no other explanation of the facts is possible before they find the accused person guilty. But if their inference is that he is guilty it must be a reasonable inference, reached with due regard to all the circumstances and with such care and assurance as a reasonable man would think necessary before he drew an important inference in his own most serious affairs.

[P 236 C 2; P 237 C 1]

Accused, who was under arrest for murder, admitted to the police while they were investigating into a murder of a girl that he along with the other accused buried all the ornaments missing from the person of the murdered girl and produced them from a place very near where the girl was murdered. Neither then nor at any other time did he give any explanation of his connexion with the ornaments:

Held: in the above circumstances the Court was entitled to draw the reasonable inference that the accused has taken part in the murder: *A I R* 1932 *Mad* 748, *Dist.*; 13 *Mad* 426; 12 *I C* 652 and 21 *I C* 156, *Ref.*

[P 237 C 2]

* (c) Criminal P. C. (1898), S. 342—Accused defended by counsel—Failure of Magistrate to put explicit questions is immaterial.

Duty of a Judge under S. 342 is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by counsel, it is often in his interest that the Judge should formally comply with the section by asking a general question and then leave the accused's counsel to

offer explanations on his behalf in the way most favourable and least dangerous to him. Hence where an accused is defended by counsel, the failure of the Magistrate to put explicit questions beyond asking a formal general question as to what he had to say does not vitiate the trial especially when the accused is not prejudiced by such examination. [P 238 C 2]

(d) Criminal P. C. (1898), S. 162 — Statement made by witness to police in course of investigation cannot be used to corroborate witnesses' evidence — Evidence Act (1872), S. 145.

Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and, if the written record of what a prosecution witness has said to the police is to be used to contradict him under S. 162, Criminal P. C., it must be proved and used in accordance with the provisions of S. 145, Evidence Act.

[P 239 C 1]

(e) Criminal P. C. (1898), S. 367 — Judgment should not be unnecessarily long.

A judgment should not be too long with a number of repetitions. It should set out the effect of the evidence fully, the accused's case, the attacks which are made upon the evidence by either side, the Judge's own criticisms of it and the reasons for his conclusions. [P 239 C 1]

S. Vepa—for Appellant.*Parakat Govinda Menon* for Public Prosecutor—for the Crown.*Reilly, J.*—Accused 1 in this case, the appellant before us, a boy of 16, has been convicted of murdering Ambama, a girl of 12-14, at Amaravathi on 30th September 1931. Accused 2 in the case, who was charged with the same offence, was acquitted.

There is undisputed evidence that Ambama, who lived at Amaravathi with her mother, P. W. 1, was at her mother's house soon after dark on the evening of 30th September: she then went to the adjoining house, where P. W. 3 lives: about evening mealtime she was missing; her mother and relations searched for her all night but did not find her: early the next morning her dead body was found in a ruined and deserted fort at Amaravathi; death had been due to strangulation, part of her sari having been tied tightly round her neck with four knots; there were three incised wounds, described by P. W. 10, the Sub-Assistant Surgeon, who examined the body, as "muscle-deep," one above the navel, one on the left side of her abdomen and one on the back of her left wrist; there were also indications that she had been raped; a pair of silver anklets, two pairs of gold plated copper bangles and a gold bead necklace, worth in all Rs. 45—50, which Ambama had

been wearing on the previous evening and was in the habit of wearing, were missing from the body. P. Ws. 2 and 4 have given some evidence against the appellant, which the learned Sessions Judge regards as quite untrustworthy and which it is not suggested for the Public Prosecutor we should treat as of any value. P. W. 5, a lamp-lighter, has given evidence that, while he was lighting lamps on the evening of 30th September, he saw Ambama going alone through the bazaar towards a temple, by which he appears to mean the temple close to the ruined fort, where her body was found next day. P. W. 3 says that about sunset on the evening of 30th September Ambama came to her house to play, as she used to do, and that, while they and others were playing Ambama went away saying that the appellant was calling her.

The evidence against the appellant is that on the morning of 4th October, after he had been arrested, he said in the presence of the Inspector of Police, P. W. 7, the Sub-Inspector, P. W. 15, the Village Magistrate, P. W. 8, and P. W. 9, an assistant karnam, that he and accused 2 had hidden Ambama's ornaments in the fort and that he would show them; what he said was recorded in Ex. B, which was signed by P. Ws. 8 and 9 and others; then they all went to the fort, and at a spot about 25 feet from the place where the body had been found the appellant removed some tiles and took out the earth, in which they had been buried, a pair of silver anklets and two pairs gold plated bangles, which have been identified as those Ambama had been wearing. The recovery of these things is recorded in a later part of Ex. B, which is again signed by P. Ws. 8, 9 and others and at this place also by the Sub-Inspector. The evidence of what the appellant said and did on that occasion has not been recorded in the witnesses' depositions in the Sessions Court as fully and explicitly as it should have been. But what I have mentioned is the effect of their depositions and of Ex. B. That the appellant said and did what I have mentioned is not now disputed; nor is it disputed that the anklets and bangles then produced by him, M. Os. 1 and 2, are the anklets and bangles which Ambama was wearing on the evening of

30th September. And of neither his production of the ornaments nor his statement that he and accused 2 hid them has the appellant ever offered any explanation. At the trial he merely denied them. It has been contended for the appellant that evidence of his statement that he and accused 2 hid the ornaments in the fort is not admissible. But that part of his statement distinctly relates to the discovery of the ornaments and is admissible under S. 27, Evidence Act: cf. *Queen-Empress v. Nana* (1), and the opinions of all the Judges in *Sogaimuthu Padayachi v. Emperor* (2). What is much more seriously contended is that the production of the ornaments by the appellant and his statement that he and accused 2 had hidden them provide no ground for inference that he murdered, or took part in the murder of, Ambama. It is suggested that from the appellant's possession and hiding of the ornaments no more serious inference should be drawn than that he stole the ornaments. Mr. Vepa for the appellant has relied on the opinion of Wallace, J., in *Sogaimuthu Padayachi v. Emperor* (2), with whom, when the difference between Wallace and Devadoss, JJ., was referred to him, Spencer, J., agreed. In the case there was evidence that the Pandarasannadhi of a mutt had been murdered and that some jewels, currency notes, etc., belonging to the murdered man or to his mutt were produced by the accused after making statements admissible under S. 27, Evidence Act, that they had buried them. The accused offered no explanation how they came to be in possession of the things; but Wallace, J., refused to draw an inference that they had taken part in the murder. I gather from the report that the things recovered were buried by the accused at a considerable distance from the mutt where the murder was committed. It appears that none of the things was on the person of the murdered man at the time he was killed, that there was no evidence that they were in the mutt at the time of the murder, that there was no evidence that they were missing when the murder was discovered and that there was evidence that, after the murder was discovered and before the loss of

1. (1890) 14 Bom 260 (F B).

2. A I R 1926 Mad 688=93 I C 42=27 Cr L J 394=50 Mad 274.

these things was discovered, the jewel room of the mutt, in which they had been kept, was raided by people of the crowd who came to the mutt after the murder was discovered. With respect it appears to me clear that Wallace, J., was right in that case in refusing to draw from the production of the jewels and notes by the accused and their admissions that they had buried them an inference that they had taken part in the murder of the Pandarasannadhi.

Mr. Vepa however relies not on the actual decision in that case, but on passages in the judgments of Wallace and Spencer, JJ. In Wallace, J's judgment he says:

"In such a case I am confident that neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen property. The Court has to be satisfied, not merely that the thief could not have come into possession of the property unless murder has been committed, but also that he could not have come into possession of the property unless he himself has taken part in the murder or was party to it."

Spencer, J., expressed agreement with the first of those sentences and also said:

"When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property? I think the answer must be that, if there is other evidence to connect the accused with the death of the murdered man, a jury, or in this country a Judge, may find upon circumstantial evidence that he is the murderer. But when the unexplained possession of the stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered."

With great respect these general statements do not appear to me to have been necessary for the disposal of the case in which they were made. But it must be remembered that the first sentence quoted from Wallace, J's judgment begins with the words. "In such a case," meaning such as the one with which he was dealing; and I do not think it was fair to the learned Judge to quote the rest of the sentence, as Spencer, J., did omitting those very important qualifying words. But with the greatest respect I do not understand why the sentence even with those qualifying words appears in the judgment. I do not understand

why any reference to the nature of the punishment which may follow should be brought into a discussion of the inference of fact to be drawn from certain evidence. And, as for convicting a man of murder in such a case or in any case "simply because he does not plead guilty to being a thief or a receiver of stolen property," no one can seriously suppose that any such question ever arose. And the statement that :

"the Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it,"

whether intended to apply generally or only to the case with which the learned Judge was then dealing, was I venture to think, a serious over-statement. When it is the duty of a Judge or a jury to draw from evidence a reasonable inference, it is not their duty to find that there was no conceivable possibility other than the conclusion which they reach. It is not possible for reasonable men to conduct the affairs of life or to make judicial decisions on questions of fact with mathematical certainty. And again with the greatest respect Spencer, J's remark as to what can be done :

"when the unexplained possession of stolen property is the only circumstance appearing against an accused charged with murder and theft,"

does not appear to me to be helpful apart from the fact that it is inconsistent with the latter part of the same sentence. We are here dealing with inferences of fact and presumptions of fact within the principle of S. 114, Evidence Act. It is often instructive to observe what inference other Judges have thought proper to draw from certain evidence or what assumptions or presumptions of fact they have thought fit to make in certain circumstances. But outside the sphere of presumptions of law it appears to me a waste of words and effort for any Judge or Court to attempt to lay down by general ruling, or even to express general opinions, what inferences may or may not be drawn by other Judges from other facts in other cases. That is a matter which Anantakrishna Ayyar and I had to discuss recently in *Bommadevara Chayademma v. Venkataswamy* (3). There is one general rule which must never be forgotten, namely, that in making presumptions of fact or in drawing infer-

ences of fact from evidence a Judge or a jury must always have regard to all the known facts of the case. And that they must do because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful mental exercise; but it appears to me wholly out of place in a judicial decision.

What are the facts proved in this case? The girl Ambama was murdered in the ruined and deserted fort at some time between lamp-lighting time on the evening of 30th September and the early morning of 1st October; she was also raped; ornaments of considerable value, which she habitually wore and which she was wearing on the evening of 30th September, were missing from her body when it was discovered the next morning, though there were then on the body some trinkets of small value; the appellant, as he admitted on 4th October, with accused 2 buried all the missing ornaments but one at a spot in the fort only a few yards from the place where the girl was murdered, and from that spot he produced those ornaments; he made that admission when he was under arrest for the murder of the girl to the officers who were investigating the murder; neither then nor at any other time has he given any explanation admissible in evidence of his connexion with the ornaments. Of the surrounding circumstances we may infer from the evidence that Ambama might go about the town by herself without exciting surprise, that her mother, when she was missing, thought it possible that she had gone off to watch a theatrical performance, and that she went away from P. W. 3's house on the evening of 30th September in the middle of a game, saying that accused 1 was calling her, which did not excite any protest from P. W. 3. What is the reasonable inference to be drawn from the proved facts? It has been suggested that before it can properly be inferred from these facts that the appellant took part in the murder of Ambama all other possible explanations of his part in burying the ornaments must be shown to be untrue or very improbable and that the fact that he was at one time in possession of these ornaments shows at the utmost that he took part in stealing

them: possession of stolen property, it is urged, may be evidence of theft but not of a more serious offence. These arguments I think involve confusion of thought. The evidence that an accused person was in possession of stolen property soon after it was stolen is most commonly of use in theft cases. But the possession by itself is never sufficient evidence that the possessor was the thief.

In such cases it is the possession of the stolen property soon after the theft combined with the failure of the possessor to give any reasonable explanation of his possession which enables the Judge or jury to draw an inference that he was the thief, if after considering all the circumstances so far as they are known, they think that inference reasonable. There may be many conceivable explanations why the accused person was in possession of stolen property. He might have been induced by the real thief innocently to take care of the stolen things; he might have been compelled to do so under a threat of violence; he might have seen the real thief drop them or he might have found them lying on the ground, and in either case he might have intended to misappropriate them or merely to keep them until he ascertained who was their owner; he might have himself stolen them from the original thief or have robbed or murdered the original thief in order to get possession of them. There may be a hundred possible explanations other than that he himself was the original thief. But it is not for the Judge or jury to invent or imagine such explanations. It is for the accused person to give his explanation if he has one. If he gives no explanation, then it is for the Judge or jury as reasonable men to draw an inference from the proved facts after considering all the circumstances. And on the way to that inference they may raise such presumptions of fact as appear to them reasonable presumptions which arise from their experience of the world and of life, the course of human conduct and human nature. Such presumptions they will often reach by unconscious reasoning, and they will be based not on facts proved by evidence in the case, but on facts of general knowledge. In essence such presumptions also are inferences of fact. It is not the law that the Judge

or Jury must be certain that no other explanation of the facts is possible before they find the accused person guilty.

But if their inference is that he is guilty, it must be a reasonable inference reached with due regard to all the circumstances and with such care and assurance as a reasonable man would think necessary before he drew an important inference in his own most serious affairs, and all the facts proved must be clearly in their minds, including the very important fact that the accused person has offered no explanation of his possession of the stolen things. The Judge or jury must be satisfied that there is no reasonable doubt that the accused person was the thief, and in that sense they must be satisfied that the only explanation of the facts reasonably to be accepted is that he was the thief. It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts. If the accused person offers a reasonable explanation then, as pointed out by the Court of criminal appeal in *Rex v. Schama* (4), it is for the prosecution to show that that explanation is untrue. But, if the accused offers no explanation, it is not for the Judge or jury to invent one. One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation.

The possession of stolen things and the failure to explain that possession may be relevant and important facts in cases other than those of simple theft. When the theft has been committed in the course of, or in connexion with, house-breaking, they may often be important facts for use in making an inference that the accused person took part in the house-breaking. And when things, which were on a murdered person's body at the time when he was murdered, are traced to a person accused of the murder and he gives no explanation of his possession of them, those may be important facts for use in making an inference that he took part in the murder: cf. *Queen-Empress v. Sami* (5), *Public Prosecutor v. Chireddi Munayya* (6), and *Emperor v. Neamat-ulla* (7). In the present case it is pos-

sible to suggest many conceivable explanations how the appellant came to join with accused 2 in burying Ambama's ornaments. It is not inconceivable that they took the ornaments from her while she was alive and that some one else afterwards murdered her. It is not inconceivable that they found her lying dead and then removed her ornaments. It is not inconceivable that accused 2 murdered her and afterwards forced the appellant to assist him in burying the ornaments. It is possible to imagine many other explanations of what the appellant has admitted that he did. But it is not for us to invent those explanations. During all the time which has elapsed since the appellant made his admission on 4th October he has never offered any such explanation. We have no right, and the learned Sessions Judge had no right, to indulge in speculation. We must return to the question what in the circumstances is the reasonable inference from the facts proved, the murder of Ambama in the ruined and deserted fort, the removal of her valuable ornaments on the night of her murder, the burial of all but one of those ornaments in the fort a few yards from the scene of the murder, the appellant's production of those ornaments, his admission while he was under arrest for the murder of Ambama to the officers who he knew were investigating that murder, that he and accused 2 had buried the ornaments there and his failure to offer any explanation why he did so.

The learned Sessions Judge and three of the four assessors drew the inference that the appellant took part in the murder of Ambama. In my opinion that was a reasonable inference, which in the circumstances they were entitled to make. In my opinion there is no sufficient reason to doubt that that was the right inference to make. Mr. Vepa has urged that this case is complicated by the fact that what the appellant admitted was that he and accused 2 buried the ornaments and that, even if the appellant took part in burying them, we are left in uncertainty whether he or accused 2 actually committed the murder. He urges also that, as the appellant is a boy of 16 and accused 2 a young man of 23, it is more likely that accused 2 was the murderer than the appellant. He has invited our attention to

4. (1915) 84 L J K B 306=112 L T 480=79 J P 184=31 T L R 88=59 S J 288=24 Cox C C 591.

5. (1890) 13 Mad 426=1 Weir 290.

6. (1911) 12 Cr L J 564=12 I C 652.

7. (1913) 14 Cr L J 556=21 I C 156.

Public Prosecutor v. Venkatamma (8), to show that, where there is a doubt which of two persons committed a murder, neither can be convicted of it. In that case two women, a mother and daughter, were charged with the murder of a little boy. There was evidence, which all the learned Judges accepted as sufficient, to prove that the boy was murdered in the house where both the women lived when no one but the women were there and therefore that the boy was murdered by one or other of the women or by both. There was also evidence that the two women joined in disposing of the body. On a difference of opinion between Waller, J., and Krishnan Pandalai, J. Curgenvén, J., agreed with Krishnan Pandalai, J., that it was not proved that both the women took part in the murder, that one or other of them must have been guilty of murder, but it was not clear which, and that therefore both must be acquitted of murder, though both should be convicted of causing evidence to disappear.

I do not think that case is of help to us. Their relation to each other might well induce either the mother or daughter to help the other in disposing of the body if the other had committed the murder. I gather from the report that only the daughter admitted taking any part in disposing of the body and she attributed the murder to her mother and denied having had anything to do with it, a denial which neither Krishnan Pandalai, J., nor Curgenvén, J., was satisfied was untrue. In this case the position is quite different. The appellant has admitted that he and accused 2 buried Ambama's ornaments. He has offered no explanation why he joined accused 2 in doing so. He is of a different caste from accused 2, and no explanation can be inferred from any circumstance in the case why he should join accused 2 in burying the ornaments where they were found if he had not taken part in the murder. Mr. Vepa is right in laying stress on the difference in age between the two accused, from which it may reasonably be inferred that the appellant was not the leader. But it cannot be said that his statement that he acted with accused 2 in burying the ornaments in the absence of any further explanation leaves a rea-

sonable doubt that accused 2 alone may have committed the murder and may afterwards have compelled or induced the appellant to assist him in the simple matter of burying the ornaments.

Mr. Vepa has raised one other contention for the appellant: that he was not properly examined by the Sessions Judge in accordance with the provisions of S. 342, Criminal P. C. That section provides that, after the prosecution witnesses have been examined, the Judge shall question the accused generally on the case for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Before the committing Magistrate the appellant had merely said that he knew nothing about the murder. The Sessions Judge asked him whether the record of his statement before the Committing Magistrate was correct, which the appellant said it was, and apart from asking whether the appellant intended to examine defence witnesses the only other question put by the Sessions Judge was "Do you wish to say anything more now"? Mr. Vepa urges that it was incumbent on the Sessions Judge to draw the appellant's attention to his production of the ornaments and his admission that he had joined in burying them and to give him an opportunity of explaining those facts then if he wished to do so. I agree that the Sessions Judge might have put more explicit questions to the appellant. Indeed I think many Sessions Judges fail to carry out properly the duty imposed on them by S. 342 of the Code, especially when the accused are undefended.

But it is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by counsel, it is often in his interest that the Judge should formally comply with the section by asking a general question and then leave the accused's counsel to offer explanations on his behalf in the way most favourable and least dangerous to him. In the present case the appellant has nothing to complain of in this respect.

8. A I R 1932 Mad 748=1932 Cr C 923=199
I C 725=33 Cr L J 814.

He was represented by counsel, who no doubt put forward the appellant's case in the manner which appeared to him best. And beside that, when the appellant was asked by the Sessions Judge whether he wished to say anything more than he had said before the committing Magistrate, he took the opportunity to deny that he ever showed Ambama's ornaments to the police and that they were ever in his possession and added that he did not know who had given them to the police. It will be seen therefore that the appellant on that occasion gave the answer he wished to give to the question about the ornaments which Mr. Vepa complains was not asked. In the circumstances the appellant was not prejudiced in any way by the method of his examination by the Sessions Judge. In my opinion the conviction of the appellant was right: his conviction and sentence should be confirmed and his appeal dismissed.

In conclusion there are two matters which I think call for some remark. First, the learned Sessions Judge allowed questions to be put to the Sub-Inspector, P. W. 15, and put a number of questions himself to that witness, which were inadmissible. Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and, if the written record of what a prosecution witness has said to the police is to be used to contradict him under S. 162, Criminal P. C., it must be proved and used in accordance with the provisions of S. 145, Evidence Act. The learned Sessions Judge should be careful not to transgress the provisions of S. 162, Criminal P. C., in future. Secondly, the learned Sessions Judge in his anxiety to do justice to the case has written a very careful and very elaborate judgment; but it is far too long and contains a number of repetitions. I should be the last to encourage Sessions Judges to write short and perfunctory judgments in serious cases. The judgment in such a case should set out the effect of the evidence fully, the accused's case, the attacks which are made upon the evidence by either side, the Judge's own criticisms of it and the reasons for his conclusions. But in this case the learned Sessions Judge has written much more than was necessary. The whole oral evidence in the case occupies only 17 printed pages.

The judgment covers 19 closely printed pages, each of which contains about twice as many words as a page of evidence. In writing such a judgment the learned Sessions Judge has given unnecessary trouble to himself and unnecessary work to those who have to read his judgment.

Beasley, C. J.—I entirely agree and only desire to make a few observations with regard to *Sogaimuthu Padayachi v. Emperor* (2). On the facts of that case I quite agree with Wallace, J., and with Spencer, J., to whom the case was referred on a disagreement between Devadoss and Wallace, JJ., that it was not right to draw the inference that the accused had taken part in the offence of murder merely from the production of the jewels by the accused and their admissions that they had buried them for which matters no explanation was given by the accused; but with the general observations of Spencer, J., and Wallace, J., with regard to whether it is open to the Court to draw such inference in cases where the charge against the accused is not one of theft or of receiving stolen property, I find myself in disagreement with those learned Judges. Wallace, J., has stated that the Court has to be satisfied not merely that the thief could not have come into possession of the property unless murder has been committed but also that he could not have come into possession of the property unless he himself has taken part in the murder or was privy to it. Spencer, J., has stated that, when the unexplained possession of the stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. Wallace, J., qualifies his statement by the use of the words "in such a case"; but Spencer, J.'s observations have no such important qualification. In my view it is not correct to say that the Court is not entitled to draw the inference that the accused committed a murder or was present when it was committed when the accused is found in possession of property proved to have been in the possession of the murdered person at the time of the murder or is able to point

out the place or places where such property is concealed and admits having concealed such property and fails to give any explanation for the possession of those goods or their disposal or such an explanation as can reasonably be accepted. S. 114, Evidence Act, allows the Court to draw inferences of fact and presumptions of fact. That section provides :

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case "

This section therefore entitles the Court to draw any reasonable inference or presumption of fact. It is a matter of common procedure to utilize evidence of this kind and the presumption such as this in connexion not only with theft and the receipt of stolen goods but with more aggravated offences. I propose to refer to two cases only. One of which deals very clearly with the presumption in the case of the offence of receiving stolen property and the other with the presumption in a case of murder ; the former is an English case, viz. *Rex v. Schama* (4). The appellants there were charged with the offence of receiving stolen goods well knowing the same to have been stolen. The evidence for the prosecution established that the appellants were in possession of goods recently stolen and the Judge in directing the jury said :

"It is the duty of the prosecution to prove the case against the prisoners. The burden of proof is on them up to a point, that is to say, they have to prove that the goods were stolen, and the stolen goods were in the hands of these people ; but then the prisoners have to give an account of how the goods came into their possession."

and

"As I said from the beginning the prosecution have to prove that these men were dealing with stolen goods. That they have done. The prisoners are then put to explain how it came that they were dealing with these stolen goods, and to give an explanation which will satisfy twelve reasonable men."

It was held by the Court of criminal appeal that this was misdirection and that the true position was that, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, the jury might convict the

prisoner but that, if an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, the prisoner was entitled to be acquitted inasmuch as the Crown would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. The other case is *Emperor v. Nemetulla* (7). There it was held by Jenkins, C. J., and Sharfuddin, J., that, where in a case of murder blood-stained ornaments were found in the room occupied by the accused and the evidence established that those articles belonged to the deceased, and in the Sessions Judge's charge to the jury there was no direction pointing out that the possession in the case, if believed, was a fact from which the Court might presume not merely theft or receipt of stolen property but also murder with which the accused was charged, that was a serious omission detracting materially from the value of the verdict and opinion of the jurors. Jenkins, C. J., points out in the course of his judgment that it is clear that the inferences and presumptions in criminal cases which are provided for in S. 114, Evidence Act, arise not only in connexion with cases of theft and receipt of stolen goods but also in connexion with other offences.

I have thought it necessary to make these observations which are entirely in agreement with those which have fallen from my learned brother because *Sogaimuthu Padayachi v. Emperor* (2) is constantly quoted in this High Court as an authority for the principle that criminal Courts in the absence of any explanation by the accused can only draw an inference that the accused committed the murder where no other inference is possible. It was not necessary in *Sogaimuthu Padayachi v. Emperor* (2) to lay down any such general principle and for that reason it cannot be accepted as a decision upon this point ; and, for the reasons I have already given, I do not agree with the opinions of the learned Judges on this question in that case.

P.R.S./K.S.

Appeal dismissed.

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A. I. R. 1933 Madras 241

MADHAVAN NAIR, J.

Dwarampudi Basivireddi—Appellant.

v.

Gadi Kamaraju and others—Respondents.

Appeal No. 218 of 1927, Decided on 7th September 1932 against order of Sub-Judge, Narasapur, D/- 10th March 1927, in Appeal No. 127 of 1926.

Mortgage—Moveable property—Mortgagee is entitled to right of sale.

A mortgage of moveable property is valid and decree can be passed in enforcement of that mortgage. A mortgagee of moveable property is entitled to a right of sale quite as much as a mortgagee of immovable property in execution of the decree: 42 Cal 455, *Ref.*

[P 241 C 1; P 242 C 2]

G. Lakshmana—for Appellant.*Ch. Raghava Rao and A. Sundaram Aiyar*—for Respondents.

Judgment.—The point for determination in this Civil Miscellaneous Second Appeal is whether the decree-holder in O. S. No. 296 of 1924 is entitled to take the amount in deposit in preference to the decree-holder in O. S. No. 410 of 1918.

The decree-holder in O. S. No. 410 is the appellant before this Court. In O. S. No. 296, respondent 1 obtained a mortgage decree. The subject matter of the mortgage was immovable property and the crops that may grow on it. The decree stated generally that the decree-holder may realize his decree by sale of the mortgage property. To that decree the present appellant was a party as he also held a mortgage over the same property. He was defendant 3 in the suit. Before the execution of the mortgage decree the present appellant obtained a money decree and brought the standing crops on the property to sale. The mortgagee decree-holder then put in an application stating that the amount brought into Court should be utilized towards the discharge of his decree. His prayer was that the deposit amount may be transferred to his mortgage suit and that meanwhile the said amount may be attached and prevented from being paid to others.

It is undoubted law that a mortgage of moveable property is valid, and a decree can be passed in enforcement of that mortgage. The learned District Munsif held that inasmuch as the mortgage was of immovable property the

decree-holder's right was not to take steps to sell it, but to enforce the lien which alone he has on the moveable property by obtaining a decree for money in a subsequent suit and as the procedure which the decree holder has resorted to was unwarranted in law, he dismissed his application. In appeal the learned Subordinate Judge set aside the order of the District Munsif and ordered execution to proceed.

In this second appeal Mr. Lakshmana has again emphasized the point on which the decision of the District Munsif is based, i. e., his contention is that without obtaining a separate personal decree no execution can be proceeded with against the moveable property. What he states is that a separate suit should be instituted and it is only after obtaining a decree for money that any execution can be taken. In my opinion this contention cannot be accepted. Once a decree for sale of property has been passed, the distinction that part of the mortgage property is moveable and part is immovable is altogether effaced. There is a decree for sale of the mortgage property including the moveable as well as the immovable property and as the decree gives the decree-holder the right to sell, I think without resorting to a separate suit the mortgage property can be brought to sale. Otherwise the position will lead to this complication. Having once obtained a decree for the sale of the property, moveable though it may be, he cannot execute that decree unless he obtains another decree in respect of the same property. A suit for the same relief in those circumstances cannot lie.

There is no direct authority on this point in any decision of the High Court, but a decision in *Mahamaya Debi v. Haridas Haldar* (1) lends support to the conclusion arrived at by the appellate Court. There, there was a mortgage of intangible property and a decree for foreclosure was passed. The learned Judges held that such a decree could be passed and executed. Relying on that decision the learned commentator, Sir D. F. Mulla, in his Civil Procedure Code, says:

"A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immovable property."

1. (1915) 42 Cal 455=27 I C 400.

If a mortgagee of chattels is entitled for foreclosure quite as much as mortgagee of immovable property, I do not see any reason why a mortgagee of moveable property is not entitled to right of sale quite as much as a mortgagee of immovable property.

In this case there is a further difficulty. The present appellant was a party to the decree in the mortgage suit. Even assuming, as is argued on his behalf, that there was only a lien declared by the decree as regards the moveable property, still being a party to the decree, his rights can only be subject to this lien and he cannot be heard now to say that his rights should be recognized first and that the rights of the decree-holder in the mortgage suit should be recognized only later.

In these circumstances I think the order of the lower Court is right and this Civil Miscellaneous Second Appeal is dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 242

RAMESAM AND MOCKETT, JJ.

P. Rajagopala Gramani—Defendant—Appellant.

v.

Baggiammal—Plaintiff—Respondent.

Original Side Appeal No. 59 of 1932, Decided on 11th October 1932, from judgment of Stone, J., D/- 8th August 1932.

Trusts Act (1882), S. 11—Court can sanction reasonable amount for an object unprovided for by the author of trust which is beneficial and essential to beneficiary.

Where an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument arises, the Court would exercise its general administrative jurisdiction on behalf of all the parties interested.

Where the paramount intention of the author of the trust is to benefit his granddaughter, but no provision is made in the deed for her marriage and other ceremonies the Court can sanction a reasonable amount for the expenses of such ceremonies: *New's case*, (1901) 2 Ch. 534; in *Re : Tollemache* (1903) 1 Ch. 955, *Appl.*

[P 243 C 1, 2]

Short, Bewes & Co.—for Appellant.

V. S. Rangachariar—for Respondent.

Ramesam, J.—This is an appeal from the decree of our brother Stone, J., dated 8th August 1932, in Application No. 1879 of 1932 in C. S. No. 137 of 1932. The defendant is the appellant before us.

The facts out of which this appeal arises may be briefly stated. One Raju Gramani executed a deed of trust on 1st September 1919 under which he settled his properties upon trust appointing the defendant, who is his son-in-law by his second wife, as trustee. At the time of his death, he had three houses and had a fixed deposit for a sum of Rs. 50,000 in the Imperial Bank. He provided that one of the houses shall be utilized for the residence of the members of his family, that is, his wife and his daughters until their marriage. The income of the other houses which is said to be Rs. 80 per month was to be utilized by the trustee for paying taxes in respect of the estate, for repairs and for the expenses of his first wife Baggiammal, who is the plaintiff in this suit. After her death, the net income was to be paid over to his son Gnanasundaram and after the death of Gnanasundaram it was to be distributed equally between his children. But if he dies issueless, it was to be distributed equally between the daughters. The interest accruing on the fixed deposit in the Imperial Bank was to be spent similarly. Misunderstandings have arisen between the first wife Baggiammal and the trustee and this suit was filed by Baggiammal against the defendant for the purpose of removing him from trusteeship.

A Judge's summons was taken in this suit by a notice of motion for the purpose of obtaining an interlocutory order from the Court directing the defendant to pay: (1) Rs. 1,500 required for the nuptial ceremonies of the plaintiff's granddaughter, that is, the daughter of Gnanasundaram, including the amount required for the earlier ceremony when she attained age; (2) a sum of Rs. 2,000 required for paying off certain creditors from whom she borrowed for the expenses of her Suits Nos. 268 and 269 of 1931; (3) a sum of Rs. 1,000 required for paying off the decree-holder in S. C. S. No. 2480 of 1931, the plaintiff having borrowed that amount for the marriage expenses of her grand-daughter from one Ratna Bai; and (4) certain miscellaneous items such as maintenance, etc., amounting to Rs. 1,000. Altogether she applies for the payment of Rs. 6,500. The duties of the trustee are defined in the deed of trust already mentioned. No provision was made by the settlor for expenses of suits

between his wife and the trustee, nor has he provided for the expenses of the marriage and nuptials and other ceremonies connected with his granddaughter. It is very difficult to say what exactly he intended. Perhaps he intended that the expenses of the marriage and other ceremonies of the granddaughter were to be defrayed by the wife out of the net income which was to be paid to her, or perhaps it was an oversight on his part. The duties of the trustee are governed by S. 11, Trusts Act, which runs as follows:

"The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal civil Court of original jurisdiction."

In this case Gnanasundaram's children are both minors and other children may be born who are entitled to take under the trust deed. The Court's consent is therefore necessary. S. 11 is based on the well recognized principles of English law. In *In re Walker, Walker v. Dencombe* (1) at p. 885 Farwell, J., observed:

"The question that I have to consider is whether I can on the true construction of this will authorize the trustees to make any expenditure larger than the sum mentioned in the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible. But in considering what is the true construction of the will, it is open to the Court to ascertain if there be a paramount intention expressed in the will, and if so, to consider whether particular directions are properly to be read as subordinate to such paramount intention, or are to be treated as independent positive provisions."

Here there being a paramount intention to benefit the granddaughter, the question is whether the Court cannot sanction expenses for her marriage and other ceremonies as subordinate to that intention. In *New's case* (2) it was held:

"Where . . . there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being sui juris or not yet

in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees,"

and it is said that this principle particularly applies where the estate consists of a business or of shares in a mercantile company. In *Re Tollemache* (3), on appeal from the judgment of Kekewich, J., at p. 457 of the same volume, the Court on appeal affirmed the judgment of Kekewich, J., and dismissed the appeal. Romer, L. J., said:

"*New's case* (2) shews how far the Court will go, and beyond what point it will not go."

Cozens-Hardy, L. J., observed:

"In my opinion *New's case* (2) constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

In Kekewich J's. judgment at p. 457 he enumerated various sub-headings of this extraordinary jurisdiction. The first sub-heading is where an advance was sought out of the capital of the estate for the benefit of a minor who is a beneficiary with a vested or contingent interest. The present case must if at all fall under this heading. The second sub-heading is where a business has got to be continued. The third is where a business is to be sold to a joint stock company. The fourth is where reconstruction of a company is contemplated. The fifth is where mortgages have got to be dealt with. As I already said, the further headings do not help the petitioner in this case: vide also Lewin on Trusts, pp. 319 and 398. Having regard to the principles laid down in the above cited English cases and the provisions of S. 11, Trusts Act, we think we may sanction a reasonable amount for the expenses of the consummation ceremony of the granddaughter. But we think the amount sanctioned by the learned Judge is rather too high. We think it is enough to allow Rs. 750 for the coming of age ceremony and for the consummation ceremony, the amount to be distributed according to the discretion of the grandmother. This amount may be raised by a loan in the Imperial Bank or any other Bank on the security of the fixed deposit receipt at a reasonable rate of interest, and the interest and the principal of the loan should be paid off in monthly instalments of Rs. 50 to be deducted out of the monthly payment to

1. (1901) 1 Ch 879=70 L J Ch 417=84 L T 193=49 W R 394.

2. (1901) 2 Ch 534.

3. (1903) 1 Ch 955=72 L J Ch 539=88 L T 670=51 W R 597.

the plaintiff from the net income. If before the loan is discharged the plaintiff and Gnanasundara die, the balance should be debited against the interest of the granddaughter Chandrambal. But as to the second, third and other items, we are unable to see how these expenses fall within the principles mentioned above.

It is said by the learned advocate for the respondent that the trustee practically consented to the order of the learned Judge. Mr. Brooke Elliot, who appeared before us for the appellant, denies that he ever consented, but on the other hand opposed the petition. He however stated his willingness to obey the directions of the Court. The trustee is of course bound to obey the directions of the Court and a statement to that effect cannot amount to a consent that the plaintiff's application in respect of the various items should be allowed. Even Mr. Krishnaswami Ayyangar does not say that there was any consent that a particular amount should be awarded. Under these circumstances we think that the matter is really left to the Court to decide under S. 11, Trusts Act. The consent of the other beneficiaries will not be necessary. We allow the appeal to the extent indicated above. The plaintiff will pay 2/3rds of the cost of the trustee to be debited against her monthly allowance in instalments. The trustee will reimburse himself in respect of his own costs from the interest on the trust estate. The direction to pay the amount to the advocate will remain.

Mockett, J.—I agree. I must however add that I am satisfied that, whether there was or was not a consent decree in the strict sense, there was no serious opposition to the course adopted by the learned Judge. Previous orders in this trusteeship had been made by several Judges of this Court, all apparently by consent. Now the trustee takes up the correct attitude that the terms of the trust deed must be strictly applied and on that basis informs us that he argued before the learned trial Judge and has now in this appeal through his counsel addressed learned arguments to us based on the provisions of the Indian Trusts Act and certain decisions of the English Chancery Courts. We must of course accept this assurance. I cannot help thinking that the argument before us was

at least a little more emphatic than that addressed to the learned Judge. I do not find in the learned Judge's judgment which has not been printed and which is very brief any indication that the question of importance which is now raised was argued before him. I mention this as I was at one time, during the course of this appeal, of opinion that we ought to send the matter back to the learned trial Judge for decision after argument, but after what Mr. Brooks Elliot has said I concur with my learned brother that as the matter has now been fully argued before us it is better to deal with it here in the interests of saving judicial time.

The facts have been stated by my learned brother and I do not propose to repeat them. It is sufficient to say that in the estate of Raju Grammany deceased, his widow, the plaintiff, is given a life interest, with remainder over to the settlor's son for life and after his death to his children. The widow Baggiam Ammal is now suing to remove the trustee with whom she is quarrelling. In fact she asks for Rs. 1,500 for the nuptial ceremonies of her granddaughter, Rupees 2,000 for paying off creditors from whom she borrowed for the expenses of litigation in 1931 and Rs. 1,000 for paying off a decree-holder. This debt was in respect of money borrowed for the marriage expenses of her granddaughter and miscellaneous items to the extent of Rupees 1,000. She asks that this money should be advanced out of the capital of the trust property. We are told that this widow is an elderly lady. It must be borne in mind that she has a life interest only. There is no specific provision for maintenance or for raising loans in the trust deed. But S. 41, Trusts Act, would appear to give power to the trustee to do this when necessary. That surely must apply to the case of persons having reversionary interest in the capital. S. 11 of the Act deals with the duties of trustees. It will be seen that they are bound to carry out the purpose of the trust except as modified by the consent of all the beneficiaries being competent to contract or where the beneficiary being incompetent to contract, the consent of a principal civil Court of original jurisdiction has been obtained. There is a proviso that nothing in the section requires the trustee to obey any direction

when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries. Now it is clear I think that to raise Rs. 6,500 out of the capital for the purposes for which it is intended in this case to be used is not within the provisions of the Trusts Act. There has been no consent of the beneficiaries competent to contract and it is not suggested the matter was brought to the learned trial Judge on the basis that this was a matter so beneficial or advantageous to the minor beneficiaries that the formal permission of the Court should be obtained. S. 11, Trusts Act, would appear to have been founded on the principles which are specifically stated in *In re New* (2) and I think that the doctrine therein enunciated applies to this country, namely, that :

"where an emergency or a state of circumstances which, it may reasonably be supposed, was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument arises, the Court would exercise its general administrative jurisdiction on behalf of all the parties interested."

As pointed out *New's* case has been held in England now to :

"constitute the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

The judgment of Kekewich, J., in *Re Tollemache* (3) which is approved by the Court of appeal in *Re Tollemache* (4) and which appears to be the leading case on the subject) sets out the grounds on which the extraordinary jurisdiction of the Court would be exercised. I agree with my learned brother that the only payment which has been sanctioned in this case and which can conceivably be brought within that judgment is the amount of the nuptial expenses of the granddaughter who has a contingent interest in the trust. My learned brother considers that Rs. 750 is adequate for the purpose named and I of course agree with him in any estimate of this sort. I also agree with the safeguards which he has named for the protection of the corpus of the trust property against diminution caused by the raising of Rs. 750. I agree that the appeal should be allowed to the extent which this sole payment involves and also with the order proposed as to costs.

P.R.S./K.S. *Appeal partly allowed.*

* A. I. R. 1933 Madras 245

BARDSWELL, J.

Perumal Konan and others—Petitioners.

v.

Tirumalai Machi Reddiar and others—Opposite Parties.

Criminal Revn. Case No. 203 of 1932, and Criminal Revn. Petn. No. 188 of 1932, Decided on 6th September 1932, to revise the order of First Class Sub-divisional Magistrate, Ariyalur, D. - 24th December 1931.

* (a) Criminal P. C. (1898), S. 147 — Dispute as to possession and right to perform puja—Magistrate can deal with latter claim also.

When there is a dispute as to the possession of a temple and the right to perform puja therein the Magistrate can deal with the claim as to the right to perform puja as part of the larger relief that is prayed for. If however it is not so included in the major relief, it is doubtful whether an application under S. 147 can lie merely as to the right to perform puja in a certain temple : 34 I C 651, *Foll.* [P 246 C 1]

(b) Criminal P. C. (1898), S. 145 — Pujari having possession on behalf of trustee cannot set up that that possession is his own.

A trustee has authority over an archaka or pujari even if his post is hereditary. Hence a pujari having possession on behalf of his superior trustee, cannot set up that that possession is his own: 25 Mad 631, *Rel on.*; 2 Weir 107, *List.* [P 246 C 1]

A. V. Narayanasami Ayyar— for Petitioner.

K. S. Jayaram Ayyar and K. G. Srinivasa Ayyar— for Opposite Parties.

Order.—The petitioners put in a petition under Ss. 145 and 147, Criminal P. C., asking that it might be declared that they and their pangalies alone have been in and are entitled to possession of certain temples, and asking that the counter-petitioners may be prohibited from interfering with the exclusive rights of the petitioners and their pangalies to do puja in the said temples. The petition has been dismissed, and the petitioners have come in revision.

There seems to be no reason whatever for interfering with the order under S. 145. The oral evidence on either side is found not to be very satisfactory, but the documentary evidence clearly indicates that the petitioners occupied a subordinate position to C. P. 1 who held the post of trustee. Possession has been found to be with C. P. 1, while such possession as the petitioners had was on his behalf as subordinate to him as such trustee. The learned advocate for the

petitioners on this petition has called to my attention certain authorities, and principally *Baboo Reddi v. Kullappa Nattan* (1), in which it has been held that when there is a dispute between a tenant and a landlord as to actual possession the point cannot be taken that the possession by the tenant is possession by the landlord. But this view has nothing to do with the facts of the present case. It is a matter of the possession of a servant or subordinate being the possession of the person who has authority over him. That a trustee has authority over an archaka or pujari, even if his post is hereditary as petitioners claim theirs to be, is shown by the decision in *Seshadri Aiyangar v. Ranga Bhattar* (2). No authority has been quoted to show that a servant can set up that possession by him for his master or superior is his own possession, or that the master or superior cannot set up that that possession is his own, though exercised for him by the servant.

The next point is as to the application under S. 147. As to this the Magistrate has passed no order perhaps because he thought that what was applied for under S. 147 was included in what was applied for under S. 145. As has been pointed out by Sir William Ayling, J., in *Palaniyandi Pandaram v. Palaniappa Thevan* (3), when there is a dispute as to the possession of a temple and the right to perform puja therein, the Magistrate can deal with the claim as to the right to perform puja as part of the larger relief that is prayed for. If however it is not so included in the major relief, the same decision shows that it is doubtful whether an application under S. 147 can lie merely as to the right to perform puja in a certain temple. As Ayling, J., had pointed out, the wording of the present S. 147 is different from the language of that section in the old Criminal Procedure Code. In the present case then there can be no doubt but that it was competent for the petitioners to make the application under S. 147. I shall therefore refer to it on its merits.

As has been stated above, the petitioners claim a hereditary right to be pujaries in the temples in question, though it does not appear that they were

ever formally appointed to that position; but rather the case appears to be that they assumed the position on the removal of certain other persons who held the office before them though, as they contend, under no right. Be this as it may, the attempt of the petitioners to show that they have a hereditary right has not been established before the Magistrate. Though the Magistrate holds it to be immaterial for the purpose of this case, to find whether the first petitioner was an hereditary pujari or not, he has stated that there was no particle of trustworthy evidence to support the hereditary claim. There he has left the matter. He has also found that the first petitioner—the only petitioner who gave evidence—was such a liar that it was only by mistake that he ever told the truth. The claim, then, of the petitioners in so far as it rests upon a hereditary right has at any rate not been made out before the Magistrate. Nor is it a case in which orders such as those passed in *Baboo Reddi v. Kullappa Nattan* (1) and *Palaniyandi Pandaram v. Palaniappa Thevan* (3) could apply. It is not a case in which the temples have been attached so that no service can be performed such as the public have a right to expect. Nor again is it a case of some one who, though he cannot claim possession of the temple, yet has a right to enter the temple to perform puja therein. The petitioners have established no right at all before the Magistrate. Their case under S. 147 also must therefore fail.

The third point taken is the matter of costs. It has been ordered that the petitioners are to pay the costs incurred by the counter-petitioners, in respect of the witnesses actually examined in Court, and pleader's fee for one advocate at the scale of fees paid to the Public Prosecutor for Crown work. Considering the number of witnesses examined and the number of exhibits filed, and considering also the opinion which the Magistrate has held of the petitioners, I think that both the costs have been properly awarded and that the rate of costs allowed is not excessive. The petition therefore fails throughout and is dismissed.

P.R.S./K.S. *Petition dismissed.*

1. (1881) 2 Weir 107.

2. (1912) 35 Mad 631=10 I C. 548.

3. (1916) 17 Cr L J 235=34 I C. 651.

* A. I. R. 1933 Madras 247

BARDSWELL, J.

Bhogi Reddi Ankamma and others—
Petitioners, In re.

Criminal Revn. Case No. 601 of 1932, Criminal Misc. Petn. No. 783 of 1932 and Criminal Revn. Petn. No. 557 of 1932, Decided on 2nd September 1932, from order of Sess. Judge, Guntur D/-9th August 1932.

(a) Criminal P. C. (1898), S. 439 — Court cannot revise its own order.

A Court cannot revise its own revisional order. Even a High Court cannot do this : 16 I C 518, Ref. [P 248 C 1]

* (b) Criminal P. C. (1898), S. 437—Person committed to Sessions Court for offence under S. 201, I. P. C.—Subsequent examination of witness under S. 219, Criminal P. C., by committing Magistrate—Sessions Judge adding charge under S. 302, I. P. C., also on basis of such evidence—Such charge must be quashed.

An order under S. 437 has to be passed on an examination of the record of any case as it stands at the time when the Judge takes it up for consideration. Accused were committed to the Sessions Court for a charge under S. 201, I. P. C. One of the prosecution witnesses was again called by the committing Magistrate and he was examined under S. 219, Criminal P. C. On the basis of his evidence, a charge under S. 302, I. P. C., was also added.

Held : that the charge under S. 302 must be quashed as the evidence of the witness recorded under S. 219, Criminal P. C., was a later addition by way of supplement to the record and did not form part of it. [P 249 C 1, 2]

* (c) Criminal P. C. (1898), Ss. 226 and 219—S. 226 cannot be applied with reference to additional evidence taken under S. 219.

Section 226 has to do with a charge that is imperfect or erroneous when any person is committed for trial and in order to apply the section the charge must be imperfect or erroneous at the time of commitment. S. 219 provides for the taking of supplementary evidence after commitment but before the trial, and there is no provision that the charge can be altered or a fresh committal order made by the Magistrate of his own motion after the taking of such evidence; and therefore S. 226 cannot be applied with reference to additional evidence taken under S. 219, Criminal P. C. : 32 Cal 22 and A I R 1920 Mad 131, Ref. [P 250 C 2]

K.S. Jayarama Ayyar and G. Gopala-swami—for Petitioners.

Order.—The five petitioners come in revision against the order of the Sessions Judge of Guntur, directing that they stand their trial at the Sessions on a charge of murder in addition to a charge under S. 201, I. P. C., already framed by the committing Magistrate. They ask on various points of law that the commitment on the charge of murder may be quashed. A charge sheet was put in

against them and sixteen others by the Station House Officer, Bapatla, the offences stated being those punishable under Ss. 302 and 201, I. P. C. In the charge sheet the petitioners figured as accused 3, 4, 5, 8 and 16. The Stationary Sub-Magistrate, Guntur, who held the preliminary inquiry discharged sixteen of the accused, including all the petitioners in respect of both offences and, while discharging accused 1 (Ankamma) before him in respect of the offence of murder, framed a charge sheet against him under S. 201 and committed him to the Sessions to stand his trial on that charge. The Sessions Judge, on reading the committal order, issued, on his own motion on 25th July 1932, notice to : (1) accused 1, 4, 6, 7, 9 to 15 and 17 to shew cause why they should not be committed on a charge of murder ; and (2) accused 2, 3, 5, 8 and 16, the present petitioners, to show cause why they should not be committed for offences punishable under Ss. 302 and 201, I. P. C.

After hearing the petition the learned Judge, in his Criminal Revision Proceedings 22 of 1932, of the same date, passed orders that accused 2 should be committed to the Sessions on a charge of murder and that the petitioners should be committed to the Sessions for the offence under S. 201, I. P. C. The Sub-Magistrate committed these several persons to the Sessions accordingly. This also was on 26th July 1932. On 8th August 1932 the Public Prosecutor made an application to the Sessions Judge under S. 338, Criminal P. C., in which he represented the expediency of tendering a conditional pardon to Ankamma (Accused 1) in order that he might be examined as witness against the other accused, whether for the prosecution or on behalf of the Court.

The learned Judge then tendered a pardon to Ankamma, and adjourned the case (S. C. 24/32) against him sine die, and directed that he should be heard as a witness, though not as a prosecution witness, as the right of the prosecution to summon an additional witness, was, to use his own words, "exhausted under S. 219, Criminal P. C." In another order however of the same date he adjourned the case (S. C. 36/32) against the petitioners to 4 p. m. the next day, in order to enable the prosecution to summon Ankamma before the commit-

ting Magistrate under that very S. 219. His reasons for adjourning the case were that, if Ankamma repeated his version, the interests of justice would require that some or all of the petitioners and others should be tried for murder and that some or all of those others should be tried for the offence under S. 201, I. P. C. On the following day 9th August 1932, after Ankamma had been examined as a witness by the committing Magistrate, he passed an order that the charges against the petitioners were to be under S. 302 as well as under S. 201, I. P. C.

One ground on which this order is attacked in revision is that it was a review such as was not within his competence by the Sessions Judge of his revisional order of 26th July 1932. It is not disputed that a Court cannot revise its own revisional order. Even a High Court cannot do this : *Ranga Rao, In re* (1). The learned Judge however has tried to show that in his order of 9th August 1932 he was not revising his earlier order dated 26th July 1932, but only interpreting it; but the learned Public Prosecutor does not try to support a great part of the reasoning by which he tries to show this, nor, indeed, can it be supported.

He sets out that, in his order of 26th July 1932, he should have said merely that he had directed the committing Magistrate to commit accused 3, 4, 5, 8, 16 (petitioners) for trial and that, when he said further that the trial was to be "for the offence under S. 201, I. P. C." those additional words were mere surplusage. At least this is what he clearly means, though he has only underlined the words "S. 201" as being by way of surplusage. That he should have so expressed himself is most astonishing. By the terms of S. 437, Criminal P. C., under which the order of 26th July 1932 must be taken to have been passed, the Sessions Judge may order that a person, who has been improperly discharged by an inferior Court in a case triable exclusively by the Court of Session, be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge, improperly discharged. Obviously the order cannot be confined to a bare direction that the person is to be committed, but must state the matter in

respect of which the commitment is to be made. It is true that S. 437 does not say that the commitment is to be on a specific charge, but the very sections in Ch. 28 on which the learned Judge relies in support of his view show that a Magistrate, in committing any person to the Sessions, has to frame against him a charge showing with what offence he is charged. It was under Ch. 28 that the Magistrate had to make the commitment. Indeed I cannot follow the line of argument of the Sessions Judge in this connexion, nor has any attempt been made to explain it. He says, with a strange confusion of tenses:

"the committing Magistrate framed a charge under S. 210 and he cancels it under S. 213 (2) Criminal P. C., but when he commits under S. 213 (1), Criminal P. C., he merely commits the accused for trial without being under any obligation to commit accused for trial for any particular offence. If he refers to any particular offence, with reference to his committal, the reference is surplusage."

Why he should have at all dragged in S. 213 (2) is past my imagining. The Magistrate in this case has not cancelled any charge and, had he done so, under the provisions of S. 213 (2), there would of course have remained nothing left on which the petitioners could be committed. It almost seems as if the learned Judge thought that, because S. 218 comes later than S. 213 (2), it is somehow affected by it, so that for the purposes of applying S. 218, the Magistrate's action in framing a charge as required by S. 210 is washed out. It is only by taking it that he had some such idea in his head that I can understand his making the further remark that

"the distinction between the framing of a charge by the committing Magistrate and the committal made by him may be seen in Form No. 33 of the Criminal Rules of Practice,"

though what he means by this is beyond me. S. 210 provides that, when the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged, while in Form 33, which is the form to be used when applying S. 218, there have to be stated the offence in respect of which there is a charge against the accused; and S. 218 itself is even more explicit. By it when an accused is committed for trial a notification has to be sent by the Magistrate to the person appointed by

the local Government on that behalf, in which the offence is to be stated in the same form as the charge, and the charge together with the record of inquiry, is to be sent to the Court of Session. The word "charge" in this section can only mean the charge framed as provided by S. 243. It is clear then that the Magistrate in committing the petitioners had to frame a charge showing of what offence they were accused, and this is what he has, in fact, done in framing a charge against them under S. 201, I. P. C., in accordance with the Sessions Judge's revisional order of 26th July 1932. Mr. Bewes tries to support that part of the learned Judge's order under review in which it is stated:

"I must find that I did not accept the discharge of the present accused 1 to 6 (petitioners) by the committing Magistrate as regards S. 302 as final, on grounds other than those on which the Judge has himself based his finding."

Mr. Bewes points out that there was a notice issued to the petitioners to show cause why they should not be committed to the Sessions for offences under both Ss. 201 and 302, I. P. C., and argues that as the order of 26th July 1932, while directing this committal under S. 201, I. P. C., did not specifically discharge the notice as against them in respect of S. 302, there was not a definite disposal of that notice as regards the charge of murder. Even however, assuming, without allowing, that it was open to the learned Judge to make such a reservation while passing what was on the face of it a final order, and that he did, in fact, make such a reservation, I cannot find that in any way justifies his order of 9th August 1932 against the petitioners. An order under S. 437 has to be passed on an examination of the record of any case; and so any order passed by the learned Judge, in pursuance of his notice to the petitioners to show cause, could only be with reference to the record as it stood at the time when he took it up for consideration. The evidence of Ankamma, recorded under S. 219 was a later addition by way of supplement to that record and by no means a part of it. I understand the learned Public Prosecutor to concede, at least, that there would have been no committal of the petitioners for murder without the evidence of Ankamma, and that such is the case is, indeed, plain from what

the learned Judge has stated in his earlier revisional order. He doubted very seriously whether certain statements made by Ankamma as an accused party could be used in evidence against his fellow accused, and found that the evidence of P. Ws. 10, 13 and 14, the only other witnesses against the petitioners, justified a charge against them only under S. 201, I. P. C. It is evident, then, from his order now under review that it was because of the additional evidence of Ankamma that he directed that the petitioners should be charged with murder. That order, then, was not based on the record as it stood before him either when he initiated proceedings under S. 435, Criminal P. C., or at the time of his passing the order itself under S. 437, and it is therefore unsustainable. The learned Judge has given, as another reason for holding that his order of 26th July 1932 against the petitioners was not final, that he wound up the order thus:

"I hope that eventually further investigation will disclose who the offenders beside accused 2, are in respect of the charge of murder."

But the taking from Ankamma on oath of a statement in consonance with what he had previously stated, without being sworn to it, as an accused, can hardly be regarded as a further investigation, while anything that came out in a further investigation, could not be part of the record as it then stood before the Sessions Judge. Investigation, too, I may note, normally means investigation by the police. My conclusion, then, is that the order of the learned Judge now under review cannot be upheld, as far as it is considered as having been passed under S. 437, Criminal P. C. I have next to consider whether the framing of the additional charge of murder can be justified under the terms of S. 226, Criminal P. C. By that section, when any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court may frame a charge, or add to or otherwise alter the charge, as may be, having regard to the rules contained in the Code as to the form of charges. The learned Judge has referred to this section also and has observed that, once the Sessions Court has seisin by virtue of the committal, it can frame any charge that arises on the evidence adduced in the committing Magis-

trate's Court. Now, in the present case, the petitioners have certainly not been committed for trial without a charge, neither can it be said, with reference to the evidence, to which I have already alluded, that was available at the time of the committal, that they were committed with an imperfect or erroneous charge. The absence of any such defect is clearer here than in *Queen-Empress v. Kharga* (2), which has been brought to my notice. Reference has also to be made to *Rama Varma Raja v. The Queen* (3).

In that decision it is pointed out that a Court of Session has power, when the accused has been committed without a charge at all, or upon a charge which the Court, upon a reference to the proceedings before the committing Magistrate, considers improper, to draw up a charge for any offence which it considers proved by the evidence taken before the committing Magistrate. A charge which was added by the Sessions Court and which could not be supported by the evidence taken by the Magistrate was found to have been framed ultra vires. It is true that in the same case it was found that there was no evidence taken by the Magistrate which would have supported the charge that was framed, whereas here, after the examination of Ankamma under S. 219, there is evidence, taken by the Magistrate, on which the charge of murder might be supported. But in the circumstances of that case the evidence taken by the Magistrate could only have been the evidence taken up to the time of committal, as the additional witness on the strength of whose evidence the conviction on the added charge could alone be sustained, was not at all examined by the Magistrate, but only at the Sessions. The decision does not deal with S. 219, because, in the circumstances, it had no occasion to do so, but so far as it goes it does not, as I read it, encourage the idea that S. 226 can be applied with reference to additional evidence taken under S. 219. I may note that the additional charge in that case was framed before the additional witness was examined and so it was added, or purported to be added, under S. 226. S. 227, which has to be read with S. 237, can only apply after some evidence has been taken at the trial in the Sessions

Court. I have not now to consider the applicability of that section as the stage for applying it, if it can be applied at all, has not been reached. There appears to be no decision as to the effect upon S. 226 of additional evidence recorded under S. 219; but, without any authority, it seems clear enough that, as contended by Mr. Jayarama Ayyar, its effect upon that section must be nil.

Section 226 has to do with a charge that is imperfect or erroneous when any person is committed for trial, and this, I take it, can only mean that, for it to apply, the charge must be imperfect or erroneous at the time of commitment. S. 219 provides for the taking of supplementary evidence after commitment but before the trial, and there is no provision that the charge can be altered or a fresh committal order made by the Magistrate of his own motion, after the taking of such evidence. And so, though the additional evidence may be, and in this case has been, recorded by the committing Magistrate, it forms no part of the record upon which the accused has been, or could have been, committed for trial. Though it has no bearing upon the effect of S. 219, I may here refer, for the purpose of showing the general principle, to *Birendra Lal Bhaduri v. Emperor* (4), in which it is pointed out that:

"the Sessions Court is not a Court of original jurisdiction and, though vested with large powers for amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matter not covered by the indictment."

This statement of principle has been quoted with approval in *Muhtu Goundan v. Emperor* (5). I must hold that the learned Sessions Judge was not authorized under S. 226 in framing the additional charge of murder against the petitioners, in that the charge against them at the time of their commitment was neither imperfect nor erroneous. As I have remarked above the question of whether the additional charge of murder can be framed later on on the strength of S. 227, is not a matter with which I have now to deal. I do not therefore discuss some rulings bearing on that section which have been quoted in the course of the argument on the petition.

4. (1905) 32 Cal 22=S C W N 784=1 Cr L J 794.

5. A I R 1920 Mad 131=54 I C 21=21 Cr L J 57.

2. (1886) 8 All 665=(1886) A W N 254.

3. (1881) 3 Mad 351=2 Weir 269.

Another point that has been taken for the petitioners is that the committing Magistrate was not warranted in law in recording the evidence of Ankamma under S. 219, and that the Sessions Judge should not have ordered him to take it. I do not however find that the learned Judge ordered the Magistrate to record this evidence. What he did was to allow time to the prosecution to examine Ankamma before the committing Magistrate. I must take it that the Magistrate was asked to record the evidence of Ankamma and that he recorded it because he thought fit to do so. This would be in accordance with S. 219 and as I see no reason to think that the provisions of that section were not complied with, the petitioners fail on the point. As however they have succeeded on the other points, I quash the charge against them under S. 302, leaving open the matter of whether that charge can be added later on under S. 227.

P.R.S./K.S. Order accordingly.

*** A. I. R. 1933 Madras 251 (1)**

BURN, J.

Bhogole China Somayya and others—
Accused—Petitioners, In re.

Criminal Revn. Case No. 489 of 1932 and Criminal Revn. Petn. No. 485 of 1932, Decided on D/- 13th October 1932.

*** Criminal P. C. (1898), S. 367 — Judgment signed but not pronounced by Magistrate—Judgment pronounced by successor of such Magistrate — Accused is not entitled to de novo trial.**

The trial of a criminal case is over as soon as the Magistrate has determined the issue of the guilt or innocence of the accused. The mere pronouncing of the judgment is not a part of the trial.

Where a Magistrate who signs a judgment but does not pronounce it is transferred and the judgment is pronounced by his successor there is no irregularity, much less illegality, and the accused is not entitled to a de novo trial: *A I R 1929 Mad 201* and *18 M L J 197, Rel on.*; *40 Mad 103*; *A I R 1920 Mad 337* and *27 Mad 510, Ref.* [P 251 C 2]

V. Suryanarayana—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The case was finished on 17th March 1932, and adjourned on that date to 22nd March 1932, for judgment. The judgment was signed and dated by the Magistrate on 22nd March 1932, but was not pronounced by him because some of the accused were absent. On 31st March

1932 the Magistrate who wrote the judgment handed it over to his successor, who pronounced the judgment on 4th April. I respectfully agree with the reasoning and conclusion of Reilly, J., in *Public Prosecutor, Madras v. Chockalingam Ambalam* (1). The trial was over before the petitioners made their application, on 4th April, for a de novo trial. In whatever sense the word "trial" is used [*In re Savrimuthu Pillai* (2), *Venkatachinnayya v. Emperor* (3) and *In the matter of Ramasamy Chetty* (4)] it is clear that the trial of a criminal case is over as soon as the Magistrate has determined the issue of the guilt or innocence of the accused. The mere pronouncing of the judgment is not a part of the trial. Hence in my opinion the petitioners in this case were not entitled to a de novo trial and there was no irregularity, much less illegality, in the pronouncement of judgment by the successor of the Magistrate who wrote it: *In re Sankara Pillai* (5).

On the merits little is to be said. It is contended that the learned Subdivisional Magistrate has not given findings as to the common object of the petitioners, their bona fides and so forth. I agree with the learned Public Prosecutor that the findings on these points are sufficiently well indicated in the judgment of the appellate Court. The sentences are not excessive. This petition is dismissed.

P.R.S./K.S.

Petition dismissed.

1. *A I R 1929 Mad 201=118 I C 374=30 Cr L J 903=52 Mad 355.*
2. *(1916) 40 Mad 103=17 Cr L J 163=33 I C 646.*
3. *A I R 1920 Mad 337=53 I C 50=21 Cr L J 402=43 Mad 511 (F B).*
4. *(1904) 27 Mad. 510=1 Weir 787.*
5. *(1908) 18 M L J 197=7 Cr L J 450.*

*** A. I. R. 1933 Madras 251 (2)**

PANDALAI, J.

Vancheswara Sastri—Petitioner.

v.

Narayana Ayyar—Opposite Party.

Civil Revn. Petn. No. 1052 of 1929, Decided on 14th September 1932, from order of Sub-Judge, Ottapalam.

*** (a) Limitation Act (1908), S. 19—Promissory note insufficiently stamped containing acknowledgment of prior liability is admissible to save limitation.**

A promissory note which was insufficiently stamped ran as follows: "I have received full consideration by adjustment of the sums which I owe you, namely, Rs. 300 due to you by me on

the occasion of your marriage with my granddaughter for her jewels; Rs. 200 due for cloths, silks and vessels for the sixth month ceremony and nuptials."

Held: that the former part of the instrument which is the promissory note is inadmissible as it is insufficiently stamped, but that the latter part contains an express acknowledgment of a prior liability and is admissible as such to save limitation. [P 252 C 1]

(b) Limitation Act (1908), S. 20 — No agreement to pay interest in contract—Subsequent entry as to payment of interest saves limitation.

An entry as to payment of interest, even though there is no agreement at the time of contract, will save limitation because it is enough if there is a subsequent agreement for interest to which the actual payment of interest is the best evidence. [P 252 C 1]

S. Venkatachala Sastri — for Petitioner.

C. S. Swaminathan — for Opposite Party.

Judgment.—This case is fully covered by the decision in *Rakkapan v. Surppiah* (1). Here as in that case the promissory note dated 14th May 1924 consists of two parts and is as follows:

"Rupees 500.—I, Narayana Iyer, son of Vanchi Patter of Kavaseeri Ottupura Gramam, hereby promise to pay Vancheswara Sastri, son of Gopal-krishna Pattar of Kavasseri Ottupura Gramam, or order, the above sum, Rs. 500, with interest at 7½ per cent per annum; I have received full consideration by adjustment of the sums which I owe you, namely, Rs. 200, due to you by me on the occasion of your marriage with Laxmi my granddaughter for her jewels; Rs. 200 due for cloths, silks and vessels for the sixth month ceremony and nuptials."

The former part of the instrument which is the promissory note is inadmissible as it is insufficiently stamped. But the latter part contains an express acknowledgment of a prior liability and is admissible as such to save limitation. It is found that on 2nd May 1926 the defendant signed an entry on the promissory note, written in the handwriting of his son, stating that in April 1925 Rs. 25 has been sent by money order and that Rs. 12-8-0 was paid on that date making up Rs. 37-8-0 on account of interest for one year.

The learned Subordinate Judge says that this entry does not save limitation as a payment of interest because there was no agreement for interest at the time of the marriage and the nuptials and sixth-month ceremony. He is clearly wrong because it is enough if there was any subsequent agreement for interest as to which the payment itself

is the best evidence. The suit was clearly in time. The decree of the lower Court is set aside and there will be a decree as prayed with costs in both Courts.

P.R.S./K.S.

Decree set aside.

A. I. R. 1933 Madras 252

ANANTAKRISHNA AYYAR, J.

M. Kunju Nair — Plaintiff — Petitioner.

v.

Narayanan Nair—Defendant—Opposite Party.

Civil Revn. Petn. No. 822 of 1929, Decided on 29th April 1932, against decree of Dist. Munsif, Palghat, in S. C. S. No. 1485 of 1928.

Malabar Law — Chit fund — Stipulation making prize winners liable to pay all future instalments on default is not penal — Contract Act (1872), S. 74.

A particular stipulation in a kuriwari may be of the nature of a penalty. But the provision to pay all the future instalments in a lump sum in the case of default by a prize-winner in payment of any instalment provided for by the kuriwari is by itself not a penalty : *Case law discussed.*

[P 255 C 2]

C. Unnikanda Memon—for Petitioner.

P. A. Krishnankutti Nair—for Opposite Party.

Judgment. — The plaintiff in Small Cause Suit No. 1498 of 1925, on the file of the District Munsif of Palghat, is the petitioner in this civil revision petition. He started a kuri in which the defendant took one ticket. The defendant bid in auction and was paid the amount due. As per the kuriwari Ex. B and the receipt Ex. C (executed by the defendant to the plaintiff when he was paid the amount of the auction), the defendant was bound to pay the future instalments regularly ; but having made default, the plaintiff sued to recover the whole of the future instalments at once. The defendant pleaded that the plaintiff was not entitled to claim the future subscriptions in one lump sum. The main point for determination was whether the plaintiff was entitled to claim the amounts of the future instalments in one lump sum. There was no oral evidence in the case, neither the plaintiff nor the defendant having gone into the box nor adduced any oral evidence. The only exhibits filed in the case were : Ex. A, the registered notice sent by the plaintiff's wakil to the defendant prior to this suit demanding the amount ; Ex. B the kuri-

wari (the rules and conditions of the kuri) ; and Ex. C, the receipt granted by the defendant when he was paid the prize money when he bid at the auction. The learned District Munsif held (1) that under the terms of the kuriwari, the plaintiff was not entitled to claim all the future instalments in a lump sum, and (2) that

"in any case the plaintiff can only claim the subscriptions which have actually become due."

The plaintiff's suit was decreed with reference to the amounts due for the instalments which fell due up to the date of the plaint, and the claim for the other instalments was disallowed. The plaintiff has preferred this revision petition claiming the whole of the future instalments in a lump sum, the default by the defendant having been found by the lower Court. On a construction of the kuriwari, I have no reasonable doubt on the first point. Para. 6 of the kuriwari Ex. B runs as follows :

"The person who bids and receives moneys is to pay his subscription on the same date of auction to the stake-holder, and cause entries thereof to be made in his book by the stake-holder. If default has been made thereof, it is to be paid within five days at a profit of four annas in the rupee, and if default is made even in that, the stake-holder is entitled to recover all the amounts to be paid in future together in a lump sum with interest at 2 per cent per mensem."

The provision is clear that when the defendant made default in the payment of subscriptions for two consecutive instalments according to the finding in the present case, the plaintiff, the stakeholder, was entitled to recover the whole of the amounts due for all the future instalments. Whether the provision is valid or not (a question to be considered presently) it is clear that there is such a provision in the kuriwari. The learned advocate for the respondent did not seriously contest this position, and I think that the learned District Munsif was not right in his construction of the kuriwari. I hold that the terms of the kuriwari provide that the plaintiff would be entitled to recover all the amounts due for all the future instalments in this case.

The second question which was fully argued before me by the learned advocates who appeared in the case is whether such a stipulation is valid and whether the plaintiff is entitled to enforce that provision. On that point also I am unable to agree with the decision of the lower Court. As the question is one

likely to arise frequently in practice having regard to the prevalence of kuries (chit funds) in Malabar and some other Districts in the Presidency, I think it is better that I just mention the line of reasoning which has led me to arrive at my conclusion. The plaintiff is the stake-holder called kuttimooan in Malabar, and karaswan in some other districts. The kuri is to consist of 50 tickets of the value of Rs. 6 each. There was to be an auction once in every month. The stake-holder is to collect moneys from the ticket holders, and he is himself responsible to pay the amount bid in auction to the successful bidder. The auction bidder is to be paid the amount of the bid by the stake-holder within 15 days on furnishing sufficient security or surety to the satisfaction of the stake-holder. If sufficient security be not furnished, the stake-holder is to deposit the amount bid in auction in a particular bank in the stake-holder's name. The future instalments are to be paid by the stake-holder from out of the said deposit and any deficiency is to be recovered by the stake-holder from the subscriber in question. If there be no subscribers who were prepared to bid in an auction, then tickets that yet remain to be drawn were to be drawn by the casting of lots and the subscriber in whose name the ticket happened to be drawn has to be paid the amount after deducting Rs. 15 which is to be taken by the stake-holder as his remuneration for his pains.

The stake-holder and the subscriber have signed the kuriwari. Except that the stake-holder is allowed to take Rs. 15 out of the collections every month for his pains, the rules of this kuriwari are substantially the same as those which find a place in the ordinary kuries, as seen, for example, from the kuriwaris set out in the cases reported in *Panchena Manchu Nayar v. G. K. Padmanabhan Nayar* (1) and *Vasudevan Nambudri v. Mammad* (2). The question is whether in the absence of any special circumstances, the stake-holder is entitled to recover the amounts due for all the future instalments in case there was default in paying any future instalment as provided in the kuriwari. It was argued that such a stipulation is in the nature

1. (1897) 20 Mad 68=7 M L J 26.

2. (1899) 22 Mad. 212.

of a penalty and that the stake-holder is only entitled to a decree in respect of the amounts due for the instalments that have actually fallen due, with interest, but that he is not entitled to a decree for anything more. As the matter has come before the Courts on various occasions, I think it will be convenient to note how the Courts have viewed similar provisions of such kuriwaris. In *Periasami Thalevar v. Subramanian Asari* (3), Benson and Bhashyam Ayyangar, JJ., had before them a case "where under the terms of a bond executed to the stake-holders of a certain chit fund the obligor bound himself to pay 27 cottas of paddy in certain instalments, and, that on default, to pay one-sixteenth cotta per cotta per diem for interest from date of default."

The Court held that "the stipulation was not unenforceable." The learned Judges observed as follows:

"There is no allegation that the defendant did not enter into the transaction with his eyes open, or was deceived as to its terms. The bond was entered into in accordance with the rules of the chit fund, which are not in any way illegal. There is no ground for not allowing the rule to be given effect to."

No doubt the question before the Court then was not exactly the same as the one before me. But the observations are useful as throwing light on the general nature of the bonds entered into between ticket holders and the stake-holder in chit funds. In *Vaithinatha Iyer v. Govindasami Odayar* (4), Oldfield and Ramesam, JJ., had more directly to consider the effect of similar provisions in kuriwaris. At p. 557 (of 42 M L J), the learned Judge observed as follows:

"Throughout the whole of the lower Court's judgment we find no mention of the special relation in which the stake-holder of the chit is to the subscribers, and the special necessity for provision for protection of his interest in the agreement by which these relations are regulated. That this relation is of a special nature and justifies stringency in those conditions and in particular in the rate of interest provided for cases of default has been clearly recognized in the decisions with which we respectfully agree. The stake-holder has necessarily to depend on punctual payments from his subscribers and to reserve to himself powers to enforce such payments. For the stake-holder alone is liable to each subscriber and there is no liability between the subscribers inter se and without punctual payments by the individual subscribers, the stake-holder could not discharge his liabilities to the successful bidders, as they arose Looking at the transaction as a whole as defined by Ex. A we are unable to hold that any of the

conditions are unreasonable or are such as the parties might not naturally recognize should regulate the exceptional relations between them. Generally therefore we cannot treat any of them as penal."

In *Ayya Patter v. A. Manakkal Karnavan* (5), Abdur Rahim and Spencer, JJ., observed as follows:

"Generally speaking and apart from the conduct of the parties in this case we should say that time in such transaction is of the very essence of the contract."

In *Sankunni Menon v. The Empire of India Life Insurance Co. Ltd., Bombay* (6), Venkatasubba Rao, J., remarked at p. 394 (of 61 M L J) as follows:

"What may be construed as a penalty in the case of an ordinary loan, is not necessarily a penalty in the case of a chit fund transaction. That is the effect of the decision in *Vaithinatha Iyer v. Govindasami Odayar* (4). It is there pointed out that in the case of a stake-holder of a chit, his relation to the subscribers being of a special nature, special necessity exists justifying stringent provisions to protect his interest. The learned Judges observed: 'Without punctual payments by the individual subscribers, the stake-holder could not discharge his liabilities to the successful bidders as they arose.' Such remarks will apply with greater force to the contract of insurance."

One may refer also to contracts of hire purchase. In *Ellammal v. Venkataramana Rao* (7), Spencer and Devadoss, JJ., held that "time was of the essence of the contract in such cases."

It is true, as held by Ramesam, J., in *Muthukumaraswami Pillai v. Subramania Chettiar* (8), that it could not be said that the doctrine of penalty would not apply at all under any circumstances to provisions in a kuriwari. In the words of the learned Judge, "the terms of a chit fund contract may be penal." But I do not understand the learned Judge to say that a stipulation to pay the whole of the future instalments in a lump sum in case of default in payment of an instalment as provided in the kuriwari should be considered as a penalty and should always be relieved against. I have gone through the judgment of the learned Judge, and I do not think that the learned Judge meant to decide that question. This is what the learned Judge says:

"The second point argued before me is that the conditions of the bond are penal. Under this point he (the defendant) raises two ques-

5. A I R 1920 Mad 822=52 I C 938.

6. A I R 1932 Mad 241=134 I C 977=61 M L J 388.

7. A I R 1924 Mad 796=79 I C 958.

8. A I R 1927 Mad 1105=102 I C 14.

3. (1904) 14 M L J 136.

4. A I R 1922 Mad 67=67 I C 995=42 M L J 551.

tions. The first is that the rate of interest payable in default is penal, and secondly, the stipulation relating to payment of all the future instalments on two defaults is also penal. Mr. Patanjali Sastri appearing for the respondent argues that the second point was really not raised either in the written statement or in the issues. It was raised very vaguely in the written statement. It is true it is not raised in the issues. Defendant 4's conduct in depositing the amount of the instalments 6 to 21 with interest at 12 per cent from the date of the 6th call up to 17th August 1920, namely, Rs. 1,746, seems to suggest that he intended to raise no question about the advancing for the payment of instalments 6 to 21. The suit was filed on 8th September 1920. By that date instalments 6 to 13 had fallen overdue, and 14 to 21 had not. Even assuming that the stipulation about the payment of all the instalments on defaults is penal, there is nothing to prevent defendants from paying and the plaintiff from accepting the amount of instalments 14 to 21 before their time. The only question is whether the amount of interest which he has paid for these instalments, namely, Rs. 546, was too much, if it is regarded as the amount of interest only on instalments 6 to 13. One thing is clear, that he was quite content to get rid of the obligation to pay instalments 6 to 21 by paying an interest of Rs. 546 for them, whichever way the figure may be arrived at."

The learned Judge's decision was really only on the question of the amount of interest that the plaintiff was entitled to, in the peculiar circumstances of that case. There was a Letters Patent Appeal (L. P. A. No. 199 of 1927) preferred against the learned Judge's judgment by the plaintiff. The learned Judge's decision on the question of interest was confirmed in the circumstances but the plaintiff was given a decree in respect of the future instalments also. The District Munsif had passed a decree in respect of all the other instalments, in regard to which the defendant had preferred an appeal. Accordingly, by the decision in the Letters Patent appeal the amount fixed in the decree in S. A. No. 563 of 1925 was added to the amount due under the District Munsif's decree.

I have thought it necessary to quote the relevant passages from the judgment of the learned Judge, as it was strongly pressed upon me by the learned advocate for the respondent that the question before me was decided by the learned Judge in *Muthu Kumaraswami Pillay v. Subramania Chettiar* (8), in favour of the respondent's contention. But from what I have said above, it seems to me that the learned Judge's judgment in this case is no authority in favour of the contention that a provision in a

kuriwari to pay all the future instalments in case of default of payment of one instalment, should always be treated as penal and relieved against. In fact that learned Judge sitting with Oldfield, J., had decided the contrary in the case reported as *Vaithinatha Iyer v. Govindasami Odayar* (4), and there is no reason to think that the learned Judge was inclined to withdraw from the position taken up in that case, as was contended before me by the learned advocate for the respondent.

The learned advocate for the respondent strongly relied on two decisions of V. V. Srinivasa Ayyangar, J., reported as *Ramalinga Adaviar v. Meenakshisundaram Pillai* (9) and *Subbiah Pillai v. Shanmuga Pillai* (10). As those decisions have been recently considered at length by Curgenvin, J., in S. A. No. 921 of 1926, I do not purpose to go into them in detail. The learned Judge—Curgenvin, J.—after discussing the questions whether such a case would fall under Illus. (f) or Illus. (g), S. 74, Contract Act came to the following conclusion :

"I can see no reason therefore for not following the decision in *Vaithinatha Iyer v. Govindasami Odayar* (4), which sitting singly I should feel bound either to follow, or to refer this case to a Bench. I conclude that the claim to the principal should be allowed in full."

The case before the learned Judge was also a case of a chit fund, and it was held that a stipulation for payment of the entire amount of the future instalments on default in payment of one, was not a stipulation by way of penalty. As already mentioned, particular stipulation in a kuriwari may be of the nature of a penalty, as observed by Ramesam, J., in *Muthu Kumara Swami Pillay v. Subramania Chettiar* (8) : see also the decision of the Full Bench in *Avathani Muthu Krishnier v. Sankaralingam Pillai* (11). But the provision to pay all the future instalments in a lump sum in the case of default by a prize winner in payment of any instalment, provided for by the kuriwari has been held in a number of cases in this Court to be by itself not a penalty.

The decision of Odgers and Curgenvin, JJ., in *V. Tatayya v. K. Gangayya*, (12).

9. A I R 1925 Mad 177=85 I C 261.

10. A I R 1928 Mad 245=108 I C 319.

11. (1913) 36 Mad 229=18 I C 417 (F B).

12. A I R 1927 Mad 965=105 I C 789.

was also referred to. But that was not a case of a chit fund, but of a decree incorporating a razinama between the parties, and the Court held that the provision that in default of payment of any one of the instalments, the plaintiff could recover, irrespective of the future instalments, the entire amount of principal and interest that remained outstanding by that date, was not in the nature of a penalty under S. 74, Contract Act. As the question has been discussed in the cases already quoted by me, I propose only to give reference to the decision of the House of Lords in *Wallingford v. Director of the Mutual Society* (13), of the Court of appeal in England in *Protector Loan Co. v. Grice* (14), and of the Irish Court: *In the matter of O. B.: An Arranging Debtor* (15). In 13 Halsbury's Laws of England, p. 152, para. 179, there are the following observations which seem to be relevant to the present case:

"Where money is actually payable or to become payable, a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complies with the terms he is entitled to the benefit of the provisions. But he must purchase the benefit by strict compliance with the terms; and if he is in default the full debt is payable and he cannot claim relief as against a penalty. Upon this principle when a higher rate of interest has been stipulated for in a mortgage, interest at a lower rate may be substituted on condition of punctual payment; and where a debt is payable by instalments, a stipulation that on nonpayment of any instalment the entire debt shall become due is not in the nature of a penalty: see also para. 1325, at p. 555, of Story on Equity, 3rd Edn., by A. E. Rendall."

In essence the transaction before me is a loan of a common fund to one member. The member to whom the loan is to be advanced is selected either by casting of lots or by other means. The person who offers the highest discount is in some cases selected as the person entitled to the loan of the common fund. But the amount advanced to such member is a loan, and the common fund is lent to each subscriber in turn. As observed by Scotland, C. J., and Frere, J., in *Kamakshi Achari v. Appavu Pillai* (16):

13. (1880) 5 A C 685=50 L J Q B 49=20 W R S1=43 L T 258.

14. (1880) 5 Q B D 592=49 L J Q B S12=43 L T 564=45 J P 172.

15. (1917) 2 Ir L R 354.

16. (1862) 1 M H C R 418.

"It is simply a loan of the common fund to each subscriber in turn."

These remarks were made in 1863. It is really a debt in praesenti but to be paid by particular instalments if certain conditions be duly observed, but otherwise to be paid up at once irrespective of the benefit of time and instalments. It has been so viewed in this Presidency for a long time. English Courts have held that in such cases no question of penalty arises: see the observations of Lord Selborne, at p. 696, of Lord Blackburn at p. 705 and of Lord Watson, at p. 710. With reference to the general nature of such kuri transaction, I may quote the following observations of Benson and Sundara Ayyar, JJ., in Appeal No. 218 of 1911. The learned Judges say:

"the kuri as a well-known institution in Malabar and is resorted to help thrifty persons for the purpose of their investing savings with good chances of profit."

As kuri transactions are common in the States of Travancore and Cochin also, I just wanted to see how the Courts in those States have dealt with such a matter. Such transactions are in Travancore called chitty-transactions and I find that the Travancore High Court has held that "a stipulation of the kind in a chitty bond is not penal": see *Venkatusubrahmaniam Ayyar v. Velayudham* (17) and *Krishnan Raman v. Raman Aiyappan* (18), (which latter case refers at p. 55 to a Full Bench decision of that Court to the same effect) and 44 T. L. R. 461. The Chief Court of Cochin has also taken the same view: see 7 *Cochin Law Reports* 309, where it is remarked as follows:

"When regard is had to the nature of a kuri, it is impossible to regard such a provision as a penalty."

I do not feel called upon in the circumstances to refer this question to a Bench. I may note that no question has been argued before me whether the provision in this kuriwari relating to interest is penal or not, and so it is not necessary for me to give any opinion on that point in this case. For the above reasons I think that the learned District Munsif was in error in this case in holding that the plaintiff, the stakeholder was not entitled to the amounts due for all the instalments together, and his decree will be modified by giving the

17. 15 Trav L R 182.

18. 22 Trav L R 52.

plaintiff a decree for the whole of the amount sued for, together with interest at 6 per cent from date of plaint till date of payment, with costs in this and in the lower Court.

P.R.S./R.K. *Decree modified.*

A. I. R. 1933 Madras 257

SUNDARAM CHETTY, J.

S. R. M. Annamalai Chettiar—Defendant—Appellant.

v.

Rama Narasimhulu Naidu and another—Plaintiffs—Respondents.

Second Appeals Nos. 727 and 728 of 1930, Decided on 30th October 1932, against decrees of Dist. Judge, Chittoor, in Appeal Suits Nos. 133 and 134 of 1928.

Madras Estates Land Act (1908), S. 13 (3)—Raiyat digging well in patta land at his sole expense—Landlord cannot charge higher rate of rent.

Where the raiyat sinks a well in his patta land for the supply of water for agricultural purposes at his sole expense, the landlord is not entitled to charge higher rate of rent on account of any increase of production by virtue of S. 13 (3); nor can the landlord be regarded as having contributed something towards the improvement by reason of the fact that he loses the chance of recovering any rent on the area of the site covered by the well. The landlord can claim like that if the well is dug in poramboke land : 27 I. C. 869, Dist. [P 258 C 1]

B. Somayya and V. Satyanarayana—for Appellant.

S. A. Seshadri—for Respondents.

Judgment.—These are connected second appeals arising out of two suits filed by two raiyats against the landholder for grant of patta under S. 55, Madras Estates Land Act, for fasli 1336. The main point argued is whether the plaintiffs have effected any improvements at their sole expense within the meaning of S. 13, Cl. 3 of the said Act in some of the dry lands in question, and whether the land-holder can charge rent according to cropwar rates and second crop rates prevailing in the village, although crops of a superior nature such as garden and wet crops raised on such dry lands were the result of those improvements. According to the findings of the lower Courts, it is clear that these lands are classified as dry that though they were originally poramboke, they have become patta lands of the plaintiffs, that the improvements effected by the raiyats (plaintiffs) consist of wells sunk in their patta lands at their own cost, subsequent

to the passing of the Estates Land Act, and that before the sinking of those wells, only ordinary dry crops could be raised on these lands. It is admitted that the usage in this village is to levy cropwar rates of rent, which depends upon the nature of the crop raised and the extent of land actually cultivated. As would appear from the pattas filed (for instance Cl. 10 of the patta Ex. C) no rent would be charged on lands left waste or uncultivated unless the non-cultivation is due to the neglect of the raiyat.

In the light of these facts the question in issue has to be determined. S. 13, Cl. 3, declares that notwithstanding any usage or contract to the contrary a raiyat shall not by reason of making an improvement at his sole expense, become liable to pay a higher rate of rent on account of any increase of production or of any change in the nature of the crop raised as a consequence of such improvement. In the present case, there is no doubt that the well sunk by the raiyats in their patta lands for the supply of water for agricultural purposes, would be an improvement within the meaning of S. 3 (4) of the Act. These wells are not shown to prejudicially affect any other land of the land-holder. Nor is it the case of the defendant, that any money was contributed by him for the expenses of sinking these wells. It is argued by the learned advocate for the appellant, that the landholder may be deemed to have contributed something towards the improvement, by reason of the fact that he loses the chance of recovering any rent on the area of the site covered by the wells. In support of this contention reliance is placed on the decision in *Lodd Govindoss v. Chinnappa Naidu* (1). It is strenuously contended on the respondent's side that that decision has no application to the present case. In that case the point was whether in view of the facts disclosed in the evidence, the zamindar was entitled to charge enhanced rates for crops grown with the aid of well water. S. 13, Cl. (3), Estates Land Act, was held to be not applicable to that case, as the improvements were those effected prior to the Act. But the question turned upon the validity of the contract to pay enhanced rates. In order to see whether there was consideration

1. (1915) 27 I C 869.

for the contract, some facts had to be taken into account. It was shown that the wells were dug by the raiyats in land entered in the accounts as poramboke, and that the area covered by the wells was rendered uncultivable. The land in which the wells were dug was not the property of the raiyats, but belonged to the zamindar. That is why Napier, J., has observed thus :

“ By handing over that area to the raiyats for the construction of wells he has in our opinion contributed to the cost of the wells and such contribution is good consideration for the contract set up by him.”

For the purpose of applying Cl. 3, S. 13, the important point is whether the wells in question were sunk at the sole expense of the raiyats. In order to dig a well, the first requisite is land which must serve as the site for the well. If the wells in question were dug in poramboke land, the land-holder by handing over that site for sinking the wells, can be regarded as having contributed towards the cost of these improvements and the case would be taken out of the operation of the said section. The prospective loss of rent on the area of the site covered by the wells cannot by any stretch of the observation in *Lodd Govinddoss's* case (1) be deemed to be a contribution by the land-holder towards the cost of sinking the wells, and for this reason, it cannot be held, that the improvements are not those made at the sole expense of the raiyats, within the meaning of S. 13 (3) of the Act. For the damage sustained on account of any such loss of rent, it seems to me a remedy will be available. If by the neglect of the raiyat, any plot is left waste or uncultivated, the land-holder is entitled to charge rent. By a voluntary act of the raiyat, if he disables himself from cultivating a certain plot he cannot say, that for causes beyond his control, the cultivation could not be carried on. Though the land-holder cannot prevent the raiyat from making an improvement by way of digging a well in the holding, he may have recourse to the method of charging rent even on the area of the site of the wells, at the dry rates. But in view of the bar created by Cl. 3, S. 13, he cannot levy higher rates of rent, under the prevailing system of charging crop-war rates, if the change in the nature of the crops raised by the consequence of

the improvements effected by the raiyat at his sole expense.

The same question was recently considered by Anantakrishna Ayyar, J., in S. A. No. 1980 of 1927, and that decision is clearly in favour of respondents' contention. It is true that the ruling in *Lodd Govindoss v. Chinnappa Naidu* (1) was not considered in that decision. But, in my view, that ruling does not materially help the appellant in the present appeals. I therefore confirm the finding of the Courts below on this point. As regards the memorandum of objections I see no substance in them. The lands, Nos. 592 and 593, have been classed as wet, and treated so in the previous pattas. They must be presumed to be wet lands liable to be charged accordingly, until the raiyats resort to an appropriate remedy and get the classification changed or assessment reduced. In the result, these appeals and the memoranda of objections are dismissed with costs.

P.R.S./K.S. *Appeals dismissed.*

A. I. R. 1933 Madras 258

JACKSON AND MOCKETT, JJ.

M. V. Sundaresa Ayyar—Appellant.

v.

Pacala Subba Rao and others—Respondents,

Appeal No. 496 of 1931 and Civil Revn. Petn. No. 1973 of 1931, Decided on 5th September 1932, against order of Sub-Judge, Nellore, D/- 13th March 1931.

Civil P. C. (1908), S. 151—Court has no inherent right to deprive party of right obtained by limitation.

Where the defendant has acquired a right by operation of the law of limitation to claim that the litigation against him should cease, the Court has no inherent power to deprive the defendant of that right, and to order the litigation to proceed. [P 258 C 2]

K. Umamaheshwaran—for Appellant.

Judgment.—The Subordinate Judge has restored an application to restore a suit after that application was itself time barred. He seems to have thought that where the defendant had acquired the right by operation of the law of limitation to claim that the litigation against him should cease, the Court has an inherent power to deprive the defendant of that right, and to order the litigation to proceed. Obviously S. 151 never confers any such power upon a Court—a power for the ends of injustice and to

promote abuse of the process of the Court. The defendant after the plaintiff has exhausted his statutory limit of time clearly has justice on his side and the Court has no right to interfere in order to override a lawful bar of limitation. The petition is allowed with costs throughout and the lower Court's order is cancelled. This disposes of the appeal.

P.R.S./K.S.

Appeal allowed.

* A. I. R. 1933 Madras 259

VENKATASUBBA RAO AND REILLY, JJ.

K. V. Srinivasathathachar—Plaintiff—Appellant.

v.

Naravalur Srinivasathathachar—Defendant—Respondent.

Appeal No. 112 of 1931, Decided on 26th August 1932, against an order of Sub-Judge, Salem, D/- 14th November 1930.

(a) Civil P. C. (1908), S. 54—Partition of revenue also is not necessary for applicability of section.

In construing S. 54 which is plain and unambiguous, words not to be found there should not be imported into it. Hence for the applicability of the section it not necessary that the partition should be is not only of the land, but also of the revenue assessed on it: *A I R 1931 Cal 93* and *A I R 1931 Cal 104*, *Rel on*.

[P 259 C 1, 2]

* (b) Civil P. C. (1908), S. 54—Decree for partition of portion of undivided estate is outside scope of section.

Section 54 applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. A decree directing partition of a portion of an undivided estate does not fall within the terms of the section: *A I R 1931 Cal 93*; *A I R 1931 Cal 104* and *24 Cal 725*, *Rel on*.

[P 259 C 2]

C. S. Venkatachariar—for Appellant.

B. Sitarama Rao—for Respondent.

Venkatasubba Rao, J.—The question raised relates to the construction of S. 54, Civil P. C. The lower Court has made an order directing the decree to be forwarded to the Collector for partition being effected. Mr. Venkatachari for the appellant contends that the order is wrong. It is first urged that the section does not apply unless the partition is not only of the land, but also of the revenue assessed on it; in other words, unless the division of the land is to be followed by the apportionment of the revenue. This construction is opposed to the plain provisions of the section. What the section refers to is, the partition of the estate assessed to the payment of revenue and

not the partition of the estate as well as the revenue. Why in construing the section, which is plain and unambiguous, words not to be found there should be imported into it, I fail to see. I agree with the observations of Rankin, C. J., on this point in the two cases cited at the Bar, namely *Abdul Razack v. Sri Nath Ghose* (1), and *Kiran Chandra Rai v. Rama Nath Dutta Chowdhury* (2). But it is unnecessary to pursue this point, as the second contention of Mr. Venkatachari is, in my opinion, clearly well founded. He argues that what the section contemplates is an entire undivided estate and not merely a part of it. In the present case, the plaintiff and the defendant were entitled to a portion of the undivided estate and the decree directed that that portion should be divided into two equal halves. Such a decree does not fall within the terms of the section. Is this decree . . . one for the partition of an undivided estate? Or again, is it for the separate possession of a share of such an estate? The answer is in the negative. A share of an estate is not equivalent to a share of a portion of an estate; when the decree relates to the separate possession of a share of a portion, that decree does not fall within the terms of the section. Trevelyan, J., expresses this tersely in *Jagadishury Debya v. Kailash Chandra Lahiry* (3), in a passage extracted by Rankin, C. J., in the first of the two cases already cited. Says Trevelyan, J.:

"The section applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to Government. A decree for possession of a share of a portion of an undivided estate is not a decree for "possession of a share of an undivided estate" in any sense."

The intention of the statute seems to be, that where the duty is cast upon the Collector of executing the decree, the partition he has to effect is to be both complete and perfect, that is, not only is the land to be divided, but the revenue also is to be allocated, the object being that the interests of the Government are safeguarded and there is also a final adjudication of the rights and liabilities of the parties in the sense, that one sharer shall no longer be at the mercy of the other co-owners; and such a course the

1. *A I R 1931 Cal 93*=*130 I C 129*=*58 Cal 122*.

2. *A I R 1931 Cal. 104*=*130 I C 287*.

3. (1897) *24 Cal 725*=*1 C W N 374*.

Collector can appropriately adopt only when the decree relates to the whole, and not merely a part of, undivided estate and all the parties interested and to be affected by the proposed division, are before him. I agree with the view taken of the section by the learned Judges of the Calcutta High Court in *Abdul Razack v. Sri Nath Ghose* (1) and *Kiran Chandra Rai v. Rama Nath Dutta Chowdhury* (2), referred to by me. The result is the Subordinate Judge's order is set aside and the appeal is allowed with costs. I must point out that there was some difficulty in the lower Court as regards getting a proper officer appointed for effecting the partition. The Commissioner selected reported that without the aid of an expert surveyor he was unable to make a partition. We direct the Court to appoint a fresh Commissioner and would suggest that, if possible, a trained surveyor should be appointed.

Reilly, J.—It appears in this case that the aghaharamdars of the village in 1876 by an arrangement among themselves allotted certain plots of land in the village to each other to be enjoyed separately in accordance with their vrithis, reserving, we are told, certain other plots still to be enjoyed in common. In course of time plots of land representing about 7/9ths of the whole village, we are told, came into the possession of the plaintiff and the defendant in the suit. The suit is for the partition of those plots between the plaintiff and the defendant. It appears to me quite clear that such a suit does not come within the meaning of S. 54 of the Code. It is certainly not a suit for the partition of an undivided estate within the words of the section. It is not a suit for the partition of the whole aghaharam village. Nor is it a suit for the separate possession of a share of that village. If it were a suit for the separate possession of a share of that village, not only would the plaintiff and the defendant be parties, but all the aghaharamdars would have to be parties to the suit. Here we are quite outside the provisions of S. 54 of the Code, as I understand them. Perhaps I may also say with respect that I entirely agree with the interpretation of S. 54 of the Code given by Rankin, C. J., in *Abdul Razack v. Sri Nath Ghose* (1). I agree that this appeal should be allowed with

costs and that the revision petition should be dismissed, but without costs.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 260

PANDALAI, J.

R. Kandaswami Chettiar—Petitioner.

v.

Municipal Council of Pollachi—Opposite Parties.

Civil Revn. Petn. No. 759 of 1932, Decided on 11th August 1932, to revise an order of Dist. Judge, Coimbatore, D/- 22nd April 1932.

(a) **Madras District Municipalities Act (5 of 1920), S. 51—Decision by District Judge under S. 51 is not open to revision by High Court.**

Provided a District Judge is acting within his jurisdiction, his decision under S. 51, however erroneous on the facts or even on the construction of the rules, cannot be revised by the High Court. For where a District Judge who has jurisdiction to inquire into an election petition under the rules, passes, as the result of his inquiry, an erroneous order based on an erroneous construction of the sections of the Act or the rules, it cannot be interfered with in revision, and it cannot be said in such case that on account of this error of law the District Judge exercised a jurisdiction which did not exist: *A I R 1924 Mad 561, Rel. on.*

[P 261 C 2; P 262 C 1]

(b) **Madras District Municipalities Amending Act (1930), S. 177—There is no intention to exempt future elections from conditions necessary for all elections.**

All that S. 177 of the Amending Act 1930 purports to do is to enable the Government to extend the tenure of the councillors holding office on the date when the Act came into force and that extension is expressly made subject to four sections, S. 48 (2), 50, 51 and 60. The mention of these specific sections is to make it clear that if during the extension any of the so extended councillors took Government service under S. 48 (2) or became subject to any of the disqualifications mentioned in S. 50 or S. 60, they would still be liable to be declared disqualified under S. 51. There was no intention to exempt future elections from the conditions necessary for all elections.

[P 262 C 1, 2]

(c) **Madras District Municipalities Act (1920), S. 51—Scope.**

Objections under S. 51 may embrace disqualifications existing before the election. [P 262 C 2]

(d) **Madras District Municipalities Act (1920), S. 49 (2) (f)—Persons standing in superior or subordinate positions to councillor should be excluded.**

The effect of S. 49 (2) (f) is not merely to disqualify Government village officers or part-time Government officers who are subordinates or superiors of sitting councillors. The much more natural and reasonable meaning of the words is that persons standing in a superior or subordinate position to a sitting councillor and holding office as such, not necessarily Government office, should be excluded from election.

[P 263 C 2]

T. R. Ramachandra Ayyar—for Petitioner.

M. Krishna Bharati — for Opposite Parties.

Judgment.—This is a petition to revise an order of the learned District Judge of Coimbatore passed under S. 51, District Municipalities Act, on an application to him under the same section by the present petitioners. They were respectively the President and the Secretary of the Pollachi Town Bank, Limited, having been elected to these offices on 15th July 1931. They were also Councillors of the Municipal Council of Pollachi. The life of the council then in existence was, in pursuance of S. 177 of the Amending Act of 1930, extended by Government to 1st December 1931, some time previous to which the elections for the new council, which was to come into existence on the above date, took place. At that election which was governed by the District Municipalities Act as amended, the present petitioners, being still President and Secretary of the Bank, were re-elected members of the new council. No objection was apparently then taken. They entered on their offices and were functioning as such. After some time questions arose, at whose instance it does not matter, which led to the Chairman of the Council calling a special meeting to consider the matter. The petitioners forestalling any action that might be taken by the council or at its instance presented this petition to the District Judge, purporting to do so under S. 51 of the Act as amended, stating that unfounded questions and doubts had been raised about the validity of their election and asking for an order that such doubts and questions were unfounded and that they were holding their offices as councillors legally. The respondent to the petition was the Municipal Council which appeared through its Chairman and put forward the objection that under S. 49 (2) (f) both the petitioners were disqualified for being elected as Councillors on the ground that at the time of election one was the official superior and the other the official inferior of the other. This was the only question before the District Judge. On an examination of the clauses of the Articles of Association of the Bank the learned Judge held that the first petitioner, President, was the offi-

cial superior of the second petitioner the Secretary of the Bank, and therefore they were both disqualified for election to the council.

In the grounds of the petition to this Court the only ground taken is that the Secretary is not an official inferior of the President of a Bank, and that the learned Judge was in error in taking that view. A preliminary objection was taken for the respondent against the petition being heard on the grounds stated in the petition on the ground, that assuming that the learned Judge took an erroneous view, this Court is not competent to revise that opinion, and for this Cl. 2, S. 51 of the Act was relied upon, which says that the said Judge after making such inquiry as he deems necessary shall determine whether or not such a person is disqualified under sub-S. (1), Ss. 48, 49, S. 50 or S. 60, and his decision shall be final. On this section a number of decisions of this Court have put it now beyond dispute that, provided the District Judge was acting within his jurisdiction, his decision however erroneous on the facts or even on the construction of the rules, cannot be revised by this Court. In *Umar Uduman v. Moideen Pillai* (1) it was held that, although a District or Subordinate Judge deciding an election petition under the rules is not a *persona designata* but a Court subordinate to this Court's jurisdiction, yet if all the fault that can be found with the decision of that Court is that it was wrong on the merits or even upon a doubtful question of construction of the rules, this Court will not interfere. That however was in an election petition. The case in *Duraiswami Nadar v. Joseph* (2) was also one of an election petition. In *Ramaswami Goundan v. Muthu Velappa Gounder* (3) it was held that a District Judge inquiring into an objection under S. 57, Local Boards Act (corresponding to S. 51, District Municipalities Act), cannot give himself jurisdiction to entertain a matter not within it by committing an error of law. And this opinion was repeated in *Parthasaradhi Naidu v. Koteswara Rao* (4) where the ultimate decision was in a

1. A I R 1929 Mad 257=119 I C 145.

2. A I R 1926 Mad 319=92 I C 119.

3. A I R 1923 Mad 192=71 I C 1039=46 Mad 536.

4. A I R 1924 Mad 561=78 I C 98=47 Mad 369 (F B).

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fied under S. 48 (1), S. 49, S. 50 or S. 60 and such person does not admit the allegation or whenever any Councillor is himself in doubt whether or not he has become disqualified for office under S. 50 or S. 60 such Councillor or any other Councillor or the Chairman at the request of the Council shall apply to the District Judge, etc. It is obvious that the applicant under the section must be some Councillor or the President at the request of his Council. No stranger can apply; that is no voter can apply; no candidate who has been defeated can apply. This provision is entirely in favour of the Councillors and the Council acting through its Chairman. It is reasonable to suppose that the person against whom the application under the section on the footing of S. 49 was contemplated was not the person under disqualification himself, because the section says or supposes that such person does not admit the allegation, which implies that he disputes it and that some other Councillor makes the application. The only case of a Councillor applying about his own disqualification is when he is in doubt as to S. 50 or S. 60. However that may be, these two petitioners may be regarded as having filed an application in the character of "any other Councillor" about each other. It is now too late for them to say that they made a petition against themselves and that they are not willing to be bound by the result. The petitioners having invoked the jurisdiction of the District Judge, no doubt hoping for a favourable order, cannot be heard to repudiate it now that it is pronounced against them.

These are the objections raised to show that the lower Court has no jurisdiction to entertain or decide this petition, and in my opinion they fail. Therefore, even if the decision that the petitioners are subordinate and superior to each other be incorrect, I should not be empowered to interfere. As however the matter has been argued, I ought to notice the objection taken that on a proper construction of S. 49 (2) (f) persons who stand in the relation of official subordination or superiority to a Councillor holding office on the said date must be persons holding some Government office. I think that this is quite unfounded for the reason that S. 48 (2) of the Act debars Government servants

as a class from standing for election and it was not necessary to enact this clause to exclude from election Government officials standing in subordinate or superior position to some Councillor holding office on a particular date. But it was said that Government officials are not totally excluded and that village officers are eligible, and also the only officials are excluded are whole time servants of the Government remunerated by salary or fees. In other words part-time Government servants, whether remunerated or not by salary or fees, are not excluded. In my opinion the effect of S. 49 (2) (f) is not merely to disqualify Government village officers or part-time Government officers who are subordinates or superior of sitting Councillors. The much more natural and reasonable meaning of the words is that persons standing in a superior or subordinate position to a sitting Councillor and holding office as such, not necessarily Government office, should be excluded from election. The reason is that it is necessary to maintain the independence of Municipal Councils and the purity of their administration, which would be imperilled if subordinates or superiors of existing Councillors in an official capacity were to be allowed to compete for seats as they would have the natural advantage of the influence and position of the sitting Councillors and, if successful, might form cliques and factions with them.

The only remaining and last point was that the Secretary of this bank by its rules does not occupy a subordinate position to the President. On this point I will shortly say that I am not satisfied that the view of the learned Judge is wrong. The petition fails and is dismissed with costs.

P.R.S./v.S. *Petition dismissed.*

A. I. R. 1933 Madras 263

JACKSON AND MOCKETT, JJ.

A. Ghulam Muhiuddin Rowther—Appellant.

v.

Sulaiman Rowther and another—Respondents.

Appeal No. 258 of 1930, Decided on 13th September 1932, against order of Sub-Judge, Tanjore, D/- 11th November 1929.

Civil P. C. (1908). O. 21, R. 89 — Amount deposited in Court is not amount "received" within the meaning of R. 89.

An amount which has been deposited in Court cannot be said to have been received within the meaning of O. 21, R. 89 (1) (b) unless it is actually received by the Court: 23 Bom 723 and A I R 1923 Bom 299, Appr. [P 264 C 1]

S. Venugopala Chari—for Appellant.

M. S. Venkatarama Ayyar—for Respondents.

Judgment—This is a question under O. 21, R. 89, Civil P. C. The short point is whether an amount which has been deposited in Court can be said to have been received within the meaning of O. 21, R. 89 (1) (b). It is argued for the respondents that "received" means "virtually received" or constructively received and that actual receipt is not necessary. We cannot accede to this argument. "Received" means what it says, that is, received free from qualifying adverbs. We agree with the view taken in *Trimbak Narayan v. Ramchandra Narsingrao* (1) and *Husenuddin Nuruddin v. Dulakshidas* (2), which are cases in point, and accordingly allow this appeal with costs throughout.

P.R.S./K.S. *Appeal allowed.*

1. (1899) 23 Bom. 723=1 Bom L R 215.

2. A I R 1923 Bom 299=77 I C 474.

A. I. R. 1933 Madras 264

MADHAVAN NAIR, J.

Chitti Babu Mudaliar—Plaintiff—Appellant.

v.

A. Venkatasubbu Mudaliar and another—Defendants—Respondents.

City Civil Court Appeal No. 53 of 1929, Decided on 19th August 1932.

Civil P. C. (1908), S. 9—Suit for mere "honours" does not lie—Specific Relief Act (1877), S. 42.

Plaintiff sued for a declaration that the right to conduct a particular festival in a temple vested in his family and that he being the senior member of it was entitled to conduct the festival. It was conceded by the plaintiff that he was neither bound to go to the temple for the festival nor could the temple authorities compel him to come to the temple on the festival day to perform it.

Held: that the claim of the plaintiff was only one for mere honours and as such it did not lie and further as there was no mutuality of obligations, the plaintiff could not be said to have any rights which could be enforced against the temple even though the suit may be described as a suit for a declaration of a right: 36 I C 568, Dist.

[P 265 C 1,2]

K. Krishnaswamy Ayyangar and V. S. Rangachari—for Appellant.

V. Ganapathi—for Respondents.

Judgment.—The plaintiff is the appellant. This is an appeal against the decree passed by the learned City Civil Court Judge in O. S. No. 167 of 1929 dismissing the plaintiff's suit on the ground that a suit of the nature brought by him is not maintainable under S. 9, Civil P. C. The plaintiff's suit was for a declaration that the right to conduct Aroodra Utsavam at the Sree Kabaleeswarar temple at Mylapore is vested in his family and that he being the senior member of it is solely entitled to conduct the said Utsavam as Ubayakar or Kattalaidar. This is stated in para. 3 of the plaint. In para. 5 it is stated that the trustees of the temple, the defendants, denied the right of the plaintiffs and of the members of his family and denied to them the rights and honours appertaining to the Utsavam and the conduct thereof. It was conceded before the learned City Civil Court Judge that in so far as the suit was one for mere "honours," it does not lie. This concession having been made, what is now argued before me is that the plaintiff is entitled to get a declaration of his right to conduct the Utsavam and that the lower Court was wrong in having held that such a suit will not lie. If more concessions than what I have just referred to had not been made before the lower Court, it may probably be said with some force that the plaintiff's right is not barred by S. 9, Civil P. C., though the nature of the right disclosed by the learned counsel—no evidence having been taken in the case—is, I must say, somewhat novel.

It is said that the fund for conducting the Utsavam is under the control of the trustees as the result of an endowment created by an ancestor of the plaintiff, that what the plaintiff is entitled to do is either to conduct the Utsavam after getting the interest of the fund from the trustees or by asking the trustees to conduct it under his own supervision. It is also said that he need not be present when the Utsavam ceremony is being held but he may send a substitute to supervise it. Assuming that a suit of the nature herein described will lie under S. 9, Civil P. C., the various concessions made by the counsel which I shall refer to presently make it impossible to hold that S. 9 will not be a bar to the suit. The plaintiff conceded

that he does not claim any right of property in the temple or any office. The learned City Civil Judge, in the course of the case, asked the plaintiff's counsel:

"whether his client was bound to go to the temple in connexion with the annual Aroodra festival and perform the ceremony."

He frankly said that his client was not so bound. The learned City Civil Judge also says that he was also good enough to concede that the temple could not compel him by action or otherwise to come on the Aroodra festival day to perform the festival or to do any function or even take any part of it. All that he claims is that should he happen to go, the temple authorities

"are compellable to put into his hands votive offerings and that when he has presented the offerings they must again confer upon him the usual honours."

This would show as the learned Judge remarks "that there is no mutuality of obligations." According to the decisions no doubt a person may have a right to institute a suit for a declaration that he is entitled to perform the duties of an office, to conduct a Mandahappady, for instance, as in *Thirumalai Alwar Ayyangar v. Srinivasachariar* (1). But that is not the case which is presented before the Court by the plaintiff having regard to the various concessions made by his counsel. To constitute an office I think it will be essential to have some duties attached to it which the office holder will be under a legal obligation to perform, the non-performance of which will be visited with penalties; but that is not the case with respect to the claim made by the plaintiff. As already observed nobody can compel him to perform the Utsavam or even to be present at the place. Shortly stated what the plaintiff says is, if he happens to go to the temple at the time of the ceremony the usual honours must be conferred upon him. As the learned City Civil Judge remarks there is evidently no mutuality about the obligations. The nature of the plaintiff's claim has been considerably modified as a result of the concessions made by him in reply to questions put by the Court. In so far as the suit is a claim for mere honours it will not lie and though it may be described as a suit for a declaration of the plaintiff's right to conduct an Utsavam, having regard to the fact that he is

under no obligation to perform any particular function, it cannot be said that he has any rights which can be enforced against the temple. This being the true nature of the claim set out in the plaint, I agree with the learned City Civil Judge that the plaintiff's suit is not maintainable. I would therefore dismiss this appeal with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 265

SUNDARAM CHETTY, J.

Karingali Thendambalath Karnavan and others—Appellants.

v.

Karlingali Thendambalath Govindan Nambi and others—Respondents.

Second Appeal No. 806 of 1930, Decided on 7th September 1932, against decree of Sub-Judge, South Malabar.

(a) Malabar Law—Maintenance arrears—Mere delay or omission to make demand does not amount to waiver of claim.

Mere delay in the matter of claiming maintenance and the mere omission to make demands would not be sufficient to draw an inference as to waiver or abandonment. Over and above these factors, it must be clearly shown in each case that there are justifiable grounds for inferring that the claim for arrears of maintenance was abandoned : 36 *Mad.* 563, *Expl.* [P 266 C 1]

(b) Malabar Law—Maintenance—Private acquisition of members should be taken into account in fixing maintenance allowance where tarwad income is insufficient to provide suitable subsistence.

The circumstance of each member in respect of his private acquisitions should be taken into account by the karnavan in fixing the maintenance allowable to that member if the income of the tarwad would not be sufficient to provide a suitable subsistence for all the members : *A I R* 1923 *Mad* 280 and 5 *Mad* 71, *Rel on*

[P 266 C 2]

(c) Malabar Law—Maintenance—Arrears claimed in lump sum—Court has discretion to fix rate.

When the plaintiff claims a lump sum on account of arrears of maintenance for some years, a discretion is vested in the Court in the matter of fixing the rate. The point of view would not be the same in cases where future maintenance is to be declared and fixed. [P 267 C 1,2]

(d) Malabar Law—Maintenance—Karnavan is not personally liable for maintenance dues of members.

The karnavan as manager of the tarwad is bound to maintain the other members from out of the family income only. In the absence of proof of malversation or misappropriation of the income by the karnavan it would be most unreasonable to make him personally liable for such dues. [P 267 C 2]

K. Kuttikrishna Menon and E. P. Narayana Nair—for Appellants.

P. Govinda Menon—for Respondents.

1. (1916) 36 I C 563.

Judgment.—This second appeal arises out of a suit brought by the plaintiff as a member of a Makkathayam family, of which defendant 1 is the karnavan, for the recovery of a lump sum of money as arrears of maintenance due for six years eight months at the rate of Rs. 20 per mensem. The claim was hotly contested by defendant 1 and the first Court decreed the plaintiff's suit by awarding arrears of maintenance at the rate of Rs. 16 a month. The lower appellate Court modified the first Court's decree by reducing the rate of maintenance to Rs. 12 per mensem. In this second appeal preferred by defendant 1, the main contention urged is that the lower Courts should have inferred waiver or abandonment of the right to arrears of maintenance on the part of the plaintiff from all the circumstances of this case. The claim for maintenance relates to a period of six years eight months commencing from June 1920 and the registered notice of demand was sent by the plaintiff only in January 1927. It is settled law that mere delay in the matter of claiming maintenance and the mere omission to make demands would not be sufficient to draw an inference as to waiver or abandonment. Over and above these factors it must be clearly shown in each case that there are justifiable grounds for inferring that the claim for arrears of maintenance was abandoned.

The learned Subordinate Judge observes that there is hardly any evidence worth the name to prove that the plaintiff waived his right. Several decisions have been relied on by the learned counsel for the appellant, in which the question of waiver has been considered. As far as I can see, those decisions do not support the appellant in the contention that mere delay and omission to make demands are enough to give rise to an inference about waiver. In the present case, there is no justification for holding that the plaintiffs' conduct was such as to mislead defendant 1 into the belief that the plaintiff would not set up any claim for the arrears of maintenance. There being no tangible basis for presuming that there was justification for defendant 1 to suppose an abandonment of the claim by the plaintiff, I am of opinion, that the ground of attack based on waiver must fail. The observation in the judgment of a Division Bench of

this Court reported in *Muthu Amma v. Gopalan* (1) (at pp. 596 and 597) is to the effect, that if a man is rich and able to provide properly for his wife and children, and if no demand for maintenance is made on the tarwad for a long time, the Court would be justified in inferring an intention to abandon the claim, but the question whether there was really a waiver should be decided on the circumstances of each case. This observation does not materially help defendant 1 in this case, in the absence of some special circumstances giving rise to an inference in favour of abandonment.

The next question for consideration is whether the rate of maintenance awarded by the lower appellate Court is liable to reduction. The net income available for maintenance as taken by the lower appellate Court would be Rs. 1,430-8-0 per annum. Though a higher amount was fixed by the first Court as the annual income of the tarwad the Subordinate Judge thought fit to proceed on the admitted annual income and arrive at a lower estimation by way of caution. Taking the members of the family as eight majors and two minors, he fixed the allowance at Rs. 12 per mensem for each member. In arriving at this rate the learned Subordinate Judge has failed to take into consideration some material circumstances. It has been held in the decision in *Ekanat Thayu Kunji Amma v. Ekanat Shangunni Valia Kyamal* (2), which was followed in *Kunhalikutti Haji v. Kunhamayan* (3) that the circumstance of each member in respect of his private acquisitions should be taken into account by the karnavan in fixing the maintenance allowable to that member if the income of the tarwad would not be sufficient to provide a suitable subsistence for all the members. The method of dividing the total net income by the number of members in the tarwad without due regard to the real necessities of the several members thereof would not be always a correct method. If there is income sufficient enough for providing a suitable subsistence for all the members then the fact of a particular member having other and independent means would not affect the question.

1. (1913) 36 Mad 593=16 I C 895.

2. (1882) 5 Mad 71.

3. A I R 1923 Mad. 280==46 Mad 567.

In this particular case I am of opinion that the income of the tarwad is not sufficient to provide a suitable subsistence for all the members. That being so, we have to see whether the plaintiff has any other source of income which would be an important factor for consideration in fixing the rate of maintenance awardable to him. It is clear from the evidence in this case that the plaintiff had been employed in some department which procured him an income of Rs. 40 per mensem on an average.

We may take it that he was deriving this income from about August 1922, i. e. for a period of four years six months out of the period for which arrears of maintenance are claimed. This independent income derived by the plaintiff is more than thrice the rate of maintenance which each member in this tarwad could get out of its income. In making the allotment among the members on account of maintenance, it would be reasonable to take into consideration the fact of the plaintiff getting an extra income of Rs. 40 per mensem. It is urged on behalf of the appellant that in the course of two years eight months during the period in question the plaintiff and his wife and children were the recipients of several presents in the shape of cash and cloth from the karnavan and that fact also should be taken into account in fixing the rate of maintenance. These appear to be the customary presents which any member of the tarwad would be ordinarily entitled to. I do not think there is any basis for holding that these presents have any manner of connexion with the maintenance otherwise due to a member. Even if a member of the tarwad was actually living in the family and fed on its income, he would still be entitled to such customary presents. There is no good reason to take this circumstance into account in fixing the rate of maintenance due to the plaintiff. For the other reason already set forth, it seems to me that the plaintiff should not be allowed the rate of Rs. 12 per mensem arrived at by the lower appellate Court without having regard to any of the circumstances which should be taken into consideration.

When the plaintiff claims a lump sum on account of arrears of maintenance for more than six years, a discretion is vested in the Court in the matter of fixing the

rate. The point of view would not be the same as in the case where future maintenance is to be declared and fixed. In view of the discretionary power vested in the Court and taking into account the fact of the plaintiff getting Rs. 40 per mensem as an independent source for his livelihood, I think fit to reduce the rate of maintenance decreed by the lower appellate Court to Rs. 6 per mensem for the period of four years six months during which the plaintiff was getting the said extra income.

One other question remains to be considered. The Courts below have made defendant 1 personally liable for the amount decreed to the plaintiff. There are no satisfactory grounds in this case to deviate from the general principle that the karnavan as manager of the tarwad is bound to maintain the other members from out of the family income only. In the absence of proof of malversation or misappropriation of the income by the karnavan, it would be most unreasonable to make him personally liable for such dues. I feel it necessary to observe that the considerations which prevailed in the present case for reducing the rate of maintenance decreed to the plaintiff are confined to his claim viewed as one for a lump sum as arrears of maintenance for more than six years. The discretion vested in the Court in dealing with such claims has been exercised in this case. These considerations may not be taken as the guiding factors in any claim for future maintenance to be made by the plaintiff or by any other member of the family. A claim of that kind will depend upon proof of circumstances relating to the family and the member claiming it.

In the result, the decree of the lower appellate Court is modified by awarding to the plaintiff maintenance at the rate of Rs. 12 per mensem for the first period of two years and two months and for the remaining period of four years and six months at the rate of Rs. 6 per mensem. Defendant 1 will not be personally liable for this amount, but he should pay the same from out of the income of the tarwad properties and also from the properties of the tarwad. The parties will give and take proportionate costs in all the Courts.

P.R.S./K.S.

Decree modified.

A. I. R. 1933 Madras 268

BURN, J.

M. N. Schamnad and another — Accused—Petitioners.

v.

M. N. Rama Rao—Complainant—Opposite Party.

Criminal Revn. Case No. 677 of 1932 (Crim. Revn. Petn. No. 632 of 1932), Decided on 17th October 1932, from order of Subdivl. First Class, Magistrate, Mangalore, D/- 11th June 1932.

(a) Criminal P. C. (1898), S. 132 and Penal Code (1860), S. 79—Protection given by two sections—Difference pointed out.

Section 79 can only be applied when all the facts are known, i. e., when the trial is over; S. 132, Criminal P. C., can only operate when the trial begins. Protection given by S. 79 is a protection against conviction, while the protection given by S. 132, Criminal P. C., is a protection against trial. It is impossible to hold that these protections are identical. [P 269 C 1]

(b) Criminal P. C. (1898), S. 132—Application of section.

It is not correct to say that in order to decide whether a prosecution is barred under S. 132, Criminal P. C., for want of the sanction of the Local Government, only the complaint and the sworn statement should be referred to. [P 269 C 1]

(c) Criminal P. C. (1898), Ss. 132 and 197—Construction.

The terms of S. 132 are as wide as, if not wider than, those of S. 197. It is framed in very wide terms. It requires that Judges, Magistrates and certain public servants shall not be prosecuted without the sanction of the competent authority for any offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. The object obviously is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them, while they were acting or purporting to act as public servants. The policy of the legislature is, to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted, to confer on the Local Government, if they choose to exercise it, complete control of the prosecution. Hence the section must be construed as widely as it has been framed: *A I R 1929 Mad 659, Foll.*

[P 269 C 2]

V. L. Ethiraj and A. S. Sivakaminathan—for Petitioners.

T. R. Venkatarama Sastri for *M. C. Sridharan*—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—The petitioners are an Inspector and a Sub-Inspector of Police against whom a complaint has been laid in the Court of the Subdivisional Magistrate of Mangalore. The substance of the complaint is that on 11th April 1932, while the complainant and another were peace-

fully picketing a certain shop, a lorry full of reserve constables numbering in all about a dozen, armed with canes, came led by the accused; and accused 1 Inspector of Police, after warning the complainant and his companion to move, ordered the constables to beat them. In consequence of this order the complainant alleged that he and his companion were severely beaten, and the complainant said he believed that the 12 constables at the instance of the accused had fractured his ankle joint. A sworn statement was recorded on 19th April in which the complainant said that it was the Inspector who directed the beating and that the Sub-Inspector was present with him. The Subdivisional Magistrate took the case on the file for an offence under S. 326, I. P. C., against both the accused and issued process.

The accused made an application to the Subdivisional Magistrate in which they alleged that they had acted in the exercise of their powers under Ss. 127 and 128, Criminal P. C., in dispersing an unlawful assembly and that the complaint was barred by S. 132, Criminal P. C., for want of sanction of the Local Government. The learned Subdivisional Magistrate has held that the sanction was not necessary and that the trial must go on. He considers that the main question for decision is whether there was an unlawful assembly when the beating was ordered, and says that if the evidence at any stage discloses that there was an unlawful assembly at the time of the beating further proceedings will be stopped, but not till then. The learned advocate for the respondent contends that the learned Subdivisional Magistrate's view is correct. He says that in the first instance there must be a finding on the point whether there was any unlawful assembly, and without such a finding the Court cannot interfere and stay proceedings. Mr. Ethiraj for the petitioners contends that this view is incorrect. It is equivalent to a demand that the police officers must prove themselves to be innocent of the offences alleged against them in order to show that the complaint was invalid for want of sanction.

It appears to me that Mr. Ethiraj's contention is sound. If there was in fact an unlawful assembly the accused were acting within their powers under S. 128,

Criminal P. C., in using force to disperse it. Even if there was not an unlawful assembly but the accused in good faith and by reason of a mistake of fact believed that there was an unlawful assembly, their action would be no offence by reason of S. 79, I. P. C. But to say that the accused in this case must prove the existence of an unlawful assembly, or their bona fide belief in the existence of an unlawful assembly, is to contend that the protection afforded by S. 132, Criminal P. C., is no more than the protection afforded by S. 79, I. P. C. That is clearly not the case. S. 79 can only be applied when all the facts are known, i. e., when the trial is over; S. 132, Criminal P. C., can only operate before the trial begins. Protection given by S. 79 is a protection against conviction, while the protection given by S. 132, Criminal P. C., is a protection against trial. It is impossible to hold that these provisions are identical. The learned Sub-divisional Magistrate undertakes to stop further proceedings if it is shown at any time that there was an unlawful assembly. The learned advocate for the respondent says that the learned Sub-divisional Magistrate is right in giving such an undertaking, but he cannot refer me to any provision of the Criminal Procedure Code which would authorize the Magistrate to stop the proceedings in such a case. There is no such provision, nor is any such provision necessary, because in those circumstances the accused would have to be discharged or, if a charge had been framed, acquitted. Then the impossible position would be reached that the accused would have to be discharged or acquitted in a case which by reason of S. 132, Criminal P. C., ought never to have been instituted at all.

The contention of the learned advocate for the complainant is that in order to decide whether a prosecution is barred under S. 132, Criminal P. C., for want of the sanction of the Local Government only the complaint and the sworn statement should be referred to. This is a proposition to which I cannot assent. If it were sound it would follow that any one by appropriate assertions in his complaint and sworn statement could deprive police officers of the protection which the legislature has given them under S. 132, Criminal P. C. In the present case however there are in my

opinion quite sufficient indications in the complaint and sworn statement that the accused were acting or purporting to act in the discharge of their duty under Ss. 127 and 128, Criminal P. C. The complainant himself speaks of the "attempt to disperse an unlawful assembly of two pickets;" and although I am told by the learned advocate that these words were used sarcastically they show quite clearly that the complainant was well aware what powers the police were using or purporting to use. I agree with Mr. Ethiraj for the police officers that the principle of the decision in *Gangaraju v. Venki* (1) is applicable to this case. Referring to sub-S. (1), S. 197, Criminal P. C., Waller, J., has observed as follows:

"It is framed in very wide terms. It requires that Judges, Magistrates and certain public servants shall not be prosecuted without the sanction of the competent authority for any offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. The object obviously is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them, while they were acting or purporting to act as public servants. The policy of the legislature is, we conceive, to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted, to confer on the Local Government, if they choose to exercise it, complete control of the prosecution. We can see nothing in these precautions to which the public at large can legitimately take exception, and consider that the sub-section should be construed as widely as it has been framed."

In my opinion, every word of this passage is equally applicable to S. 132, Criminal P. C., the terms of which are as wide as, if not wider than, those of S. 197. I therefore allow this petition and quash the proceedings of the Sub-divisional Magistrate of Mangalore taking cognizance of the offence alleged to have been committed by the petitioners. There are two further points which call for remark. Against the Sub-Inspector of Police there is nothing alleged in the complaint or sworn statement except that he was present with the Inspector. Why the learned Sub-divisional Magistrate should have considered that to be an offence is not clear. So far as the Sub-Inspector is concerned, no offence whatever is disclosed in the complaint

1. A I R 1929 Mad 659=1929 Cr C 140=118
I C 102=30 Cr L J 864=52 Mad 602.

or sworn statement, and no process should have issued to him. Again it is not clear why the learned Subdivisional Magistrate supposed an offence under S. 326, I. P. C., to be disclosed in the complaint. The complainant alleged in the complaint that he believed his ankle joint to have been fractured. In his sworn statement this was modified into a suspicion that his leg bone was broken, but the complaint is quite clear on the point that the constables who beat the complainant were armed only with canes, which are certainly not "deadly weapons." At the worst the offence made out in the complaint is one under S. 325, I. P. C., and that not against the Inspector but against the constables. The Inspector was not alleged to have done any beating himself. He could be said to have abetted the beating by the constables. But since the constables were armed with canes only I do not myself see how the Inspector could be supposed to know that they were likely to cause grievous hurt. S. 111, I. P. C., could have no application to such a case and the worst offence the Inspector could be said to have committed was one of simple hurt under S. 323 read with S. 114, I. P. C.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 270

BARDSWELL, J.

Erranki Venkatasubba Rao— Accused
—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case of 442 of 1932, (Criminal Revn. Petn. No. 411 of 1932), Decided on 26th August 1932, for revising order of Stationary Second Class Magistrate, Kovvur, D/- 2nd May 1932.

(a) Criminal P. C. (1898) S. 197—Karnam acting as Village Magistrate.

Though S. 197 does not apply to a karnam, it is applicable when the karnam is acting as Village Magistrate at the time of commission of the alleged offence imputed to him. [P 270 C 2]

(b) Criminal P. C. (1898), S. 197 — Village Magistrate charged with offence under S. 411, I. P. C.—Sanction under S. 197 is not necessary—Penal Code (1860), S. 411.

A Village Magistrate charged under S. 411, I. P. C., cannot have the benefit of S. 197, Criminal P. C., as that offence cannot be taken even as the perversion of an act that he could do in his official capacity. [P 270 C 2]

P. Satyanarayana Rao — for Petitioner.

Public Prosecutor—for the Crown.

Order.—The Stationary Sub-Magistrate, Kovvur, has held that S. 197, Criminal P. C., does not apply to the case of the petitioner (accused 3) as he was the karnam. His order cannot be supported on this ground, as though the petitioner was the karnam, he was also acting the as Village Magistrate at the time when he is alleged to have committed the offence. What then has to be seen is whether the offence imputed to him by the prosecution can be in any way attributed to or connected with his office as Village Magistrate. It is not necessary in this particular case to put the matter more meticulously or to balance carefully the various rulings which have been called to my notice on the rather vexed subject of how and when S. 197 applies, as it is clear to me that the offence is not one for a prosecution for which a sanction is required under that section. He is charged by the police with having dishonestly received or retained stolen property under S. 411, I. P. C. That offence cannot be taken even as the perversion of an act that he could do in his official capacity, and the mere fact that he was acting as Village Magistrate at the time when he is alleged to have committed it will not give him the benefit of the section. I do not see how S. 2, Regn. 11 of 1816, to which I have been referred, has any bearing on the point.

It is true that, according to the charge sheet, accused 5 has said that he gave stolen property to the petitioner because the petitioner had threatened to report against him. It is not clear however whether this statement by accused 5, which appears to have been made to the police, is one that is admissible under S. 27, Evidence Act, or whether there is any evidence that would justify a charge of an offence under S. 161, I. P. C. And any way he is not charged with the offence of taking a bribe. Even now were he charged by the police with having received a bribe it is a question whether his retention of the bribe, when the bribe consisted of stolen property, cannot be said to be an act done purporting to be done in his official capacity. I need not however deal with this point now. As things stand I must hold that the petitioner is not accused of any offence for which a sanction under S. 197 is necessary. Of course, if it is made to appear

in the course of the hearing that the petitioner has committed an offence to which S. 197 applies, and no distinct and independent offence, then he must have the benefit of that section. The petition is dismissed.

P.R.S./K.S. *Petition dismissed.*

*** A. I. R. 1933 Madras 271**

RAMESAM AND MADHAVAN NAIR, JJ.
(Gunturu) Pullayya and another—Appellants.

v.

Official Receiver of Kistna and others—Respondents.

Appeal No. 314 of 1924, Decided on 7th March 1932, against order of Dist. Judge, Kistna, D/- 18th December 1923.

(a) Provincial Insolvency Act (1920), S. 53—Burden of proof.

In a proceeding under S. 53, the burden of proof is on the party who questions the bonafides of the sale deed i. e., on the Official Receiver or creditors who want to question the sale deed : *A I R 1930 P C 265, Rel on.* [P 274 C 1]

*** (b) Provincial Insolvency Act (1920), Ss. 4 and 53—If transfer by insolvent is not bona fide further transaction by transferee also falls — Court can set aside such further transaction under S. 4.**

Even if later transaction by the transferee from the insolvent cannot be considered in a petition under S. 53 they cannot be so considered only on grounds peculiar and not as consequential on the main transaction. And if the sale deed by the insolvent is not bona fide the further transactions by the transferees also fall to the ground. In such cases even if it were to be held that the Court cannot declare the further transactions invalid under S. 53, it has jurisdiction under S. 4 to declare such transactions invalid : *A I R 1932 Pat 199, Ref.; A I R 1927 Mad 158, Dist.* [P 274 C 2]

P. Somasundaram and V. Krishna Mohan—for Appellants.

Ch. Raghava Rao and B. T. M. Raghavachari—for Respondents.

Ramesam, J. — The facts out which this C. M. Appeal arises may be stated as follows : The properties which are the subject of dispute originally belonged to one Mantravadi Suryanarayana Sastri. He had no children and he adopted his brother's son Kutumba Rao. This Kutumba Rao, soon after he attained majority, seems to have entered on a career of extravagance. A deed of partition was then brought about between the adoptive father and the son. This is Ex. C, dated 23rd July 1914. We then have got a sale deed, Ex. 1 (a), dated 26th July 1914, of the whole of the son's share of the properties in favour of one Nallanchakrvarthulu Venkatacharyulu. It

appears from the evidence that this Venkatacharyulu was a student of Suryanarayana Sastri for two or three years and studied Maha Bhashyam (Patanjali's great work in Sanskrit grammar) under him : vide R. W. 1. The partition deed and the sale deed were registered on the same day, namely, 28th July. The inference is irresistible that they are parts of the same arrangement that the sale was agreed upon even before the partition was made effective by the execution of a registered deed. This sale deed was for Rs. 20,000. The details given for the consideration are: (1) the amount due in respect of the previous loans, Rupees 11,463-8-0 ; (2) the amount received in cash on the date of the sale deed, Rupees 4,536-8-0; and (3) the amount agreed to be paid before the sub-Registrar, Rupees 4,000.

Two decrees were obtained against Kutumba Rao: (1) by Sukavasi Veerayya in O. S. 92 of 1915, and (2) another in O. S. 72 of 1915. One of these suits was instituted prior to the sale deed, Exhibit 1 (a). The other was filed a few days afterwards. In execution of these decrees the decree-holders attached the properties sold by the son Kutumba Rao as if they still belonged to him. The purchaser under Ex. 1-a, i. e. Venkatacharyulu, filed a claim petition which came on for orders before the District Munsif who passed the decree and his order is now filed as Ex. L. In that order he found that the two prior debts now filed as Exs. 6 and 4 and marked before the District Munsif's inquiry as Exs. B and C were not bona fide transactions. He also found as to the sale deed Ex. 1-a (then marked as Ex. A) that the vendee went to the Registrar's office to see its execution. The vendee's statement that it was registered at Gannavaram was erroneous, and he did not take the sale deed from the Registrar's office and neither he nor his witnesses knew who took it back from the Registrar's office. The claimant did not produce the receipts for the sircar cists which he claimed to have paid. He never saw the lands before purchasing them. The judgment-debtor was a young man of admittedly bad character. Suryanarayana Sastri was present at the execution of the sale deed and the District Munsif inferred that it must have been returned to him. He found that the sale

deed was a bogus transaction and dismissed the claim petition.

It is doubtful how far the reasons given in this order can be regarded as evidence in the present matter. I am not to be understood as referring to the contents of Ex. L as evidence. I am only narrating what happened in that inquiry. Venkatacharyulu had given evidence, and though by the time the present proceedings were started he was still living he did not care to give evidence in the present inquiry. He was respondent 1 in the Court below. In the appeal originally filed in the High Court he was respondent 2, but during its pendency he died. He was not available to give evidence when the case was sent back for fresh evidence. The fact remains that he was not examined in support of the sale deed. On 11th April 1917 Venkatacharyulu executed an agreement in favour of Suryanarayana Sastry agreeing to resell the whole property to him for Rs. 18,000 (Ex. 7). On the same date a receipt was executed reciting the payment of Rs. 18,000 as the consideration (Ex. 8), but curiously, and it seems to me an extraordinary circumstance, no sale deed was actually executed in favour of Suryanarayana Sastry. After the Transfer of Property Act has been in force for 35 years, it is very rare to find sale-deeds without registration, especially when the amount involved was very large; and it is so unusual that I regard the circumstance as extraordinary. It suggests that the original sale deed itself was a benami transaction and that the parties themselves were of opinion that the title never really changed and no fresh sale deed was really therefore necessary. However mere suspicions will not amount to proof and one has to look into it more fully before coming to any decisive conclusion. At present, I only mention the suspicion that arises. Suryanarayana Sastry executed an agreement on 9th December 1917, in favour of his brother's wife Venkatalakshamma, that is, the natural mother of his adoptive son. It recites that he purchased the property from Venkatacharyulu on 11th April 1917, and obtained possession, and the receipt of Rs. 18,000 and agrees to convey the land to her and directing that she herself should get a deed of sale executed in her favour by the said Venkatacharyulu and pur-

ports to deliver possession of the lands. Thus we see the property has come back to the mother of Kutumba Rao in a roundabout way through three transactions. Here again I pause to remark that a suspicion naturally arises that the transactions were really benami and constitute an attempt to screen the property from the creditors of Kutumba Rao and were intended really to benefit the family of Kutumba Rao and his mother, the title being ostensibly made to rest on the mother. Kutumba Rao was adjudicated insolvent by the District Court on 26th March 1917 on a petition dated 22nd September 1915. The date is very significant. On 7th October 1917 Suryanarayana Sastry executed a will, Ex. D. He says his brother's wife Venkatalakshamma should protect him in future and there is nobody else to look after him. Soon after the dismissal of the claim petition of Venkatacharyulu by Ex. L, suits were filed in the name of Venkatacharyulu against the decree-holders. These are O. S. Nos. 129 and 130 of 1916 on the file of the District Munsif's Court of Bapatla. They were afterwards numbered as 725 and 726 on the file of the District Munsif's Court of Tenali to which Court they were transferred. I will later on show that these suits were conducted and the expenses connected with them were really incurred by Suryanarayana Sastry himself and not by Venkatacharyulu as one would expect if the sale deed was a real transaction. After Suryanarayana Sastry's death towards the end of 1917, Venkatalakshamma sent her brother to demand a sale deed from Venkatacharyulu. This attempt resulted in a sale deed from Venkatacharyulu, in favour of Manda Venkayya, father-in-law of Venkatalakshamma's brother, Ex. 3, dated 18th March 1920. Venkatalakshamma naturally attacked the bona fides of this sale deed. One recital in the sale-deed is very significant:

"If in respect of the schedule-mentioned property covered by the sale, any others should institute any suit you should yourself bear the loss and profits and also bear the costs of the suit."

We have here got a clause which is opposite to the usual warranty of title in a sale deed. Here the vendor is not to be responsible for any dispute regarding the sale, but the vendee has to look to it. This adds to the suspicion that

the vendor himself had not much interest in the property. However, as I have said, the bona fides of Ex. 3 was in question and the matter was ultimately settled by the execution of Ex. 22 by Manda Chinna Venkayya, vendee, under Ex. 3, in favour of Venkatalakshamma. The document is described as a sale deed or a deed of conveyance. But it was only for Rupees 4,000. It recites that Venkatalakshamma questioned the bona fides of the sale deed, Ex. 3, dated 18th March 1920, and therefore he relinquished all the rights possessed by him in favour of Venkatalakshamma for a consideration of Rs. 4,000. Strictly it does not look like a deed of conveyance and it looks more like a document of release. It simply says that Venkayya will not dispute her title to the property, that Ex. 3 was a document obtained improperly by Venkayya from Venkatacharyulu and is inoperative to convey any title to Venkatalakshamma. It shows the consciousness of the parties that Venkayya had no title to convey. If Venkatalakshamma is to get a valid title from Venkatacharyulu, the proper thing is to obtain a sale deed from him. Such a sale deed has never been obtained to this day in spite of the agreement, Ex. 7, and of the receipt Ex. 8 and the agreement, Ex. II-A. That throws some light on the title possessed by Venkatacharyulu in the belief of the parties. The present proceedings were started by a petition filed by the Official Receiver of Kistna in September 1921. He prayed for annulment of the sale deed, Ex. 1 (a), dated 26th July 1914, and the further sale deed, Ex. 3, dated 18th March 1920. The District Judge, Mr. Lakshmana Rao, dismissed the petition. A Civil Miscellaneous Appeal was filed against that order.

This appeal came on before us on a former occasion, namely, on 2nd December 1927, and we passed an order on that date in which most of the facts now stated were mentioned. Many of the suspicious circumstances now referred to by me were also mentioned. We formed the tentative opinion on that occasion that the sale deed, Ex. 1 (a) and further transactions following it were not bona fide transactions. But it was complained before us by the learned advocate for the respondent Venkatalakshamma that he was not able to adduce

full evidence in the matter because the Official Receiver was not seriously pressing his petition. The District Judge himself has noted that the Official Receiver stated before him that he pressed the claim only formally. It may be mentioned here that the services of the Official Receiver were since dispensed with by Government on the recommendation of the High Court, and having regard to this fact we thought it was possible that the respondent did not place before the Court all the available evidence and we thought it proper to give another opportunity to Venkatalakshamma to adduce all her evidence. We regarded the opinion we then formed as merely tentative and without arriving at any final conclusion we sent the case back for further evidence. In the order passed on the former occasion several deficiencies in the evidence were noticed.

It was suggested by the learned advocate that Venkatacharyulu was the guardian of Lakshminarasimhacharyulu who was supposed to be the creditor under the promissory note, Ex. 6, dated 1913. The suggestion is that the guardian in taking the sale deed, Ex. 1 (a) adjusted the amount due under Ex. 6 in the accounts between himself and the widow (mother of Lakshminarasimhacharyulu). The further evidence now taken proves the guardianship. The promissory note itself was not then filed. The agreement of sale by Venkatacharyulu in favour of Suryanarayana Sastry to sell the property Ex. 7, was not then filed. The final decision in the regular suit in the Tenali Munsif's Court on the dismissal of the claim petition was not then filed. It is now filed as Ex. 26. Having regard to these gaps in the evidence we thought the advocate's complaint was justified. Fresh evidence has now been adduced on both sides and the matter comes on before us for final disposal.

At the outset I must recognize that the burden of proof is upon the Official Receiver or the creditors who want to question the sale deed. Prima facie when a registered sale deed is produced, the presumption is in favour of the transfer of title under it. Even in a proceeding under S. 53, Provincial Insolvency Act, it was recently held by the Privy Council in *The Official Assignee, of the Estate of Cheah Soo Tuan v. Khoo*

Saw Chiew (1) that burden of proof is on the party who questions the bona fides of the sale deed. Though at the time of the former order it was thought that the respondent had to adduce further evidence, as a matter of fact both parties have adduced further evidence and all evidence in the case is before us. We can therefore deal with it on the footing that the burden is on the creditors and the Official Receiver. The first thing to be noted is that Kutumba Rao was declared insolvent on his own petition filed on 22nd September 1915. That suggests that even in 1914 he must have been in very involved circumstances. The consideration for the sale Ex. 1 (a) consists of two promissory notes besides cash payments. It is always easy to get a promissory note in support of other transactions. It is not usual to lend large sums on promissory notes, that is without any security except in commercial transactions. (After considering some of the exhibits, the judgment proceeded). On this second occasion when the case was heard, a question of law was raised by the learned advocate for the respondent that in proceeding under S. 53, Insolvency Act, only the transfer by the insolvent can be annulled and the further transactions by the transferees cannot be set aside. He referred to a decision of the Lahore High Court in *Hayat Muhammad v. Bhawani Das* (2) and *Sudhu v. F. N. C. Daulat Ram* (3).

That is also a decision of this Court in *Ponnamai Ammal v. District Official Receiver, Tinnevely* (4) to which my brother Madhavan Nair, J., was a party. But when the facts of the case are examined it scarcely supports the proposition contended for. The learned Judges have found in that case that Ex. 10 ought to be upheld. That being so there is no ground to attack Ex. 11, the further transfer by the vendee. On these facts really no such question arises. What the learned Judges seem to have meant in that case was that later transactions by the transferee cannot be questioned on a ground peculiar to themselves and independent of the attack in the main transaction but surely there

can be no objection to holding that if the sale deed by the insolvent was not bona fide the further transactions by the transferees also fall to the ground along with it. The matter was further considered by another Bench of this Court in *Jagannadha Ayyangar v. Narayana Ayyangar* (5). One of the learned Judges (Oldfield, J.) points out that the practice in England is different and refers to *In re Vansittart, Ex parte Brown* (6) and *In re Brall Ex parte, Norton* (7). He however thinks that the language in the Indian Act is different and proceeds to disallow the contention by pointing out that the real point in that case was that there was no real transfer by Ex. 3 by the first transferee but only a concealment of the insolvent's property and if that is established there is really no real transfer to any intermediate transferee. That is exactly the point in the case before us and the learned Judge's distinction equally applies now. The learned Judge also says that even if under S. 36 of the old Act (corresponding to S. 53 of the present Act) only the first transfer can be annulled, he was not expressing any opinion in respect of the validity of the later transfers as the foundation for further legal proceedings. Seshagiri Iyer, J., thinks even under the Indian Act all the transactions can be annulled and he relies on the English cases.

I am inclined to agree with the opinion of Seshagiri Iyer, J., and even if it can be really said that later transactions by the transferees from the insolvent cannot be considered in a petition under S. 53 they cannot be considered only on grounds peculiar and not as consequential on the main transaction. If we remember that distinction, I do not think there is any real difficulty. Moreover the question does not really arise in the present case. There is no sale deed by Venkatacharyulu in favour of Venkatalakshamma and the Official Receiver does not seek to set aside any such sale deed. No doubt, the Official Receiver wanted to have Ex. 3 cancelled. But that relief is now unnecessary. The parties themselves have cancelled Ex. 3 by the relinquishment deed,

1. A I R 1930 P C 265=128 I C 662=(1931)
A C 67=100 L J P C 45=44 L T 130,
2. A I R 1926 Lah 146=90 I C 1037.
3. A I R 1925 Lah 295=88 I O 89.
4. A I R 1929 Mad 58=97 I C 918.

5. A I R 1920 Mad 917=52 I O 761.
6. (1893) 2 Q B 377=62 L J Q B 279=5 R 280
=68 L T 233=41 W R 286=10 Morrell 44.
7. (1893) 2 Q B 381=62 L J Q B 457=5 R 440.

Ex. 22. China Venkayya himself admits that he has no more right to the property. No formal annulment of Ex. 3 is now necessary and the only sale deed that has strictly to be annulled is Ex. 1 (a) of July 1914. The point has been raised at a very late stage in the case and it is purely technical. Even if S. 53 does not apply we can declare such transactions void under S. 4: see *Biseshwar Chaudhuri v. Kanhai Singh* (8). Both on the merits and on the other grounds indicated I decide this point against the respondent.

The result is the appeal must be allowed and the sale deed, Ex. 1 (a) is annulled as a fraud on the creditors. The Official Receiver is declared entitled to proceed against the properties in the sale deed for the benefit of the creditors. I understand that most of the creditors have either been paid or did not take interest in the matter. Only one creditor, one who filed C. M. A. No. 314 originally, has to be paid up. If his debt is paid up, Venkatalakshmamma can still enjoy the property which once belonged to her husband's family and her son. We hope the parties will settle the matters on such a footing. If they do not, the property must be available for distribution among the creditors. Venkatalakshmamma must pay the costs of this appeal and in the Court below to the original appellant.

Madhavan Nair, J.—I agree with my learned brother; but on the point of law argued by Mr. Raghava Rao relying on *Ponnamai Ammal v. District Official Receiver, Tinnevelly* (4), I will add a few words. Strictly speaking, the point raised by the learned counsel does not arise in this case as there is no sale deed by Venkataraghavulu, the insolvent in favour of respondent 4. It is true that the Official Receiver desires to have Ex. 3 cancelled but that has been cancelled by Ex. 22. However, as the point has been argued, I will express my opinion. In *Ponnamai Ammal v. District Official Receiver, Tinnevelly* (4), Wallace, J., and I pointed out, basing our judgment on the words of S. 53, Provincial Insolvency Act, that it was not open to the Official Receiver to attack a transfer from the transferee of the insolvent. In that case it must be noticed that the transfer by the insolvent which

was questioned was upheld; and then the Official Receiver sought to question the transfer made by the transferee on altogether independent grounds and we held that this could not be done under S. 53, Insolvency Act. In the present case the transactions in question including the alienations made by the transferee from the insolvent are all attacked as links in a chain of fraudulent and connected transactions intended to screen the property from the claims of the creditors, so that while the transaction in favour of respondent 4 is attacked what is really attacked is the original alienation made by the insolvent himself. Viewed in this light the alienation made by the insolvent cannot be considered apart from the alienation in favour of respondent 4. The transactions in question are all interlinked. The decision in *Ponnamai Ammal v. District Official Receiver Tinnevelly* (4), is thus distinguishable on the facts from the present case. I may here add that in *Ponnamai Ammal v. District Official Receiver Tinnevelly* (4), it was not argued before us whether the validity of the transaction could be questioned under any other provision of the Provincial Insolvency Act. In a case like the present, if the facts are proved, I do not think it can be said that insolvency Court has no jurisdiction to declare the transactions to be invalid and not binding on the creditors. Though S. 53 of the Act may not strictly apply, in a proper case I think the Court has jurisdiction under S. 4, Insolvency Act, to declare the transactions invalid. S. 4, Cl. 1, Act 5 of 1920 is as follows:

"Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title, or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

It will be seen that this section is very widely worded and gives insolvency Courts powers not only to decide all questions of title or priority but all other questions which the Courts may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. The jurisdiction conferred

under S. 4 on the Insolvency Court is not limited in any way by Ss. 53 or 54, Insolvency Act. In my opinion, in a case like the present, S. 4 may be relied on by the Official Receiver in support of the contention that the Court has jurisdiction to declare that the transactions in question are invalid. I would therefore hold that the decision in *Ponnamai Ammal v. District Official Receiver, Tinnevely* (4) is inapplicable to the present case.

P.R.S./K.S.

Appeal allowed.

* A. I. R. 1933 Madras 276

JACKSON AND MOCKETT, JJ.

Vasireddy Ramayya and others—Appellants.

v.

Mulugu Kotayya and others—Respondents.

Appeal No. 22 of 1930, Decided on 20th September 1932, against an order of Sub-Judge, Bapatla, D/- 14th March 1929.

* Limitation Act (1908), Sch. 1, Art. 182 (3) —Review and revised decree—Limitation for execution of decree runs from date of revised decree even as against persons not parties to the review proceedings.

Where a decree is reviewed at the instance of only some of the defendants, limitation for execution of the decree runs from the date of the revised decree even as against the defendants who are not parties to the review proceedings: 24 *Mad* 1 and 38 *Mad* 419, *Dist*; 35 *Mad* 670 and *A I R* 1932 *P C* 165, *Rel on*. [P 276 C 2]

P. Somasundaram—for Appellants.

B. Somayya—for Respondents.

Judgment.—The decree sought to be executed is dated 16th February 1914. The petitioners (appellants) petitioned to execute it against defendants 4, 18 and 42, respondents 1, 2 and 3, in respect of mesne profits and for possession of a plot of land. The decree was joint and several against all the defendants. The defendants appealed to the High Court against the above decree and the appeal was dismissed on 29th March 1916. On 18th January 1917, the High Court reviewed the decree at the instance of defendants 19, 21 and 22 and limited their liability to certain items. The respondents were not made parties to the review application.

In the present execution petition the appellants give the "date of decree" as "date of amended decree 18th January 1917." They now appeal against the order in execution in so far as the learned

Subordinate Judge has held that subsequent profits for the years 1910 to 1919 are not recoverable in execution as no final decree has been passed in respect thereof. We think that this construction of the decree is clearly wrong and Mr. Somayya for respondent 2 does not argue otherwise.

There is however a memorandum of objections which raises a point which if sound goes to the root of the whole matter. Mr. Somayya argued that limitation should run not from the date of the review order but from the date of the original decree. If he is right this execution petition is time-barred. The basis of his argument is that inasmuch as the respondents were not parties to the review application their legal rights cannot be affected by an ex parte order, that is, that a fresh period of limitation cannot be created by an order in their absence. Art. 182 (3), Limitation Act, is prima facie against this contention—the words "where there has been a review" are not limited or qualified. The cases cited do not in our view support this contention: *K. Venkata Subbamma Rao v. V. Venkatarama Rao* (1), it was urged, is an authority in its favour but this was decided on the ground that the High Court acted ultra vires and that such an order could not prejudice absent parties who could therefore rightly claim that the original decree was intact. *Abdul Khadir v. Ahammad Shaiwa Ravuther* (2) is a case of fraud by one judgment-debtor being invoked to extend time against an innocent co-defendant. This position was not acceptable to the Full Bench who preferred the view of Sundaram Iyer, J., to that of Phillips, J., in *Abdul Khadir v. Aliger Ahammad* (3), the subject of the Full Bench decision. In that case Sundaram Iyer, J., at p. 675, observes:

"No doubt where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree though not all the judgment-debtors may be concerned in the appeal, review or amendment."

The learned Judge then proceeds to distinguish the special consideration applicable to fraud under S. 48, Civil P. C. The respondent is therefore asking us to

1. (1901) 24 *Mad* 1=27 *I A* 197=74 *Sar* 673 (PC).

2. (1915) 38 *Mad* 419=30 *I C* 423.

3. (1912) 35 *Mad* 670=12 *I C* 677.

apply to Art. 182 a restricted meaning for which there is no authority. On the other hand the recent decision of the Privy Council, *Nagendra Nath Roy v. Suresh Chandra* (4), is strongly opposed to the respondents' case. Their Lordships dealing with Art. 182 (2) express the following view :

"There is no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it, the words mean just what they say."

If Mr. Somayya's argument was accepted by us we should have to read into Art. 182 (3) an elaborate proviso protecting persons not parties to the review, that is, a qualification as to the parties which is precisely what the above judgment prohibits. We consider that the plain wording of Art. 182 (3) must be followed and as there has been a review, time will run from the date of the review. The result of the above conclusions is that the Appeal Against Order No. 22 of 1931 must be allowed and the memorandum of objections disallowed with costs throughout.

P.R.S./K.S.

Appeal allowed.

4. A I R 1932 P C 165=137 I C 529=59 I A 283.

A. I. R. 1933 Madras 277

WALSH, J.

(*Peria*) *Kalathi Mudali*—Complainant
—Petitioner.

v.

Venkatesa Mudali and others—Accused
—Opposite Parties.

Criminal Revn. No. 23 of 1932 and Criminal Revn. Petn. No. 22 of 1932, Decided on 18th April 1932, from judgment of Sub-Divl. Magistrate, Ranipet, D/- 16th November 1931.

(a) Criminal P. C. (1898), S. 422—Notice of appeal not sent to officer appointed by Government—No objection by Government—Appellate order should not be interfered with unless injustice is caused.

The accused were convicted by the trial Court of a petty offence and sentenced to a fine of Rs. 25 each out of which Rs. 25 was ordered to be paid as compensation to the petitioner. On appeal they were acquitted. The petitioner appeared, but was refused adjournment. No notice of appeal was sent to the officer appointed by the Government, but no objection was taken by the Government regarding this.

Held : that the mere fact that notice of the appeal was not served on the officer appointed under S. 422, Criminal P. C., was no ground for interfering with an order of acquittal, where no injustice had been occasioned: *A I R 1923 Bom 264* and *A I R 1924 Mad 837, Rel on*; *A I R 1926 Cal 1054, Ref.* [P 278 C 1]

(b) Criminal P. C. (1898), S. 422—Notice to complainant.

The Code does not require notice to be issued to the complainant : 20 I C 418, *Ref.*

[P 278 C 1]

A. C. Sampath Ayyangar—for Petitioner.

V. L. Ethiraj—for Opposite Parties.
Public Prosecutor—for the Crown.

Order.—The accused in this case were convicted by the trial Court of an offence under S. 352, I. P. C., and sentenced to a fine of Rs. 25 each, out of which Rs. 25 was ordered to be paid as compensation to P. W. 1, the petitioner. On appeal they were acquitted. This revision petition is against the acquittal, the only ground being that the petitioner was not in a position to deal effectively with the pleas raised for the accused in appeal.

The petitioner has put in an affidavit in which he says that the notice of appeal was served on him on 15th November 1931, at about 12 noon, at his village of Tirumalpur which is three miles away from Pallur Railway Station; Sholingur camp was 9 miles from the Sholingur Railway Station. He left his village for Sholingur by 6.30 p.m. train and reached Sholingur Station at 11 p.m. He took a bus to Sholingur town at 6 a.m. next morning and reached Sholingur town at 7 a.m. He represented to the Sub-divisional Magistrate that he could not bring his advocate who had his record owing to the short notice; nevertheless adjournment was refused and the appeal was heard and disposed of. Another ground taken in the petition was that notice of the appeal was not sent under S. 422, Criminal P. C., to the officer appointed by the Government. There has been no objection by the Government in this case. As regards the latter point *Devendra v. Shettappa* (1) has been quoted to show that when the District Magistrate does not raise any objection to the procedure, the High Court will not interfere in revision. The learned advocate for the petitioner relies on *Bharasa Naw v. Sukhdeo* (2). That was a case somewhat similar to the present case, where compensation was ordered to be paid to the complainant; but in that case he had no notice at all. Duval, J., says :

1. A I R 1923 Bom 264=26 Cr L J 751=56 I C 287.

2. A I R 1926 Cal 1054=27 Cr L J 1056=53 Cal 969=97 I C 62.

"It is clear that no notice to the officer appointed by the Local Government was given as required by S. 422, Criminal P. C. This alone is good reason for ordering the appeal to be re-heard."

It does not appear from the judgment whether the Government had raised any objection to the omission to give notice. If they had not, this opinion is contrary to that expressed in *Devendra v. Shettappa* (1). In *P. Kanakkan v. Amir Bi* (3) Venkatasubba Rao, J., held that the fact that notice of the appeal was not served on the complainant or on the officer appointed under S. 422, Criminal P. C., was no ground for interfering with an order of acquittal, where no injustice had been occasioned. It does not appear from the report whether the petitioner in that case had been awarded compensation or not. It is well established that the Code does not require notice to be issued to the complainant: vide *Behari Majhi v. Hari Majhi* (4). It has no doubt been held advisable to issue such notice when compensation has been awarded to the complainant: vide the remarks in *Bharasa Naw v. Sukhdeo* (2), where a reference is made to certain Madras cases which deal with cases of compensation under S. 250, Criminal P. C. In *In re Chemikkala Chinna Bali* (5) the case was referred by the Sessions Judge owing to want of notice. It has to be noted that although S. 436, Criminal P. C., has now been amended making notice to an accused person who has been discharged under S. 253 necessary before the order of discharge is set aside, no such provision has been made in S. 250 of the amended Code.

The facts of this case are that the petitioner did appear in person and was heard, as will be seen from the heading of the judgment. According to him he got notice of the appeal about noon on 15th November 1931. His village is three miles from Pallur Railway Station. Assuming that he could not get the train at 12.37, there was one at 18.29 which would have brought him to Katpadi at 21.10 hours. There was another at 19.53 which would have brought him to Katpadi at 23.45. Although there appears to be no connexion by these trains from

Katpadi to Vellore yet the distance is only 3 or 4 miles by road and the petitioner could almost certainly have got a bus or cart to Vellore. Returning to Katpadi he could have got a train at 3.17 reaching Sholingur at 4.3. So that, it is by no means clear that he could not have at least brought his papers to the Court if not the pleader. As regards *In re Arjun Tathoo* (6) and *Gulai Jha v. Emperor* (7), which are quoted in this connexion, I do not think they are applicable in the present case. In the first case the appellant himself had not been given proper notice of hearing of the appeal and the appeal was dismissed. In the second the party was asked to cross-examine a witness at 6.30 p. m. and his request for an adjournment was refused. It has not been pointed out to me that there is any mistake in the judgment. The offence is a petty one and this Court will not lightly set aside an acquittal. I see no reason to interfere, in revision. The petition fails and is dismissed.

P.R.S./K.S. *Petition dismissed.*

6. A I R 1920 Bom 318=21 Cr L J 373=55 I C 853.

7. A I R 1928 Pat 277=29 Cr L J 239=107 I C 237.

A. I. R. 1933 Madras 278

BARDSWELL, J.

Public Prosecutor—Appellant.

v.

Nellore Audinarayana Reddi — Accused—Respondent.

Criminal Appeal No. 316 of 1932, Criminal Revn. Case No. 341 of 1932 and Case Referred No. 20 of 1932, Decided on 2nd September 1932, referred by Sess. Judge, Nellore, D/- 28th April 1932.

Civil P. C. (1908), O. 21, R. 40—Detention to be valid need not be in writing—Judgment debtor escaping from custody, commits offence under Penal Code (1860), S. 225-B.

In order that an order requiring detention of a judgment-debtor under Civil Procedure Code, O. 21, R. 40, to be valid, it need not be in writing. Irrespective of a written order the detention being valid, the judgment-debtor, if he escapes from such custody, is liable to be convicted under S. 225-B, I. P. C. [P 279 C 1]

T.S. Nataraja Pillai—for Respondent.

Order.—Both the trial Court and the appellate Court have found that the Respondent-accused escaped from custody and their findings are warranted by the evidence. The appellate Court however has found that the respondent was not in lawful custody, because there was

3. A I R 1924 Mad 837=26 Cr L J 249=84 I C 249.

4. A I R 1932 Cal 61=1932 Cr C 9=33 Cr L J 305=136 I C 474.

5. (1915) 31 I C 176.

no order in writing for him to be detained in the custody of the two processions (P. Ws. 2 and 3). O. 21, R. 40, Criminal P. C. 1908, however says nothing about the order having to be in writing. The proviso added by the High Court to O. 21, R. 40 (5), Criminal P. C. says that in order to allow the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a period not exceeding ten days. This is what the District Munsif did in this case and his order, noted on the warrant, as to the judgment-debtor's paying detention batta limited the period of such custody to two days. *Emperor v. Madho Singh* (1), is no help to the respondent in the face of the proviso above noted. The acquittal of the respondent is set aside and his conviction by the Stationary Sub-Magistrate under S. 225-B, I. P. C. is restored. His offence however was only a technical one and he surrendered himself to the Court on the expiry of the two days. He is fined Re. 1 with one day's simple imprisonment in default.

P.R.S./V.S. *Acquittal set aside.*

1. A I R 1925 All 318=86 I O 801=26 Cr L J 86=47 All 400.

A. I. R. 1933 Madras 279 (1)

WALSH, J.

S. Subramania Ayyar — Accused — Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. Case No. 764 of 1931 and Criminal Revn. Petn. No. 695 of 1931, Decided on 19th February 1932, from order Sub-Divisional Magistrate, Saidapet, D/- 28th October 1931,

(a) Criminal P. C. (1898), S. 435—Findings of fact.

It is not the business of the High Court to discuss findings of fact for which there is evidence in revision. [P 279 C 2]

(b) Penal Code (1860), S. 117—Instigating railway workers to lie on line in the event of strike is offence.

Instigating railway workers to lie on the line in the event of a strike is an offence even though the strike is only a contingent matter and it is immaterial whether the accused is urging an immediate strike and instigating the workers to lie across the line or is merely instigating their doing so in case of strike.

[P 279 C 2]

K. Bhashyam Ayyangar for *R. Viswanathan*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—This being a revision petition I propose to say very little. The lower Courts have both found that the accused instigated railway workers in the event of a strike to lie on the railway line. The accused's version was that he told them to lie along the line. Not only the prosecution evidence of persons knowing Hindustani who heard his speech and the shorthand notes made on the spot of the translation into Tamil, show that he told his hearers to lie on the line but the evidence of his own witnesses does not support his own version.

However it is not the business of this Court to discuss findings of fact for which there is evidence in revision. As regards the legal question, it is urged that the strike was only a contingent matter and therefore no offence was committed. The illustration to S. 117, I. P. C. shows that an instigation to attack a procession which is going to be held is an offence under the section. It is immaterial therefore whether the accused was, as argued by the learned Public Prosecutor, urging an immediate strike and instigating the workers to lie across the line or was merely instigating their doing so in case of a strike which he advised if the retrenchment proposals, which were temporarily held up, were carried out. The sentence which was reduced by the appellate Court cannot be said to be excessive. The petition fails and is dismissed.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 279 (2)

WALLACE, J.

On difference between

WALLER AND PANDALAI, JJ.

Pogaru Ramamurti — Plaintiff—Appellant.

v.

Pushavati Alaka Narayana Gajapati Raju—Defendant—Respondent.

Letters Patent Appeal No. 125 of 1926, Decided on 20th April 1932, against judgment of Spencer, J., D/- 8th February 1926: reported in *A. I. R. 1926 Mad. 1045*.

(a) Madras Survey and Boundaries Act (4 of 1897), Ss. 11, 12 and 13—Dispute as to whether certain land is Government pro-

was a boundary dispute. After hearing it I remain of the opinion that there was here as much a boundary dispute as in *Muthirulandi Poosari v. Sethuram Aiyar* (1) and as in the cases reported as *Kamaraju v. Secy. of State* (2) and *Muthammal v. Secy. of State* (3). I find that I had omitted to deal with another contention that found favour with Spencer, J. It was that the suit—being a suit to recover the emolument of a karnam's office—was under S. 21, Madras Act 3 of 1895, not cognizable by a civil Court. The suit is not one to recover the emoluments of an office, but to eject persons who are alleged to have trespassed on some inam land, which forms part of the emoluments of the office. Apart from that I find great difficulty in following the decisions which have laid down that S. 21 of the Act takes suits by holders of offices for recovery of their emoluments out of the jurisdiction of the ordinary Courts. The Act is intended to deal with the succession to certain hereditary village offices and to provide for the hearing of claims to such offices or their emoluments. S. 13 says that "any person"—not, be it observed, village officer

"may sue for any of the village offices specified in S. 3 on the ground that he is entitled under the material sections of this and another Act "to hold such office."

That is a suit by a claimant to an office for a declaration that he is entitled to succeed to it. The section also provides for suits for recovery of the emoluments attached to such offices. It says that "any persons," in other words, a claimant and not a village officer in case

"may sue for the recovery of the emoluments of any such office on the ground that he is entitled," under the material sections of this and another Act "to hold such office." I am unable to see how the language of the section can apply to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to hold it. If there could be any doubt about the point, it is removed by Prov. 2, S. 13, which runs as follows :

"If at any time before the completion of the trial of a suit referred under this section for any office or for recovery of the emoluments of any

2. (1888) 11 Mad 309 (F B).

3. A I R 1915 Mad 106=26 I C 817=39 Mad 1202.

office, it appears to the Collector that the claimant is not eligible for appointment under sub-S. (1), S. 10 or sub-S. 1, S. 11 of this Act, as the case may be, he must pass an order rejecting the plaint."

The question of eligibility for appointment could, in relation to a suit for recovery of the emoluments of an office, arise only in the case of a claimant to an office. Such a question could not arise in the case of an actual holder of an office. That being so, it seems to me open to serious doubt whether a suit by the holder of an office to recover the emoluments attached to it is taken by S. 21 out of the jurisdiction of the ordinary Courts. Since we reserved judgment it has been brought to our notice that a Bench of this Court has held that a decision by a survey officer does not make a break in existing possession so as to render ineffective, for purposes of limitation, any adverse possession running at its date : see *Azhagaperumal Pillai v. Rasa Pillai* (4). The Judges thought that their view did not run counter to the decision of the Full Bench in *Muthirulandi Poosari v. Sethuram Aiyar* (1). With great respect, I think that it does. The referring Judges in that case were definitely of opinion that the decision of the survey officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it, so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion. Even if it be assumed that the two periods can be tacked on to each other, what was the decision of the survey officer in this case? That the inam was a pre-settlement inam and that sixty years' adverse possession was necessary to establish the title claimed by the Maharaja. The decision was erroneous, but he had jurisdiction to pass it and it holds the field till it has been displaced in the proper way. The land having been demarcated as pre-settlement inam, it would lie on the Maharaja to show that he had been over 60 years in adverse possession. All that has been shown is possession from 1873 till 1917. From either point of view the contention fails and I would allow the appeal. I should like to add, in regard to the decision in *Chinna Venkatrayadu v. Ramamurthi* (5), that I concur in

4. A I R 1932 Mad 310=138 I C 362,

5. A I R 1921 Mad 63=41 Mad 340.

Spencer, J.'s criticism of that decision. In the course of the argument we sent for the printed record, but I was unable to discover from it on what facts or evidence the observations of the Judges were based. I would restore the decision of the District Judge with costs in this and the lower Court.

Pandalai, J.—Though with great reluctance to differ from my learned brother's opinion which I have respectfully considered, I find myself unable to say that Spencer, J., was wrong when he held that there was no such dispute about a boundary as was necessary to make the order, Ex. 23, conclusive under S. 13, Survey and Boundaries Act of 1897, unless it was set aside by suit filed within a year thereafter. The nature of the dispute can be seen from the appeal petition, Ex. 23 (a), by the Vizianagaram Samasthanam. The subordinate survey officers had demarcated i. e., described a particular survey field No. 329, as "subsequent service inam" meaning post settlement service inam, whereas the zamindar contended that it was no longer service inam but raiyati (jiroyati) land. There was no dispute about the physical properties or dimensions of the land. The dispute was about tenure or the quality of estate possessed by the parties in the land and it is to be noted that whichever contention prevailed, the land was part of the zamindari. When this dispute was taken in appeal before the Assistant Superintendent of Survey the present appellant (then respondent) admitted, as it is even now admitted in the plaint, that though the inam was a post settlement inam he had lost possession for a great many years and the zamindari had let out the land as jero-yati to his raiyats and made an allowance of Rs. 30 per year to himself as compensation for the loss of the land. The result of the appeal was that the "present demarcation and registration of Survey No. 339 as mirasi inam was confirmed"—by which I understand that it was demarcated as post settlement hereditary inam.

But the appellant refers to the penultimate paragraph of the order where it is said that land is Government Service inam and therefore that the appellant should prove right by prescription for a period over 60 years. All I can say about this is, that the passage discloses

some error or confusion of facts quite against the admitted facts and the contentions of both parties. Whatever these expressions were intended to convey, I read the decision as confirming the order appealed against and not as ordering a third alternative, i. e. pre-settlement inam. This however is a detail, the substantial point being that it is abundantly clear that the dispute was not about the boundary of anything but about the tenure of a specific piece of land—the zamindar claiming it as raiyati land and the appellant as his inam. In my opinion the decision in such a dispute by a surveyor is not final under S. 13, Survey and Boundaries Act, merely because it is placed before him in the course of survey operations and he passes orders thereon. There can be no estoppel on such a point. The only class of orders which derive finality under the Act are those which decide boundary disputes. It is no doubt possible by ingenious use of language to describe a dispute about title as a dispute about boundary—in the sense that when the disputed title is decided, the boundary of the successful party's possessions is extended and that of the other diminished. But this is really a play upon words and not what is intended when it is said that the survey officer shall have power to determine and record undisputed boundaries and that when a boundary is disputed the Survey Officer shall determine the boundary and record it: Ss. 9 and 10, Act 8 of 1923, corresponding to S. 11 (1) and (2), Act 4 of 1897. It is this determination against which an appeal is allowed by S. 12 of the Act of 1897 corresponding to S. 11 of the Act of 1923 and in respect of which the appellate decision shall, unless modified by a decree of the Court, be conclusive as to the right of the dissatisfied party in respect of the boundary of the property surveyed according to S. 13 of the Act of 1897 or conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded according to S. 13 of the Act of 1923.

Whether there is or not in any particular case a real dispute about a boundary is to be determined on the facts of the dispute itself. In my opinion when two people dispute title to an ascertained and definite piece of land or to subordi-

nate interests therein the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded—as a necessary logical consequence but not by virtue of the Act. But if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey and his order, Exs. G and 23, being one on a matter beyond his jurisdiction, could not become conclusive under the Survey and Boundaries Act. The further argument has confirmed me in my opinion about the scope and purpose of the Act and of its effect on the case.

The scope and purpose of the Act of 1897 (the material Act in this case) as well as of that of 1933 is to consolidate and amend the law relating to survey of lands and settlement of boundary disputes. The power of survey officers is to fix boundaries, i. e., demarcate the physical extent of properties by setting up the boundaries between them. They have no power to decide disputes about title, but only disputes about boundaries. They were not intended to be a sort of quasi civil Courts whose decisions operate as *res judicata* in the proper sense as to all matters decided by them or which may inferentially be involved in their decisions. Thus two matters must be distinctly borne in mind: (1) The survey authorities have no jurisdiction at all in any matter except that of boundaries; and (2) the only effect of their decision on matters within their jurisdiction is not that they have the effect of *res judicata* but that as far as they are boundary decisions they only can be questioned by a suit brought within a certain time—which is quite a different thing. I will not say that some decisions on the Survey and Boundaries Act are not capable of being read as imputing a wider jurisdiction to officers acting under the Act

and a more extensive effect to their actual decisions. But I believe that the scope of the Act and the limits of the jurisdiction of survey officers and of the effect of their orders are generally recognized as I have stated. In *Kamaraju v. Secy. of State* (2) the boundary between the zamindari and a neighbouring trust Government land had been settled in 1875 under the Boundaries Act of 1860. The zamindar, then a minor, was represented before the Survey Superintendent by his Estate Manager. Later the portion so excluded from the zamindari was included in a reserve forest under the Madras Forest Act of 1882. The forest settlement officer rejected the claim of the zamindari to the area excluded from it by the survey decisions.

Of the two questions involved, the first, namely, whether an appeal lies to the High Court from a decision of the District Court passed under S. 10, Madras Forest Act, is not relevant to this case. But the second question was whether the zamindar was properly represented in the survey proceedings. It was held that he was. There was no question raised whether there had been a boundary dispute such as to give jurisdiction to the survey superintendent for the decision of 1875. The Court simply said that the matter in dispute was *res judicata* and that the zamindar was bound by the proceedings under the Boundary Act in 1875. This decision is hardly in point on the question before me. Nor can the use of the expression *res judicata* be understood as meaning that the survey superintendent's decision is *res judicata* in the proper sense in view of the decision of the Privy Council pointing out the distinction between *res judicata* in the proper sense and the statutory prohibition of questioning executive or as administrative acts except in a particular way: see *Radhakrishna Ayyar v. Sundaraswamier* (6) confirming the decision of this Court in *Radhakrishna Ayyar v. Swaminatha Ayyar* (7). In *Muthammal v. Secy. of State* (3) the question before the High Court was whether a mittadar, against whom the decision of the Boundary Commissioner excluding a certain area from his mittha had become final, could

6. A I R 1922 P C 257=74 I C 584=49 I A 211=45 Mad 475 (P C).

7. (1917) 40 I C 537.

maintain a prayer to the civil Court to reduce his peishkush proportionately to the excluded area. Sir John Wallis, C. J., held that that question did not arise in view of his opinion on the effect of the boundary decision. He said:

"In these circumstances the decision of the Boundary Settlement Officer that the lands in question did not form part of the zamindari is res judicata according to the decision of the Full Bench in *Kammaraju v. Secy. of State* (2) and I think that the ground of the decision, namely, that they never had formed part of the mita is also res judicata as having formed the ground of the decision."

In view of the opinion expressed by this very learned Judge in *Muthirulandi Poosari v. Sethuram Aiyar* (1) and *Chinna Venkatrayudu v. Ramamurthi* (5) the opinion that survey officer's decisions operate by way of res judicata is open to the remark that it does not recognize the distinction now pointed out by the Privy Council and was perhaps not intended to be understood in that particular sense. The opinion that the effect as res judicata of decisions by survey authorities extends to the grounds of the decisions also is in my opinion not justified by the Survey and Boundaries Act. In *Muthirulandi Poosari v. Sethuram Aiyar* (1) there had been a litigation in the year 1900 between the parties, and a decree was passed. There arose a dispute between the parties as to whether that decree conferred the right to a lane to the present plaintiffs. In 1904 this dispute came before the survey officers who were surveying the town of Madura. The survey officer decided that the lane belonged to the defendant and demarcated it accordingly as part of his property. This decision was not questioned by a suit within a year but the plaintiffs brought a suit in 1913 for an injunction against the defendant alleging that the decree of 1900 had awarded the lane to him, that he was in possession under it both before and after the survey decision and that the defendant had no right to interfere with the plaintiff's enjoyment. It was recognized that unless there was a boundary dispute the survey officials could not by demarcating a boundary affect title to property. Both the referring Judges, Phillips and Seshagiri Ayyar, JJ., refer to this at pp. 427 and 428 (of 42 *Mad.*) of the report. The question referred was, when a plaintiff's claim has been disallowed

under the Survey and Boundaries Act 4 of 1897, but he has been in possession of the property, does the decision of the survey officer operate as res judicata in a subsequent suit for possession? In the opinion of the Full Bench delivered by Sir John Wallis, C. J., he carefully guards himself by premising it with the words

"assuming that in this case the boundary was disputed and the dispute was the subject of an order by the survey officer under S. 11, Madras Act 4 of 1897,"

and then he stated the opinion that

"in that case the order if not reviewed by the appellate authority or questioned by a suit as provided in the section was conclusive as to the rights of the parties and nonetheless so because the unsuccessful party, who was in possession at the date of the order, was not subsequently ousted from possession."

This clearly recognizes that to give jurisdiction to a survey officer to make an order which shall be conclusive under S. 13 of the Act of 1897 there should be a boundary dispute as stated in the opening words of that section, and all that is meant is that the conclusive character of the order, which according to the section itself relates to the rights claimed in respect of the boundary of the property, is not affected by the unsuccessful party, who was in possession at the date of the order, continuing to be in possession. In *Chinna Venkatrayudu v. Ramamurthi* (5) the distinction between orders which are final under S. 12 (3) of the Act of 1897 and those which are conclusive of the rights as to the boundary unless set aside by a suit under S. 13 is pointed out by Sir John Willis himself. In that case a karnam in the Pithapur estate had during the survey operations of that estate succeeded in getting the survey officers to demarcate as included in his inam lands the neighbouring jeroyati lands of the zamindar. Neither the zamindar nor his agents had appeared before the survey officers, and there had been no appeal and no suit to set aside the order. It was pointed out that in the Full Bench case *Muthirulandi Poosari v. Sethuram Aiyar* (1) all that was decided was that the survey officer's order in boundary cases is conclusive under S. 13 only when there was a dispute and that nothing was stated therein about the effect of the word "final" in S. 12 (3). The effect of S. 12 (3) was held to be to make the boundary final as far as the authorities

are concerned, but not to preclude land-owners from ever afterwards disputing the correctness of the boundary in a Court of law. The opinion that the conclusiveness of a survey officer's order under S. 13 of the Act of 1897 can only arise if there was a boundary dispute was again laid down in *Subramania Mudali v. Meenakshi Ammal* (8) and *Municipal Council, Cochin v. Devusi* (9). It must have been in view of these decisions that in S. 13 of Act 8 of 1929 the words:

"any party to a boundary dispute before the survey officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal is given, and any person claiming under any such party,"

which are found in S. 13 of the Act of 1897 have been omitted. Under S. 13 of the new Act all persons to whom notice of orders passed under Ss. 9, 10 or 11 of the Act has been given are required to get the orders modified by suits within three years. This case however has to be decided on the words of S. 13 of the Act of 1897. As to what it is, that is concluded by a survey officer's decision acting within his jurisdiction, that is in respect of a boundary the words of S. 13 of the Act of 1897 are that a suit is to be filed to establish the right which the dissatisfied party claims in respect of the boundary of the property surveyed, and that subject to the result of such suit such order or decision shall be conclusive. The words of S. 13 of the Act of 1929 are that the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded. In my opinion the effect of both the sets of words is the same and they mean that unless the order is set aside by suit the boundary as determined is conclusive. As I have already said, if from a particular boundary being conclusively established the right of either party to the intervening space necessarily follows that will be held concluded not because of the Act but because of the force of logic. The Act itself confers no conclusiveness upon anything else but boundaries and says nothing about the right to the property or about its possession. This last point as to possession is clearly stated in *Azhagaperumal Pillai v. Rasa Pillai* (4) with which I respectfully agree when it

holds that a survey officer's decision as to boundary although conclusive as to the boundary does not have the legal effect of terminating the possession of the man who was in possession or of destroying its legal effect if it had already conferred a title upon the possessor of breaking the running of possession in favour of the person in whose favour the boundary is ordered. As pointed out in that decision it would be very extraordinary if the survey officer's decision could have such a result which would not follow even a declaratory decree of a civil Court that a party had or had not title.

I am not satisfied that there was in this case any dispute about any boundary in the proper sense of the term. The dispute was about title. The survey officer had no jurisdiction to decide it and no jurisdiction to decide such a point can be conferred upon him by calling the dispute a dispute about boundary which it is not except by a play upon words. I do not understand how the District Judge's decree for three years' rent against the respondent can in any event be supported. It is held that the raiyats are not bound by the survey officer's order and that they have occupancy rights. The rents paid by them to the zamindar were paid under engagements between him and his raiyats. The plaintiff had no connexion with these engagements which are several decades old.

The case is not one in which a trespasser has taken possession of rents due to the plaintiff and collected rents from the plaintiff's tenants, and I do not see how if the plaintiff is not entitled to possession as against the raiyats he can claim the rents paid by them to the zamindar under engagements to which he was not a party. According to the decision in *Azhagaperumal Pillai v. Rasa Pillai* (4) the zamindar's possession of the property through his tenants which began in 1873 is not affected by the survey officer's decision and even if the zamindar is not in a position to question that decision, assuming it related to any boundary, the plaintiff has got no right thereby to claim either possession of the property from the tenants or the rents from the zamindar. In fact the survey decision does not mention or necessarily mean anything about the tenants or rents paid by them. On the

8. A I R 1922 Mad 392=70 I C 481.

9. A I R 1926 Mad 235=92 I C 18.

last point based on the Hereditary Village Offices Act, I agree with my learned brother that the suit is not barred by S. 13 or S. 21 thereof. In the result I would dismiss the appeal with costs.

By the Court.—As we are not agreed, the appeal will have to be dealt with under Cl. 36 of the Letters Patent. The questions on which we differ are these: *A.* Whether there was a boundary dispute within the meaning of the Survey and Boundaries Act. *B.* Whether the plaintiff is entitled to recover from defendant 1 the melvaram collected by him from the other defendants for the three years preceding the suit and to the declaration granted to him in Cl. (1) of the decree of the trial Court. (Accordingly the appeal came on for hearing before Wallace, J., who delivered the following judgment.)

Wallace, J.—This appeal has been referred to me because of a difference of opinion between the learned Judges of the Bench who heard it. The suit is one of ejectment, the plaintiff claiming to be the Government mirasi karnam of Laveru village within the ambit of the Vizianagaram estate. This appeal is concerned with his plaint prayer to eject the defendants from a land, survey No. 333, on the ground that he is the mirasi inamdar. Defendant 1 is the zamindar and claims to melvaram right over the land; the other defendants claim to be the kudivaram tenants thereof. The village was surveyed by Government in 1904 in the course of the survey of the Vizianagaram estate under Act 4 of 1897 and the suit land was then demarcated by the survey officer as mirasi inam. Against this decision defendant 1's representative presented under S. 12, an appeal that the land should have been classed as jiroiyati. That appeal was thrown out. The estate did not file any suit under S. 13 to have that decision set aside. Under that section of the Act the decision therefore became conclusive between the parties to the dispute as regards all matters in dispute. The main point contested throughout in this case has been whether the decision of the survey officer precludes the defendants from resisting the plaintiff's claim. It was decided by the trial Court, and that decision has not been since contested,

that the order of the survey officer does not bind the tenant-defendants 2 to 12 as they were not parties to the appeal before the survey officer. As regards defendant 1, the zamindar, both the lower Courts held that he was precluded by the decision of the survey officer from resisting the plaintiff's claim and they therefore gave a decree that the plaintiff was entitled to the melvaram right over Survey No. 339. In second appeal Spencer, J., held that the survey officer's decision was without jurisdiction and therefore void, and on the ground that the plaintiff had not independently established his title he dismissed the plaintiff's suit. At the Letters Patent appeal the learned Judges differed on this main point and it is the chief question which I have to decide.

One would imagine that as it is the point on which the case really turned all available records in the survey proceeding would have been produced and exhibited. So far from that being so, the original proceedings of the survey officer are not filed, nor is the entry in the survey register. We have only the decision on appeal, Ex. G, the grounds of that decision, Ex. 23, and the appeal petition of the zamindar, Ex. 23-A, and these are by no means consistent. For example, Ex. 23-A does not show that Government was a party to the inquiry while Ex. 23 says that Government was a party. Again Ex. 23-A says that the original decision was that the land was "subsequent," that is post-settlement service inam, while Ex. 23 says the original decision was that it was a mirasi inam by which the survey officer on appeal, as he states clearly in his grounds, means Government service inam, that is pre-settlement inam. It seems to be now admitted by the plaintiff that the inam was really post-settlement, but that error of fact on the part of the survey officer cannot affect the validity of his decision if he had jurisdiction to pass it. Defendant 1 claims that the order is without jurisdiction because there was no "boundary dispute" within the meaning of the Act. One would expect that, if there was at the time of the survey inquiry any substance in this contention it would have been put in the forefront of defendant 1's appeal, Ex. 23-A, but there is no suggestion of it there. The contention is advanced on two grounds:

first, that the dispute was really whether the land was jiroiyati or darmilla inam, that is, there was no decision that it did not form part of the estate; and secondly, even if the dispute was whether it was jiroiyati or pre-settlement inam, still that is not a dispute about a boundary and therefore there is no boundary dispute. The first contention is based entirely on the wording of Ex. 23-A which, as I have said, is inconsistent with statements in Ex. 23. I see no reason why, if I am to make speculations, I should speculate that Ex. 23-A is right and Ex. 23 wrong. Defendant 1 could have made the matter quite clear by producing the original registry entry, but though it is now 15 years since the plaint was filed he has not so far done so. I must presume that the official act of the survey officer was regularly performed and with jurisdiction, that is that the dispute was whether the land was to be demarcated within or outside of the estate, ill, zeamin jiroiyati or Government service inam.

As to the second contention I find it a little difficult to follow. I understand the argument to be that there cannot be a boundary dispute unless there is a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is a dispute as to when, where and how the boundary between both shall run; but that if the dispute involves on one side or the other the whole of the contestant's property there cannot be any boundary dispute, because the boundary of the disputed portion is not itself in dispute. I can see no principle in such a contention. What the survey officer had to decide, and had jurisdiction to decide, was how the boundary of the Vizianagaram estate was to run, whether it should exclude or include the suit inam, and his decision was that the inam being Government property must be excluded from the estate demarcated out of the estate. It does not seem to me that such a dispute cannot properly be called a boundary dispute or that it is not one of the kinds of disputes with which the Act was enacted to deal. Obviously the boundary of the estate cannot be properly demarcated unless controversies of this kind are settled.

If we examine the important rulings

of this High Court under this Survey Act and its predecessor, we find that this is just the sort of case that has arisen and has been held to come under the Act. In the Full Bench case in *Kamaraju v. Secy. of State* (2) a survey officer had demarcated out of the Bodinaikanoor estate a tract of land which Government claimed to be reserved forest. There could be here no suggestion that the tract of land constituted the whole of the Bodinaikanoor estate or the whole of Government land. Nor was there any suggestion that there was any dispute as to the physical boundaries of the tract itself. The question was merely whether the tract was to be demarcated within the estate or outside the estate as Government land. The Full Bench held that this was a boundary dispute under the previous Act 28 of 1860 and that the decision was res judicata, and the zamindar was estopped from claiming the tract as part of his estate. The ruling in *Muthammal v. Secy. of State* (3) is a decision of three Judges in a Letters Patent appeal in a similar case also under Act 28 of 1860. The dispute there was whether a perfectly definite tract of land was part of a mitta or Government reserved forest. The finding was that the survey officer's decision that the land did not form the part of the mitta is res judicata. In the Full Bench case in *Muthirulandi Poosari v. Sethuram Aiyar* (1) it does not seem to have been even argued before the Full Bench that the dispute before the survey officer as to the possession of a perfectly definite piece of land, a lane, was not a boundary dispute within the meaning of Act 4 of 1897.

The only attack defendant 1 is able to make on these decisions is that the first two were passed under the prior Act 28 of 1860, and that the learned Judges made a wrong use of the words "res judicata." As to the first point S. 25 of the Act of 1860, under which the decisions were passed, lays down practically the same procedure and the same principles, stated in fact in much less emphatic terms, as Ss. 11 to 13 of the later Act. The scope of the inquiry under Act 28 of 1860 has been clearly stated in a Bench decision of this Court, *Nachiyappan v. Alagappa Chetty* (10). As to the second point it is argued that the Privy Council in a passage in *Radhakrishna Ayyar v.*
10. A I R 1921 Mad 107=62 I C 87.

Sundaraswamier (6), which had nothing to do with a controversy like the present, pointed out the legal distinction between *res judicata* and statutory prohibition. I cannot see how that decision can be of any assistance to defendant 1 here: whether one calls the decision of the survey officer *res judicata* or not defendant 1 is, by force of S. 13 of the Act, estopped from agitating anew the right which he there claimed and lost since it is conclusive against him because he did not file a suit within the time granted in order to have his right restored.

It is next contended that even taking it that the survey officer's decision is about a boundary dispute under the Act, it cannot preclude defendant 1 from now contending that the inam is not Government service inam, because the survey officer had no jurisdiction to decide questions of title. That is, if I understand the argument, while it is open to the survey officer to decide that the inam was outside the estate he had no jurisdiction to decide that it was Government service inam. This contention also I do not follow. A survey officer obviously has jurisdiction to decide anything which it was necessary to decide in order to come to his conclusion, and he obviously cannot avoid deciding questions of title in such cases. If parties *A* and *B* are disputing whether a particular piece of land is part of the property of *A* or *B* and the survey officer decides that it is the property of *A*, he is deciding that it is not the property of *B*. If that is not his function, the Act would seem to be useless; and if *B*'s civil rights were not interfered with by the survey officer's decision it would not have been necessary to declare that *B* is entitled to establish his right in a civil Court within one year.

The Full Bench decisions already quoted are clear authority for the proposition that such decisions of a survey Officer in a boundary dispute are not limited to the mere abstract question of what are the physical boundaries in dispute but are decisions on matters of title and possession. *Kamaraju v. Secy. of State* (2) and *Muthammal v. Secy. of State* (3) lay down that his decision is a decision on title and conclusive. Those decisions also implicitly and *Muthirulandi Poosari v. Sethuram Aiyar* (1), explicitly, lay down that his decision on

questions of possession also is conclusive. In all these cases it was held that the decision of a survey officer on all these points is *res judicata* and binding on the parties to the boundary dispute. *Kirukan v. Alagapa Chetty* (10) is a Bench case directly on the finality of the Survey Officer's decision on a question of title, and *Kuppuswami Iyer v. Venkataswami* (11) is a Bench decision directly holding the finality of the Survey Officer's decision on a question of possession, even when the decision was in fact wrong. *Muthirulandi Poosari v. Sethuram Aiyar* (1), is particularly instructive on this point, because it held that the decision of a Survey Officer is a decision that the successful party is in possession even though the unsuccessful party was really in possession, and that the decision stops the unsuccessful party from urging later on that he was in possession. Defendant 1 seeks to turn the edge of this decision by referring me to a Bench ruling of this Court in *Azhaga-perumal Pillai v. Rasa Pillai* (4), where the learned Judges say that they do not interpret the Full Bench decision meaning that the Survey Officer's decision stops the running of possession of a party really in possession. The learned Judges of the Bench give no reasons for this opinion except to refer to an opinion of Ramesam, J., in *Kuppuswami Iyer v. Venkataswami* (11), which, if I may say so with the greatest respect, cannot quote the learned Judge correctly, because if he really meant that the possession of the defendants in that case was not interrupted by the decision of the survey officer, then he would have upheld the defendants' title by the adverse possession.

But on the contrary he agreed with the other learned Judge of the Bench in decreeing for the plaintiffs on the ground that the decision of the Survey Officer that the plaintiffs were in possession is binding on the defendants. I therefore agree with Waller, J., in his referring judgment in this case that the plain meaning of the Full Bench ruling is that the decision of the Survey Officer is conclusive on the question of possession. There is no real hardship done and there is nothing extraordinary in the decision of an executive officer having such an effect since the civil rights of

the parties are not injured provided they sue, as in the Act they are directed to sue, within one year of the decision.

Defendant 1 relies on a ruling in *Chinna Venkatrayudu v. Ramamurthi* (5), that the correctness of an order under S. 12, Act 4 of 1897, may be disputed afterwards in a Court of law. That case is really against him; it clearly lays down that if the order was passed under S. 13 its correctness cannot be subsequently disputed. The order in the present case is under S. 13. I am quite clear therefore that the decision of the Survey Officer, expressed in Exs. G and 23, is binding on defendant 1 and he is not at liberty now and here to canvass its correctness.

The Full Bench decision in *Muthirulandi Poosari v. Sethuram Aiyar* (1), settles his further contention based on adverse possession. Defendant's possession was interrupted in 1905 on 31st July 1905, by the decision of the Survey Officer. The suit was within 12 years of that date and therefore defendant 1 has not prescribed by 12 years' continuous adverse possession before suit.

It may be mentioned incidentally that even if there were any substance in defendant's contention that the original dispute was as to whether the land was jiroiyati or darmilla inam, the case of *Chinna Venkatrayudu v. Ramamurthi* (5) is authority for the proposition that even so it would be a boundary dispute within the Act and the decision is therefore final. This also receives support from the judgment of Sadasiva Aiyar, J., in *Kirukan v. Alagapa Chetty* (10).

I therefore hold that the decision of the Survey Officer is conclusive, that the inam is not part of defendant 1's estate, but is Government service inam. It is the fault of defendant 1 or rather the fault of his predecessor that he cannot now contest those matters. That decision then puts the plaintiff in the position of a Government service inamdar and from that position he cannot now be dislodged. Whether or not the attainment of that position in 1905 gave him both the melwaram and kudiwaram rights need not now be discussed since the plaintiff is not here contending that he possesses the kudiwaram right. That would be a difficult position to maintain against the sitting tenants, defendants 2 to 12, who were not parties to the pro-

ceedings which declared him to be the mirasi inamdar. He was therefore rightly held by the lower Courts not to be entitled to eject the tenants but entitled only to a decree declaring this melwaram right against defendant 1. Defendant 1 contends that such a decree was for a relief for which the plaintiff had never asked. But that is fundamentally to misunderstand the legal position. The plaintiff sued for possession and the melwaram right is a possessory right. It is not accurate to describe it as a mere declaratory right. It is a species of possession, in fact the only kind of possession which, for example, a landlord and estate proprietor under the Madras Estates Land Act can have and no one has yet dreamt of contending that such a landlord has no possessory right. The plaintiff therefore has been given such possession as he could be given, consistent with the finding in the case. He is not entitled to possession against the tenants, he is entitled to have his possessory right to the melwaram declared against one who has been wrongfully in possession of it. For the same reason the decree for recovery of three years' melwaram from defendant is correct since defendant, has been trespassing on the plaintiff's rights as melwaramdar and wrongfully appropriating what belongs to the plaintiff.

Defendant 1 has founded an argument on this point on a statement of the trial Court at p. 8 of the printed papers:

"The relationship of landlord and tenant has never been established between the plaintiffs and defendants 2 to 12;"

and argues that therefore defendant 1 could not trespass on a relationship which did not exist. The context in the judgment shows clearly that what the Subordinate Judge meant was that since the Survey Officer's decision did not bind defendants 2 to 12 and since defendants 2 to 12 were not shown to be the tenants of the plaintiff, the plaintiff could not get a decree to eject them. By "tenants" he obviously meant ordinary tenants. But where the plaintiff is found to have been the melwaramdar since 1905, as the trial Court itself held, it is not open to kudiwaram tenants to say that he is not their landlord, and the trial Court in view of its decision in the case could not possibly have meant to say so.

I therefore agree with Waller, J., that the decree of the District Court is correct and the decree of that Court must therefore be restored. The plaintiff will have his costs against defendant 1 throughout in all Courts.

P.R.S./R.K.

Appeal allowed.

*** A. I. R. 1933 Madras 290**

WALSH, J.

Mottai Goundan — Defendant—Petitioner.

v.

P. S. Ramaswami Ayyangar and others — Plaintiffs — Opposite Parties.

Civil Revn. Petns. Nos. 1054 and 1435 of 1931, Decided on 31st October 1932, from order of Dist. Munsif, Gobichettipalayam and Dist. Judge, Coimbatore, D/- 23rd March 1931 and 8th July 1931 respectively.

*** Civil P. C. (1908), O. 47, R. 1 — Discovery of new argument based on fact or law is no ground for review.**

Order 47, R. 1, cannot possibly cover a case where the actual issue has been fully tried by the Court, and afterwards one of the parties discovers an argument which he might have raised, based either on fact or law, and asks the Court to review its order: *A I R 1922 P C 112; A I R 1924 Mad 98 and A I R 1928 Lah 919, Ref.; A I R 1925 All 364 and A I R 1928 Rang 31, Dist.*

[P 292 C 2]

Advocate-General for Government Solicitor—for Petitioner.

K. V. Krishnaswamy Ayyar and T. K. Rangaswami—for Opposite Parties.

Judgment. — The petitioner in this matter is defendant 1 in O. S. No. 216 of 1929 on the file of the District Munsif, Gobichettipalayam. The suit was for a declaration that certain alienations made by defendant 1 are not binding on plaintiff 2 and on her share in the suit properties, on the ground that the suit properties are the separate properties of plaintiff 2's husband. The first issue raised was

"whether defendant 1 was estopped from denying the title of the plaintiffs to the suit properties and from contending that they are the joint properties by reason of the decree in O. S. No. 3 of 1910 on the file of the District Munsif's Court, Tirupur."

The learned District Munsif first gave a finding in defendant 1's favour on this point. Afterwards an application was made to him to review his order which he did and gave a finding in plaintiff's favour on the point. An appeal was taken to the District Judge who remarked that the suit was still in its trial stage

and that the correctness of the finding might be canvassed by the appellant in the appeal against the final judgment. He also remarked that the appeal memorandum did not clearly show that the application for review was in contravention of O. 47, R. 2 or R. 4, but he does not discuss O. 47, R. 1 in this connexion. He dismissed the appeal. Petitioner has put in revision petitions both against the original and against the appellate order. So the preliminary objection taken that where an appeal lies, a revision petition will not be entertained is met by taking up the revision petition against the appellate decision, i. e., Civil Revision Petition No. 1435 of 1931.

Original Suit No. 3 of 1910 referred to above was filed by the grandsons of one Marappa Goundan, the maternal grandfather of plaintiff 2's husband alleging that certain properties mentioned in the schedules of the present plaint, belonged to the said Marappa Goundan and that they and plaintiff 2's husband being his heirs were entitled to the same. Plaintiff 2's husband and his father, the present defendant 1, were impleaded as defendants in that suit. The present defendant 1 contended that the suit properties were his ancestral properties and that the plaintiffs in that suit had no right to them. The suit was compromised and a razinamah decree passed under which the properties were divided into some shares between the plaintiffs and the defendants in that suit. When the first issue in the present suit was being argued at the time of the first order, it was contended that it was not open to defendant 1 to claim the suit properties as his ancestral properties inasmuch as by the razinamah decree it was in effect held that they were not so. The Court held that it was not possible to deduce from the terms of the razinamah decree that this was the basis of the razinamah decree.

It therefore as stated above, found the issue in favour of defendant 1. It was asked to revise its order on the ground that by the very fact that certain properties were made over to the plaintiffs in that suit by the decree and that certain others were declared to belong both to plaintiff 2's husband and to defendant 1 it was not open to defendant 1 to deny the plaintiffs' title and say that they were his joint family properties.

and that in any case the decree was a contract which defendant 1 could not go behind. On a consideration of these arguments the Court reviewed its previous order and found the issue in favour of the plaintiffs. The question is whether it had power under O. 47, R. (1) to do so. There is quite clearly no apparent error at all on the face of the order as is admitted by the learned District Munsif in his order granting review. He very fairly puts it:

"If there are two aspects to a question to be considered by a Court and if only one such aspect is brought to its (the) notice of the Court for consideration and it comes to a conclusion only on that aspect of the case, no application for review would lie on the ground that as the Court failed to consider the other aspect there is a patent error on the face of the order."

But he goes on:

"But though the present application may not be maintainable on that ground, I am of opinion, that as the question now raised is purely a question of law and is clearly in favour of the petitioners there is sufficient reason for reviewing the order."

In considering the legal aspect of the Court's power of review there is no use referring to any decisions before that of the Privy Council in *Chhajju Ram v. Neki* (1) because it is therein stated that there had been a number of conflicting decisions by various High Courts on the matter and so their Lordships proceeded to give an authoritative ruling. That was a case where the Punjab Chief Court had granted a review on the ground that the "judgment had proceeded on an incorrect exposition of the law." The Privy Council held that "any other sufficient reason" must be analogous to those specified immediately previously in O. 47, R. (1) and that this was not an analogous reason and therefore not a sufficient one. As remarked by Mulla in his commentary whether a particular reason is analogous or not to one or other of the two reasons, "the discovery of new and important matter of evidence" or "some mistake or error apparent on the face of the record" may obviously lead to very refined if not subtle arguments, and in fact has done so. Some subsequent cases may be noted here. The first is *Narain Das v. Chiranji Lal* (2) where a decree having been passed in favour of a plaintiff conditioned on his

performing certain acts the plaintiff found that, for reasons entirely beyond his control, he was unable to perform them. He therefore applied for review and got the decree modified. Held that he could do so. This case bears no analogy to the present.

K. K. S. A. R. Firm v. Maung Kya Nyun (3) was a case where review was allowed because, a witness who could not be found during the trial, was subsequently produced. Except for the remark that "of the same kind" is more restricted than "analogous" it does not help in the present case. Then come two cases more in point. The first is *Morari Rao v. Balavanth Dikshit* (4). A Judge there dismissed a suit on the ground that as between the plaintiffs who were the nearest agnates and the defendants who were the sister's sons of the last male owner the latter were the preferential heirs under the Mitakshara law prevailing in the Madras Presidency, held, that this was an error of law apparent on the face of the record and that the Judge was competent to grant a review. It was remarked in that judgment that each case must be judged by itself and it was held that the error was so patent that it could be said to be "apparent on the face of the record."

The next case is *Debi Sahai-Gulzari Mal v. Bashesar Lal Bansi Dhar* (5). The parties in that case had dealings in piecegoods and it was admitted that the defendant firm had failed to deliver 15 bales to the plaintiff firm. The only question in dispute was that of the shipments to which these bales belonged. The decision of the trial Court was that 13 should have been of the January shipment and two of the February and damages were granted amounting to Rs. 727 odd. After hearing the appeal the High Court decided that nine of the bales belonged to the February shipment and six to the April and after calculating rates increased the damages to Rs. 1,259. A review was sought on the ground that there had been an error on the face of the record in that the High Court had failed to apply the natural result of its own finding, and to hold that so far as the

3. A I R 1928 Rang 31=107 I C 161=5 Rang 675.

4. A I R 1924 Mad 98=76 I C 342=46 Mad 955.

5. A I R 1928 Lah 919=112 I C 540=10 Lah 184.

1. A I R 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).

2. A I R 1925 All 364=86 I C 168=47 All 361.

February shipment was concerned the suit was barred by time. Review was allowed. Referring to *Chhajju Ram v. Neki* (1) the learned Judges remarked:

"That ruling dealt entirely or almost entirely with the third heading under which reviews are competent, namely, 'for any other sufficient reason' and it was expressly stated that the first two grounds did not apply to that case."

They then proceed to notice a contention that a mistake of law does not come within the words "mistake or error apparent on the face of the record." They say: "This is not quite clear" (compare a similar remark in the Madras case where after noting the cases in which this view has been taken it is stated "but there are cases in which a different view is taken") but anyhow it is, we think, rightly contended by the other side that here there is no question of a mistake of law. It is not urged that there is no question of a mistake of law. It is not urged that of two possible views the wrong was taken. The error complained of is that after the decision had been given the consequences or results of that decision were overlooked and thus the defendants lost part of the fruits of their victory.

They then point out that though the defendant's counsel never raised the point of limitation, and while indeed on his own showing he could have objected to the whole of the decree passed against him on this ground alone, he was primarily concerned with establishing the incidents of the distribution of the various shipments. They held that the failure of the Court to apply the law of limitation to the facts found was not an error of law so much as a failure to apply the law. The review was accordingly granted.

I do not think that these two cases are sufficient authority to justify the review granted in the present case. It is no doubt argued for the plaintiffs that though there is no apparent error on the face of the order, the section mentions "record" and not "order" or "judgment." This is undoubtedly true and in the last case mentioned it is possible that to establish the apparent error the rest of the record would have had to be looked at as well as the judgment. That would depend on whether the facts necessary to show the question of limitation were or were not mentioned in the judgment, which in the absence of the

original judgment we do not know. Accepting however that the rest of the record can also be looked into to establish the apparent error, the present case goes far beyond anything allowed either in *Merari Rao v. Balavanth* (4) or *Debi Sahai-Gulzari Mal v. Bashesar Lal Bansi Dhar* (5).

Here we have a deliberate issue of estoppel raised and argued before the Court. The whole matter depended on a single document, namely, a compromise decree which was before the Court and the terms of which were perfectly well known to the parties. The argument raised for the plaintiffs, that the compromise decree implied the recognition of the property not being ancestral, was rejected by the Court. The issue was decided against the plaintiffs. That finding has not since been challenged, though I do not say that it may not be challenged in some future appeal against whatever decree is passed by the trial Court. Now they come forward for review on the ground that they overlooked another argument which could have been drawn from the document and which it is alleged is conclusive in their favour. If this can be allowed as a ground of review it would, it appears to me, enormously enlarge the scope of O. 47, R. 1, while the decision of the Privy Council in *Chhajju Ram v. Neki* (1) is to restrict it. It could be alleged that any new argument, whether of fact or law which had been forgotten was to be found "on the face of the records," for indeed no argument which a Court could listen to could be otherwise, and then there would be applications in every degree of case, from those in which the argument if allowed to be raised did not appear to admit of answer, to those in which much might be said in answer to it, but in which the parties asking for review would of course allege that their point of view was the only possible one. I cannot think that O. 47, R. (1) can possibly cover a case where the actual issue has been fully tried by the Court, and afterwards one of the parties discovers an argument which he might have raised, based either on fact or law, and asks the Court to review its order.

In the result I hold that the learned District Munsif had no power to review his order and that this petition must be allowed with costs throughout and the

original order restored. I may perhaps note that this will not, I understand, be a mere barren prolongation of the suit because there are other points involved, but in any case this short cut by way of *revi w* to rectify a mistake which, if it is a mistake, can only be rectified on appeal is not permissible. The other petition, C. R. P. No. 1054 of 1931, does not lie and is dismissed but without costs.

P.R.S./K.S.

Order accordingly.

* A. I. R. 1933 Madras 293

VENKATASUBBA RAO AND REILLY, JJ.
Ponnu Chettiar—Appellant.

v.

Sambasiva Ayyar—Respondent.

Appeal No. 445 of 1928, Decided on 5th August 1932.

*** (a) Mortgagor and Mortgagee—Receiver appointed in mortgage suit—Sale of property in execution of another money decree—Purchaser is not entitled to income collected by receiver as against subsequent purchaser under mortgage decree—Mesne profits.**

In execution of a money decree appellant attached some property of judgment-debtor. The respondent who had a mortgage in his favour executed by the judgment-debtor filed a suit on the mortgage and obtained an appointment of a receiver over the mortgaged properties which included those already attached by the appellant. The appellant got leave to execute his decree against the receiver and in execution purchased the property himself. The respondent subsequently got a mortgage decree and the properties were brought to sale and purchased by a third party. The appellant failing to get possession of the property applied for paying out to him part of the money paid by the receiver in Court as income from the property—that part attributable to the property purchased by him.

Held: that the effect of the appointment of the receiver was to deprive the mortgagor of his right to deal with the income, and that as the appellant had purchased only the right, title and interest of the mortgagor he was not entitled to the income which the mortgagor himself had no right to dispose of: *In re Anglesey Marquis*, (1903) 2 Ch 727, *Ref.* [P 294 C 1, 2]

(b) Transfer of Property Act (1882), S. 58—“Equitable mortgage.”

The term “equitable mortgage” in the English law, is of much wider import than under the Transfer of Property Act. An equitable mortgage in English law might be of several kinds and one of them is by deposit of title-deeds.

[P 295 C 1]

(c) T. P. Act (1882), S. 69-A—English law—Appointment of receiver.

Obiter.—The notion is utterly wrong, that in England those mortgagees only as are entitled to immediate possession obtain an appointment of receiver [P 294 C 2]

(d) T. P. Act (1882), S. 58—English decisions should be quoted with great care—Precedents.

It is a very dangerous thing to quote English decisions in mortgage cases in India without the very greatest care as there are many great differences between the law of mortgages in this country and the law of mortgages in England, which is a very difficult and complicated subject: *Distinctions between English and Indian law pointed out by Reilly, J.* [P 296 C 2]

(e) T. P. Act (1882), S. 58 (d) — Usufuctuary Mortgagee—Rights of Mortgagor and such mortgagee.

Though a mortgagee under his mortgage is entitled to possession, it is the nature of the transaction that till he demands possession or enters into receipt of the rents and profits the mortgagor should remain in possession and such possession is rightful. [P 295 C 1]

K. V. Sessa Ayyangar—for Appellant.

K. Bhashyam and R. Viswanadhan—for Respondent.

Venkatasubba Rao, J.—This appeal raises a question as regards the effect of the appointment of a receiver in a suit to enforce a simple mortgage. The appellant obtained a money decree against one Ganapathia Pillai in O. S. No. 78 of 1923 (District Munsif's Court, Mayavaram) and in execution of that decree attached certain properties. To enforce a mortgage executed by the aforesaid Ganapathia Pillai, the respondent filed O. S. No. 55 of 1924 (Mayavaram Sub-Court) and obtained an appointment of receiver over the mortgaged properties, which included those already attached. Thereupon, the appellant applied in the mortgage suit for leave to execute his decree against the receiver. Not only was that request complied with, but leave was also granted to him to implead the receiver as a party to the execution proceedings. Thereafter, in execution of the money decree, the attached properties were put up for sale and purchased by the decree-holder himself, that is the appellant. The sale was in due course confirmed. The appellant attempted to take possession and the respondents then made several applications to the Court, one being to restrain the appellant from taking possession; the second to implead him as a party to their mortgage suit and the third to continue the receiver as against him, after so making him a party. All the applications were granted. The appellant took the matters to the High Court but without success. Pausing here for a moment, the effect of the High Court's order was to negative the appellant's right to possession. The rest of the story may be briefly told. The respondents obtained in their suit a

mortgage decree, brought the mortgaged properties to sale, and some third party purchased them. Till the date of this sale the receiver had realized a certain amount as income from the properties and paid the amount into Court. As I have said, some of those properties the appellant had previously purchased. He applied to the lower Court for payment out to him of that part of the amount paid by the receiver into Court, attributable to the properties purchased by him, on the ground that the ownership of the income is incidental to the ownership of the property. When he made this application, the sale in favour of the third party referred to above had not been confirmed and the receiver's appointment was still in force. The lower Court having rejected his application, he has filed the present appeal.

A preliminary point has been taken that no appeal lies. This objection cannot, in our opinion, prevail. The appellant was, as I shall show, impleaded as a party to the mortgage suit. The question of substance is, to whom does the fund in Court belong, to the respondents or to the appellant? If the appellant were a stranger, it would have been open to him to assert his title to the money by a claim proceeding under O. 21, R. 56, but he having been a party the question would be one under S. 47, Civil P. C., and the preliminary objection must on that ground be overruled.

Now coming to the merits, on the facts that I have stated, the point to be decided lies in a very small compass. What was the state of affairs on the date the appellant purchased the properties? The effect of the order appointing the receiver was to deprive the mortgagor of his right to deal with the income. It was in order to safeguard the respondent's position that the receiver was appointed. The mortgagor could not defeat the order by assigning the profits to a third party. Could he have, for instance by private transfer, assigned the income to the appellant? Of course not. What the appellant purchased was no more than the right, title and interest of the mortgagor. But the latter himself had no right to dispose of the income. The order operated to take away that right, which otherwise he would have possessed:

"The order appointing a receiver operates as an injunction to restrain the judgment-debtor

from himself receiving the moneys over which the receiver is appointed: see *In re Anglesey Marquis* (1)."

It is then obvious that no private transferee from him could have acquired a valid right to the income and it follows that the appellant who was a purchaser of his right at a Court sale stands in no better position. Mr. Sesha Aiyangar, for the appellant, contends that as his purchase was with the Court's leave it vested in his client a right over the income. The argument seems to me utterly untenable. It is well established that without an application for such relief no person can proceed against a receiver. The appellant therefore chose the only course open to him: that of obtaining the previous permission of the Court which made the appointment. Had he not obtained such permission, he would have been guilty of contempt and I fail to see how the Court's order, allowing execution against the receiver, could be said to have invested the appellant with any special rights.

The question was raised in the course of the argument, in what circumstances would a Court in India be justified in granting a receiver in a simple mortgage suit? This is not relevant to the point we have to decide and I shall refrain from expressing any opinion upon it; but I may point out that the notion is utterly wrong, that in England those mortgagees only as are entitled to immediate possession obtain an appointment of receiver. This idea seems to underlie some of the decisions cited before us and with great respect, is the very reverse of the truth. A mortgage in England may be either legal or equitable, and before the passing of the Judicature Acts, the general right of a legal mortgagee was to take possession and not to come for a receiver. When he had the legal right to enter into possession, why should he be granted the equitable relief? The English Courts therefore held that the appointment of a receiver at the instance of a legal mortgagee was not a matter of course; where as in the case of an equitable mortgagee, this right was specially conferred on him, on the ground that he had no means of taking possession: Kerr on Receivers, Edn. 9, pp. 32 to 35. This of, course, is not the law to-day. Under the present practice receivers

are as freely appointed at the instance of legal mortgagees as in cases in which the mortgagees have only an equitable interest: see Kerr on Receivers, p. 37 and Fisher on Mortgages, Edn. 7, p. 359. I am referring to this subject only to correct the misapprehension to which I have adverted. I may also draw attention to another fact, namely, that the term "equitable mortgage" in the English law, is of much wider import than under the Transfer of Property Act. This fact is sometimes overlooked and confusion has arisen. An equitable mortgage might be of several kinds and one of them was by deposit of title-deeds: 21 Halsbury's Laws of England, p. 74.

To the last-mentioned subdivision alone, the term is by common usage applied in India. The question often arose in England, in what cases a receiver would be granted at the instance of a subsequent encumbrancer (an equitable mortgagee in the eye of the law) as against the first encumbrancer (the legal mortgagee): see Kerr on Receivers, pp. 32 to 44. With that question we are not directly concerned, but the law in England seems to be, that the prior encumbrancer is not entitled to rents received by the receiver previous to his giving notice that he claims them as against the receiver. Ordinarily an order appointing a receiver preserves the rights of prior encumbrancers, but if it does not, a first mortgagee is not entitled to rents collected by a receiver previous to the former's application to take possession: see Fisher, p. 374; Kerr, pp. 36 to 38 and 193 and 194. As I have said, we are not here concerned in what cases a Court in India will appoint a receiver, but when an appointment is made, the English Courts have held the receiver's right to rents already collected prevails even as against a prior encumbrancer, a person with paramount rights. As authority for this proposition I may further refer to, *In re. Metropolitan Amalgamated Estates* (2). The principle of the rule is this: though a mortgagee under his mortgage is entitled to possession, it is of the nature of the transaction that till he demands possession or enters into receipt of the rents and profits, the mortgagor should remain in possession and such

possession is rightful: 21 Halsbury's Laws of England, p. 157.

It has been urged that a Court in India will not appoint a receiver unless the mortgagee makes out that he has eventually a right to a personal decree against the mortgagor. With this subject, again we are not here concerned, but it may be pointed out that, in this case, a personal decree was eventually passed and that it has not even now been fully satisfied. Mr. Sesha Aiyangar next relies upon certain cases, such as *In re Dickinson* (3), *In re Potts*, *Ex parte Taylor* (4) and *In re Pearce-Ex parte Official Receiver* (5), and argues that the fund in question belongs to his client, as the effect of the order appointing the receiver is not to create a lien in favour of the mortgagees. But what he overlooks is, that these cases deal with special provisions of the Bankruptcy Act. Under the Statute, the property of the debtor vests in the receiver and the execution is made in favour of secured creditors. The discussion turned upon, who were secured creditors. As Lord Esher, M. R., points out in, *In re Potts Ex parte Taylor* (4):

"The Bankruptcy law is not the Common law of England; it is an enacted law and all the rights under it are determined by statute and by nothing else."

In view of these cases, it is doubtful whether the decision of Madhavan Nair, J., in *Maharaja of Pithapuram v. Gokuldas Govardhandas* (6) is correct or not, for the claimant, whose right was negatived by the learned Judge, was the Official Assignee; but with that I am not concerned. *In re Anglesey Marquis* (1), already cited, on which Mr. Bashyam Aiyangar, for the respondents, relies, is more in point. It decides that a receivership order obtained by a judgment-creditor over a judgment-debtor's share of an estate prevents the latter from dealing with it to the prejudice of the former and it also prevents any subsequent mortgagee or judgment-creditor from gaining priority by means of

3. (1889) 22 Q B D 187=58 L J Q B 1=37 W R 130=60 L T 138=6 Morrell 1.

4. (1893) 1 Q B D 648=62 L J Q B 392=4 R 305=69 L T 74=41 W R 337=10 Morrell 52.

5. (1919) 1 K B 354=88 L J K B 367=120 L T 334.

6. A I R 1931 Mad 626=133 I C 504=54 Mad 565.

2. (1912) 2 Ch 497=31 L J Ch 745=107 L T 515.

a stop order or charging order. In the result, the appeal is dismissed with costs.

Reilly, J.—I agree. As my learned brother has pointed out, the arguments in this case, which has occupied us a considerable time, have ranged over a much wider field than was really necessary. It was urged for the plaintiff-mortgagees that by reason of the order appointing a receiver, which they obtained in the course of their suit on simple mortgages, they got a special right to have their mortgage-debts satisfied out of the income of the mortgaged property, which might be collected by the receiver, and that the receiver must be treated as a receiver appointed for their benefit alone. That was contended on the strength of various English decisions. Mr. Bhashyam Ayyangar for the plaintiffs states that he also relies upon *Rameswar Singh v. Chuni Lal Saha* (7). In that case the learned Judges, dealing with a simple mortgage, certainly went all the way necessary to support Mr. Bhashyam Ayyangar's contention. They said:

"Our attention has been invited to the case of *Penny v. Todd* (8), where it is ruled that the possession of a receiver in a mortgage suit was prima facie for the benefit of the party who had obtained the appointment. On this principle it has been argued that the receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion this contention is clearly well founded."

That statement of opinion was adopted by Madhavan Nair, J., in *Maharaja of Pithapuram v. Gokaldas Govardhandas* (6), and applied to a mortgage by deposit of title-deeds. We are not here concerned with a mortgage by deposit of title-deeds or any of the incidents of such a mortgage. I venture to say with the very greatest respect in regard to a simple mortgage the statement adopted by the learned Judges of the Calcutta High Court as the law of this country appears to me to be anything but well founded. Certainly it was not a safe proposition to base upon a statement in the indirect report of *Penny v. Todd* (8), where Vice-Chancellor Mallins is represented as having made a remark of a general nature in regard to receivers

appointed at the instance of equitable mortgagees in England. The interest of *Penny v. Todd* (8), really consists, not so much in that general remark of the learned Vice-Chancellor, as in the qualifications of the general remark of which that case is an instance. But, if I may say so, it appears to me a very dangerous thing to quote English decisions in mortgage cases in this country without the very greatest care. There are many great differences between the law of mortgages in this country and the law of mortgages in England, which is a very difficult and complicated subject. If we use English decisions on mortgage questions without the very greatest care they are far more likely to befog us than enlighten us. Indeed indiscriminate citing of English decisions in mortgage cases in the Courts of this country appears to me one of the surest roads to confusion. And to say that it has been decided in a certain case in England that a mortgagee has a certain right and, therefore a simple mortgagee in this country has a similar right is a very obvious instance of non sequitur. When we are dealing with the results of appointing a receiver in a mortgage suit in this country on a simple mortgage, there are many distinctions between the law of this country and the law of England which it is profitable to remember. A legal mortgagee in England has always had the right to get possession on the mortgagor's default, unless by some special provision that is expected; a mortgagee by deed in England before the Law of Property Act of 1925 had a right himself to appoint a receiver, and that right has been restated in the Law of Property Act; an equitable mortgagee in England who applies for the appointment of a receiver, if interest has fallen into arrears, can get an appointment almost of course, and he can also realize the mortgage debt due to him in certain circumstances by getting a receiver appointed as an ordinary remedy; a mortgagee in England can pursue all his remedies at once.

None of those statements applies to a simple mortgagee in this country. In this country there is no doubt that a simple mortgagee, who has brought a suit to enforce his mortgage, can in special circumstances get a receiver appointed, for instance, if the mortgagor by his act or

7. A I R 1920 Cal 515=56 I C 839=47 Cal 418.

8. (1878) 26 W R 502.

default is destroying the mortgage-security or allowing it to be destroyed. But the appointment of a receiver has to be justified by special circumstances. It is not one of the ordinary remedies of a simple mortgagee. Mr. Sesha Ayyangar for defendant 9, the appellant before us, has suggested that in this country on the application of a simple mortgagee a receiver should never be appointed unless the mortgagee has still a personal remedy on his debt against his mortgagor. Speaking for myself I think there is a good deal to be said for that contention, if we include in "personal remedy" the remedies provided by Ss. 65, 66 and 68, T. P. Act. However it is unnecessary to express any decided opinion on that question in this case. But I do not think there is any reason to doubt that a simple mortgagee in this country cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties, who have already acquired rights in the equity of redemption. Nor do I see any reason to doubt that a receiver appointed in such a case in this country is, like a receiver appointed in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in accordance with their respective rights, as they may eventually be established.

But in this case Mr. Sesha Ayyangar has to go a great deal further than that before he can succeed. A receiver has been appointed in this suit, to which Ponnu Chetty, Mr. Sesha Ayyangar's client, was made a party as defendant 9. The receiver was originally appointed before defendant 9 was brought into the suit; but his appointment was continued after defendant 9 was impleaded, and the appeal against that order has been dismissed. After the appointment of the receiver I do not think there can be the least doubt that the mortgagor as a person bound by that order had no right to do anything to destroy the effect of that order. The receiver had the right and the duty to collect the income of the property. The mortgagor was bound by that order and could not collect or enjoy the income of the property. What was suggested at one stage by Mr. Sesha Ayyangar was that, although the mortgagor could not collect or enjoy the income of the property himself, he

could nullify the order appointing the receiver by transferring some right in him to some other person. That appears to me to be in itself an extraordinary proposition. No doubt the order appointing the receiver did not destroy such rights as the mortgagor had in the property. No doubt he could still sell some interest in the equity of redemption to a third party. But, as he had been prohibited by the appointment of the receiver from enjoying or collecting the income of the property, how could he transfer any immediate right to enjoy or collect it to a third party? Even apart from the decisions which my learned brother has quoted, showing that it is well recognized in England that a judgment-debtor cannot deal with property for which a receiver has been appointed so as to defeat the order appointing the receiver or prejudice a judgment creditor at whose instance the order has been obtained, on principle how can the position be otherwise?

But in the end Mr. Sesha Ayyangar, as I understand him, does not go quite so far as to say that after the appointment of the receiver, the mortgagor could at once turn round and defeat that order by himself selling his equity of redemption to a third party. What he contends more reasonably is that with the consent of the Court that could be done even after the appointment of the receiver. What happened in this case was, not that the mortgagor directly sold to defendant 9, but that defendant 9, who had a money-decree against the mortgagor, bought the equity of redemption in execution of his decree.

The fact that he was a Court-auction-purchaser instead of a private purchaser does not justify any contention that the consent of the Court to the transfer of the right to the income may be implied in the Court auction or in any of the proceedings in connexion with it. It happens that in this case the auction in which defendant 9 bought was in the same Court in which the mortgagee's suit was pending. The same Court appointed the receiver and conducted the court-auction in which defendant 9 bought such interest as he could buy from the mortgagor. The receiver was quite properly brought on record in the proceedings in execution of defendant 9's decree. Mr. Sesha Ayyangar suggests

that we must take it that the Subordinate Judge consented to defendant 9 buying in the court-auction the whole of the equity of redemption, including the right to possession and the right to collect the income of the property from the date of his purchase. Now why should we infer anything of the sort? Oddly enough the receiver, who was a vakil of the Subordinate Judge's Court, raised no objection to the auction sale and did not assist the Court by putting forward any contention, but merely said, as the record shows, that he left the matter to the Court. I think it would have been better if he had tried to be of more assistance to the Court. But how can we reasonably suppose that the Subordinate Judge consented to such a sale as would nullify and defeat the order appointing a receiver, which he had himself made and which was still in form in his Court. When he decided that defendant 9 was entitled to bring some interest of the mortgagor to sale in execution, that does not imply that he decided that what could be brought to sale was the equity of redemption including the right to possession and the right to the income.

There was undoubtedly a right in the mortgagor, which could be sold without interfering in any way with the effect of the order appointing the Receiver and which might, in certain circumstances, if the mortgage debt had been cleared off, have turned out to be a very valuable right. Subject to the mortgage and to any decree or order in the suit upon it the equity of redemption was put up for sale. The Subordinate Judge allowed that to be done, but I see no reason whatever to say that in so doing he gave any implicit permission to sell anything more than what the mortgagor, but for defendant 9's attachment in execution could have transferred at that time. Without the consent of the Court after the appointment of the receiver the mortgagee obviously could not have collected the income of the property, he could not have transferred the right to collect the income of the property, and defendant 9 could not have bought anything which the mortgagor could not have sold. Accepting for the purpose of this case Mr. Sesha Ayyangar's suggestion that the fund collected by the receiver from the mortgaged property is not in any way charged or earmarked

for the benefit of the mortgagee in the first instance, we have to remember that these proceedings arise out of the application of defendant 9 to withdraw part of that fund on the ground that it represents the income from the date of his purchase. It is not necessary to decide in this case whether the plaintiffs would eventually have a right to draw that money.

But it is clear, I think, that defendant 9 had no basis for his claim upon the fund at the time he made it, i. e. while the receiver's appointment was still in force. Mr. Sesha Ayyangar contends that under S. 8, T. P. Act, the income belongs to defendant 9 from the date of his purchase. So it would, if his vendor had a right to transfer it to him. But in the circumstances it is impossible, as my learned brother has pointed out, to say that he had that right while he was under the prohibition of the order appointing the receiver. The decision of the learned Subordinate Judge was therefore correct, and this appeal should be dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

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WALSH, J.

Mariappan and another—Petitioners.
v.

Nalla Sevugan Servai — Opposite Party.

Civil Revn. Petn. No. 294 of 1932, Decided on 25th October 1932 to revise order of Dist. Munsif, Ramnad, D/- 15th January 1932.

Civil P. C. (1908), O. 11, R. 1—Suit on promissory note—Plea of want of consideration—Application by defendant without letting in evidence to issue interrogatories to plaintiff must be dismissed.

Where in a suit on a promissory note, the defendant pleads want of consideration, the onus lies entirely on the defendant and he cannot escape the onus by laying no evidentiary basis for his defence but seeking to get admission from plaintiff by interrogatories: *A I R 1914 Cal 767, Dist.* [P 293 C 1]

Watrapp S. Subramania Ayyar — for Petitioners.

S. Krishnaswami Ayyangar—for Opposite Party.

Judgment.—In this case two suits were filed on two promissory notes executed by the father of the defendants in favour of the plaintiff. The defendant's father put in a written statement alleging want of consideration. Issues were framed on

1st February 1930. Defendant 1 appears to have died soon after and his minor sons were added as legal representatives. They filed an additional written statement and additional issues were framed on 15th April 1930. There were a number of adjournments and there was an ex parte decree on 25th October 1930. This ex parte decree was set aside on 15th October 1931 by the District Court (C. M. A. No. 18 of 1931). The trial was then adjourned to 27th November 1931 and on that day the present petitioners, who were defendants 2 and 3 put in an application for issuing certain interrogatories to the plaintiff. On this the Court passed the following order :

"I think that on a simple suit on a promissory note, the interrogatories sought to be exhibited are irrelevant although they may not be so in actual cross-examination. I dismiss this petition with costs."

This civil revision petition is put in against this order. The onus in this case lay entirely on the defendants and it appears to me that they cannot escape that onus by laying no evidentiary basis for their defence but seeking to get admissions from the plaintiff by interrogatories. The learned advocate for the petitioner quotes *Bajinath Kodia v. Raghunath Prasad* (1). But that case is obviously distinguishable because the hundi was attacked as a forgery and the initial onus of proof lay with the plaintiff who, if he did not let in evidence would have had his suit dismissed. This appears to me to be entirely different from interrogatories by the party on whom the onus of proof entirely rests and who has not attempted to discharge this onus in the smallest possible degree. It seems to me to allow the interrogatories in this case would be to open the door wide for parties to avoid opening the case and taking up the onus of proof which lies on them, and to cast it instead on the other party on whom it does not lie. I express no opinion as to whether such interrogatories may not be issued if the defendants (petitioners) make some effort to discharge the onus of proof but I consider that they not having let in any evidence cannot be allowed to escape the onus by this method. The petition fails and is dismissed with costs.

P.R.S./K.S. - *Petition dismissed.*

1. A I R 1914 Cal 767=24 I C 765=41 Cal 6.

A. I. R. 1933 Madras 299

MADHAVAN NAIR AND JACKSON, JJ.
(Coimbatore Sri) *Venkatachalapathi Nidhi, Ltd.* and others—Plaintiffs—Appellants.

v.

G. K. Nanjappa Goundan and others—Defendants—Respondents.

Appeal No. 20 of 1926, Decided on 21st October 1932, against decree of Sub-Judge, Coimbatore, in O. S. No. 64 of 1925.

Civil P. C. (1908), O. 37, R. 2 (2) (a)—Suit on hundis under — No agreement to pay interest in document—Statutory interest must be allowed — Negotiable Instruments Act (1881), Ss. 79 and 80.

Order 37, R. 2, Civil P. C., makes S. 79, S. 80, Negotiable Instruments Act, specifically applicable to a case filed under O. 37. Hence in suits on hundis filed under O. 37, where there is no agreement to pay interest in the document, statutory interest can be allowed under S. 80, Negotiable Instruments Act; and the admission of the allegations in the plaint under O. 37, R. 2 cannot refer to the award of interest which is specifically provided in Cl. (a). [P 300 C 1]

M. Krishna Bharathi — for Appellants.

S. Ranganadha Aiyar — for Respondents.

Madhavan Nair, J.— The plaintiff is the appellant. The suit out of which this appeal arises was instituted by him for the recovery of Rs. 5,000 with interest on five hundis, Exs. A to A-4. A decree has been given in his favour for the principal amount. The learned Judge having refused to award him interest on the principal amount, in this appeal the plaintiff claims that he is entitled to interest.

The suit was instituted under O. 37, Civil P. C., under the special rules relating to summary procedure on negotiable instruments. Under R. 2 (2) (a) of this order the plaintiff is entitled to get interest on the amount claimed in accordance with the provisions of S. 79, S. 80, as the case may be, of the Negotiable Instruments Act of 1881 up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit. Since there is no agreement to pay any interest in the documents, S. 79 is obviously inapplicable and so under O. 37, R. 2 (2) (a) the plaintiff will be entitled to get only the statutory rate of interest, 6 per cent, under S. 80. But the

learned Judge refuses to apply S. 80 because he says that the operation of this section is excluded by O. 37, R. 2. We have read the section carefully. We are not able to see how the operation of S. 80, Negotiable Instruments Act, is excluded by O. 37, R. 2, Civil P. C. On the other hand, it seems to us that O. 37, R. 2 makes S. 79 or S. 80 as the case may be specifically applicable to a case filed under O. 37. We cannot therefore accept the opinion of the learned Judge that the plaintiff is not entitled to the statutory interest mentioned in S. 80.

It is argued on behalf of the appellant that he is entitled to 33 1/3 per cent which he has claimed in the plaint. He contends that O. 37, Civil P. C., supports him having regard to the language of R. 2, namely, "the allegations in the plaint shall be deemed to be admitted." We are not able to accept this contention. No authority in support of the plea has been cited. On the other hand it appears to us that that interpretation cannot be accepted, because in R. (a), Cl. (2) special provision for interest is made to the effect that S. 79 or S. 80, Negotiable Instruments Act, will apply as the case may be. Therefore, the admissions of the allegations in the plaint relied upon by the appellant under Cl. (2) cannot refer to the award of interest which is specifically provided for in Cl. (a). We would therefore allow the appeal and award interest at the rate of 6 per cent from the date of the hundis to the date of the decree and subsequent interest also at the same rate thereafter. The plaintiff will get his costs in this appeal on the amount which we have decreed to him.

P.R.S./K.S. *Order accordingly.*

* A. I. R. 1933 Madras 300

PANDALAI, J.

Dumpala Venkanna — Defendant — Petitioner.

v.

Vutla Subbayya and another — Plaintiff — Opposite Parties.

Civil Revn. Petn. No. 823 of 1929, Decided on 7th September 1932, from decree of Dist. Munsif, Bapatla, D/- 27th August 1928.

* (a) **Negotiable Instruments Act (1881), S. 60—Promissory note discharged by execution of another note—Subsequent endorse-**

ment on discharged note—Endorsee gets no right of action on instrument.

Where a promissory note is discharged by the maker by payment or by execution of a fresh note, the discharged note loses its character of "negotiable instrument" and a subsequent endorsee, even though for value and without notice, gets no right of action on the instrument: 35 *I C* 591, *Diss from*; 7 *M H C R* 271. *Expl*; 5 *Mad* 108, *Rel on*. [P 301 C 1]

(b) **Negotiable Instruments Act (1881), Ss. 82 and 60—Difference.**

Section 82 deals generally with the discharge of parties and not discharge of instruments which is dealt with under S. 60. [P 301 C 1, 2]

(c) **Negotiable Instruments Act (1881), S. 60—Promissory note discharged by maker—Discharged note left with payee subsequently endorsed to another—Maker is not estopped from pleading discharge or non-liability under the note.**

After discharge by satisfaction at or after maturity of a promissory note, by the maker, an estoppel does not arise against him by the mere fact that "the piece of paper" or "waste paper" which once had, but has lost its, negotiable quality is left with the payee and he passes it off on others as if it were still a negotiable instrument: *Lickbarrow v. Mason*, 1 *R R* 425. *Expl*. [P 305 C 1]

P. Satyanarayana Rao — for Petitioner.

V. Subramanyam — for Opposite Parties.

Judgment.—The petitioner is the defendant against whom a decree has been given on a promissory note for Rs. 60-10-0 dated 14th October 1925 executed by him to one Ankamma, deceased, from whose widow Seshamma (defendant 3) the plaintiff took an endorsement on 17th December 1927 after her husband's death which took place in March 1926. The defence was that the note had been discharged by execution of a fresh note to the payee. It appears that Ankamma, the payee, and his wife (defendant 3, Seshamma) who had no male issue, were bringing up two nephews, that Seshamma with the assistance of one of the nephews who was siding with her got possession of the suit note and other documents from her husband, that though the latter complained to the authorities he could get no assistance from them as the matter was declared to be a family quarrel, that thereupon Ankamma took a fresh note Ex. 1 from the defendant on 5th March 1926 in substitution and discharge of the suit note, and endorsed it to a daughter of the other nephew who was siding with him and that the defendant paid off the amount of the new note to the holder of that note.

There were also pleas questioning the bona fides and consideration of the endorsement to the plaintiff. The District Munsif found the facts as above stated, but also that the plaintiff paid consideration to the widow for the endorsement of the suit note and took it without knowledge of the facts above stated. On these findings he has held that the plaintiff is a holder in due course from the widow and that defendant 1 (petitioner) must pay the debt over again though he has already once paid it. It appears to me that the District Munsif has fallen into error of ignoring S. 60, Negotiable Instruments Act. That section (corresponding to S. 36 (1) read with S. 59 (1), Bills of Exchange Act), lays down that a negotiable instrument may be negotiated until payment or satisfaction by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction. This section carried out the fundamental principle that a negotiable instrument loses its character as such after the instrument (as distinguished from a party thereto) is discharged.

A bill or other negotiable instrument is discharged in the words of S. 60 by payment or satisfaction by the maker, drawee or acceptor after maturity, or as S. 59 (1) of the English Act, puts it by payment in due course by or on behalf of the drawee or acceptor, which latter term includes the maker of a promissory note: see S. 89 (1). Thus both enactments convey the same idea because "payment" according to the English Act need not be payment in cash. But the holder may receive satisfaction in any other form: see Chalmers Bills of Exchange Act, Edn. 9, pp. 233 and 234. On such payment or satisfaction at or after maturity by the maker of a promissory note it ceases to be negotiable. The consequence of that as settled more than a century ago is that if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument: see Chalmers, p. 233 and cases cited in note (d).

But the learned advocate for respondent (plaintiff) has relied on two decisions of this Court *Muthu Reddi v. Velu Asari* (1) and *Ramanadhan Chettiar v. Gunbu Ayyar* (2) and the decision of the

Court of appeal in *Glasscock v. Balls* (3) for the contention that though a note is fully paid and discharged, but left with the payee, it continues to be negotiable and that a holder in due course can recover against the maker either on the ground that the note was not overdue and mere payment is not evidence of a demand and that payment was only an equity attaching to the note which would bind only those who were aware of it or on the ground of estoppel, that where one of two innocent parties has to suffer by the fraud of a third person he who facilitated the fraud by his neglect (in this case the omission to take back the note on payment) must bear the loss.

The decision in *Muthu Reddi v. Velu Asari* (1) is of a late learned Judge whom I remember with respect and attachment. It is in favour of the respondent's argument. But I am sorry to have to differ from it as it is based on a misunderstanding of the authorities relied on and the principle involved. In that case a promissory note for Rs. 200 was given for future instalments due to a chit fund. Some instalments were paid and the payment endorsed on the note. Subsequent payments were not so endorsed. The payee endorsed the note to the plaintiff two years after the date of the note after it was fully paid off and apparently after the chit fund had terminated. It was found that the plaintiff had paid consideration and did not know that the note had been fully paid when he took the endorsement.

In reversing a decree dismissing the suit, the learned Judge had to deal with S. 60 and a previous decision *Communden Mohideen Sahib v. Oree Meera Sahib* (4) of the year 1873. In doing so he refers to Ss. 59, 9 and 82 to support his conclusion that the maker who pays off a note is not discharged from liability if he fails to take back the note as the payment is not made in due course. I very respectfully think that herein lurks a confusion of two distinct ideas: one the discharge of a note by payment on maturity, i.e. in the case of a note payable on demand after a demand has been made expressly or by implication from conduct; and the other the effect of leaving a discharged note in the hands

1. (1916) 35 I C 591.

2. A I R 1928 Mad 1238=113 I C 456.

3. (1890) 24 Q B D 13=59 L J Q B 51=38 W R 155=62 L T 163.

4. (1871-74) 7 M H C 271.

of the payee as a ground of estoppel against the maker. The former question is a part of the law of negotiable instruments. The latter is entirely independent of that law and is a branch of the law of estoppel. They must be kept distinct for a proper decision.

On the first point the reference by the learned Judge to Ss. 59, 9 and 82 is not material to the effect of S. 60. S. 59 deals with the rights of holders who became such after dishonour or after maturity and says that except in the case of accommodation bills, the transferee gets only the rights of the transferor. The whole section deals with a situation when, ex hypothesi the instrument has not been paid or discharged by the principal party liable thereon. But S. 60 deals with the effect of payment or discharge by the principal party liable on the instrument, maker in the case of a promissory note and drawee or acceptor in the case of bills. The opinion of the learned Judge that S. 60 does not affect a holder in due course is at variance with the settled law of negotiable instruments for more than a century in England both before and after the Bills of Exchange Act. And in India that is what Innes, J., meant in *Communden Mohideen Sahib v. Oree Meera Sahib* (4), at 275, when he said referring to *Bartram v. Caddy* (5), that if there had been a settlement and discharge, it would have been a good defence against an endorsee though for value and without notice. This decision though given before the Negotiable Instruments Act is still good law by reason of S. 60 which means the same thing. The learned Judge (Seshagiri Iyer, J.) was also not accurate in attributing to Kernan, J., in *Communden Mohideen Sahib v. Oree Meera Sahib* (4), the view that discharge of a note was an equity applicable to holders of overdue notes. The fact is that both the Judges (Innes and Kernan, JJ.) found that there had been no discharge as pleaded by the defendant in that case. If there had been a discharge there would have been an end of the plaintiff's case even though he was an endorsee for value without notice. But in the absence of a discharge, the Court went on to con-

sider whether at the time of the endorsement to plaintiff, the note was overdue which depended on whether there had been a demand express or by conduct. If it was, the plaintiff as endorsee would be bound by all the equities to which the endorser was subject; aliter if it was not. The equity was not discharge of the note which was not proved; but the agreement made at the time of the note between the maker and payee, that the amount recoverable on the note was to be only what was due on the account between them of cloth supplied by the maker for which purpose the advance on the note was in fact made.

The Judges found (Innes, J., from the fact that there had been part payment from which he inferred a previous demand and Kernan, J., from the direct evidence of demand) that there had been a demand before the endorsement and hence that the note was overdue. Incidentally it is interesting to note that Kernan, J., added, p. 281, that for the equities to attach to an endorsement of an overdue note, it was not necessary that the endorsee should know at the time of endorsement that there had been a demand, i.e. that the note was overdue. Nor does the reference by Seshagiri Iyer, J., to the expression "before it became payable" in the definition of "holder in due course" advance the matter, as a note payable on demand is payable "on demand," and the only evidentiary value in this connexion of part payment towards an on demand instrument is to show that there was in all probability a demand for the whole. The learned Judge refers to good faith and want of negligence in the definition of "payment in due course" and says that failure to secure the note after discharging it is not acting in good faith and without negligence. I can understand the argument based on estoppel by reason of leaving a discharged note with the payee with which I will deal separately. But the good faith and want of negligence mentioned in the definition is as regards the person to whom the payment is made as shown by the rest of the definition where it says "under circumstances which do not afford a reasonable ground for believing that he (the person receiving payment) is not entitled to receive payment."

5. 9 Ad. & El. 275=1 P & D 207=1 W W & H 724=8 L J Q B 31.

This error has crept into the learned Judge's remarks on S. 82 where "payment in due course" occurs in Cl. (c). It may also be added that this section deals generally with discharge of parties and not discharge of the instrument which is dealt with in S. 60.

The learned Judge then refers to a remark of Lord Esher in *Glasscock v. Balls* (3). The case itself was not a case of payment or discharge of a note by the maker and endorsement of it afterwards by the payee but of a person who held both a promissory note and mortgage transferring the mortgage to one person and endorsing the note to another—the plaintiff. The defendant, the maker, had paid nothing but was sued on the note by the plaintiff, the mortgage being outstanding with the transferee. The defendant was obviously not entitled to plead the doctrine of discharge—because he had not discharged the note. But that was the argument on his behalf. The Court of appeal rejected it. Discharge being thus out of the case, was there anything to show that the note was overdue before endorsement so as to fix the plaintiff with the real nature of the promissory note, that it could not be negotiated after realizing what was due by transferring the mortgage? As to this Lord Esher said that the plaintiff cannot be said to have taken the note when overdue because it was not shown that payment was ever applied for. It was to these facts that Lord Esher's remark applies that:

"if a negotiable instrument remains current even though it has been paid there is nothing to prevent a person, to whom it has been indorsed for value without knowledge that it has been paid, from suing."

That case and the remark quoted are no authority for the purpose for which Seshagiri Iyer, J., used them, that even after a note is discharged at or after maturity by the maker it remains negotiable in the payee's hands and that an endorsee for value without notice can sue on it. On the question of discharge terminating the negotiability of a note and therewith the right of a subsequent endorsee with or without knowledge, the decision in *Van Ingen v. Dhunna Lall* (6), is directly in point. Of the three notes sued on by the plaintiff (endorsee) in that case it was held that one (Ex. B) had been discharged by payment by the

purchaser of defendants' business on his behalf. It was also found that the payee of the note (Alfred Arathoon) who was also a partner of the firm which purchased defendants' business retained the note B in his hands after it was discharged and subsequently endorsed it with Exs. A and C to the plaintiff. In those circumstances it was held that the plaintiff was not entitled to recover the amount the amount of Ex. B from defendant:

"The obligation arising out of it was thereby extinguished and Alfred Arathoon had no power by re-endorsing it to bring into existence again the liability of the defendant: *Bartrum v. Caddy* (5). His re-issue of the note was a fraud."

But I observe that the learned Judge in *Muthu Reddi v. Velu Asari* (1), to whom this case was cited, failed to note that in this respect the decision was directly against his own. The other case cited for the respondent *Ramathan Chettiar v. Gunbu Ayyar* (2) was not a case of discharge and therefore is no authority on the point before me. All that appears is an incidental reference to the remark of Lord Esher already referred to in *Glasscock v. Balls* (3). The case itself is irrelevant to this:

"Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect; they are grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper: Chalmers, pp. 141 and 142."

On the facts on which the District Munsif has decided against the defendant, the decision was clearly against law. Ankamma, the holder was against his wishes kept out of possession of the note by his wife and nephew and undoubtedly with the intention of discharging the note got the defendant to give him another in substitution. The defendant gave Ankamma another note for the principal and interest till then due on the old note. Ankamma endorsed the new note to another to whom full payment was made by defendant. Long after all this Ankamma having died meanwhile, the widow who undoubtedly knew all that had happened about her husband's having discharged the first note endorsed that note which as above stated was "waste paper" to the plaintiff. There can be no question after all this whether there had been any demand on the first note; in other words whether it was overdue, for without it, it could not have been discharged by substitution. If anything depended on

defects of title as affecting the plaintiff's endorsement, there can be no doubt that as the note was certainly overdue, the plaintiff will get no better title than the widow and will not be entitled to a decree. But the true view is not that this is a case of an overdue note endorsed with all defects of title but of an endorsement of a piece of waste paper which could give no right at all.

The only other point left is whether the plaintiff can succeed on the ground that he is an innocent person against whom a fraud by the widow has been facilitated by the default or neglect of the defendant in leaving the old note with the payee and that the defendant must bear the loss so falling on the plaintiff. This was not the ground on which the Munsif gave the plaintiff a decree. This new ground raises really new questions of fact on some of which at least the Munsif's opinion would have been valuable. The defendant was not negligent in not getting back the old note because it was then not with Ankamma but with his wife who was illegally detaining it. Whatever may be said, to which I will presently come, if Ankamma being left with the note had himself fraudulently endorsed it to plaintiff, no such blame attaches to defendant in the circumstances. Though the Munsif thinks that there was no offence in Seshamma's detention of the note, I am by no means sure that her keeping it against Ankamma's wishes with the intention of appropriating it was not technically dishonest and if so her offence however technical was criminal misappropriation. She could not in that view pass a better title to the plaintiff than her own. Even if she was not an offender she was at least a wrong doer.

I am not aware of the doctrine now invoked being used against a defendant in such circumstances. The defendant in no manner facilitated the fraud by the widow, because from the first her possession was against the wishes of Ankamma and of the defendant after he became entitled to get the note. Ankamma's wife was first guilty of conversion of the note against her husband, then against the defendant and finally guilty of deceit by passing it off on the plaintiff. The proximate or real cause of the fraud played on the plaintiff was

not any negligence on the part of the defendant or Ankamma but the wrongful act of the wife which neither of them could reasonably prevent. If A pledged his watch with me and then pays his debt to me but, before I can return the pledge to A, if I lose it or someone steals it and the finder or the thief, pledges it as his own, has A or have I facilitated a fraud? I think not. But certain passages in *Muthu Reddi v. Velu Asari* (1) are relied on where the learned Judge relies on the observations of Collins, L. J., in *Nash v. De Freville* (7). The facts to which those observations were appropriate are quite different from those in this case and in *Muthu Reddi v. Velu Asari* (1). The defendant had borrowed from a Solicitor Peed on three promissory notes and some time later received more advances and executed two consolidated notes for the whole sum. All the five notes including the first set of three notes which were satisfied by substitution were left with Peed on the understanding that they were not to be negotiated. But Peed endorsed them for value to the plaintiff who was ignorant of the understanding.

After some months, i. e. when Peed was no longer in possession of the notes the defendant paid off the whole debt to him but failed to get back the notes. After some more months on plaintiff's demand of payment Peed gave him a cheque on a bank where he had no credit and plaintiff returned the notes which Peed immediately sent to the defendant who took them in good faith and put them into the fire. The cheque was dishonoured; and Peed absconded and was afterwards adjudicated bankrupt. The plaintiff sued the defendant for conversion of the notes which were obtained from him by the fraud of Peed. The real question on which the decision turned as stated by A. L. Smith, L. J., was whether the defendant when he got back the notes from Peed got a better title than Peed had. If he did he would succeed; if otherwise, the plaintiff. From the judgments delivered especially by Collins, L. J., it is clear that the principle of *Lickbarrow v. Mason* (8), that of two innocent persons one of whom

7. (1900) 2 Q. B. 72=69 L. J. Q. B. 484=82 L. T. 642=48 W. R. 434=16 T. L. R. 268.

8. 1 R. R. 425=2 Term Rep. 63=1 H. B. L. 357=6 East 21.

must suffer by the fraud of a third, he must sustain the loss who has enabled the third person to occasion it) was called in aid not with reference to Peed's obtaining back the notes from plaintiff by means of the worthless cheque but with reference to his earlier act in negotiating the notes in violation of the agreement between him and the defendant: see p. 83. The essence of this was that the defendant put the solicitor in possession of instruments in their form negotiable though with a promise not to negotiate them and so put it in his power to negotiate them:

"When these notes were negotiated by Peed they were still current and the defendant was estopped as against the plaintiff from setting up any fact which would have defeated Peed's right to negotiate them; for instance the fact that Peed was under a duty to the defendant to return them and not to negotiate them:" p. 85.

The estoppel had nothing to do with defendant's leaving the notes with Peed after payment. For in fact Peed had not got them then, though defendant was ignorant of this, and only got them some months later by a trick played on plaintiffs to which the defendant did not contribute by any act or omission of his. This is further brought out in the latter passages where the learned Judge deals on grounds other than estoppel separately with the first three notes which were satisfied and the two later notes which were unsatisfied. As to the former on the footing that they were overdue or actually paid he says at p. 87:

"These pieces of paper therefore between the defendant and Peed having lost their negotiable quality are denuded of that element which alone makes it possible for a transferee to get a better title than his transferor."

On the whole it seems to me that this case is not an authority for what it is relied upon in *Muthu Reddi v. Velu Asari* (1) i. e., that after discharge by satisfaction at or after maturity of a promissory note, by the maker, an estoppel against him arises by the mere fact that "the piece of paper" or "waste paper" which once had but has lost its negotiable quality is left with the payee and he passes it off on others as if it were still a negotiable instrument. The case is of course different if the payment or satisfaction takes place before maturity, when the instrument is current; in the case of a promissory-note payable on demand before demand. The principles

of this branch of estoppel are summarized in Hals., Vol. 13, p. 398 to 402, and there is a useful summary of the cases in note (t). The decree of the lower Court is set aside and the suit dismissed with costs of defendant 1 in both Courts.

P.R.S./K.S.

Decree set aside.

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VENKATASUBBA RAO AND REILLY, JJ.
Lakshmindra Tirta Swamiyar — Appellant.

v.

President, Board of Commissioners, Hindu Religious Endowments, Madras and others—Respondents.

Appeal No. 420 of 1930, Decided on 25th October 1932, against order of Dist. Judge, South Kanara, D/- 28th July 1930.

(a) Madras Hindu Religious Endowments Act (1925), S. 70 — Order in proceedings under the section is open to appeal — Civil P. C. (1908), S. 47.

The effect of S. 70 of the Act is not merely to prescribe the mode of execution so as to make only provisions relating to methods of procedure applicable. The words "as if a decree had been passed" attract to the order in proceedings under S. 70 the whole procedure in execution and consequently a right of appeal under S. 47, Civil P. C.: 14 M L J 433; 31 Mad 24; A I R 1929 Lah 228 and A I R 1922 Bom 377, Ref.; A I R 1913 All 419, Dist. [P 306 C 1, 2]

(b) Madras Hindu Religious Endowments Act (1925), S. 70—Notice served on managing or executive trustee is sufficient.

Section 70 refers to the "trustee" as the person on whom notice is to be served. The trustee mentioned in the section means the person who represents that institution. Hence where by usage one of several trustees acts as the managing or executive trustee, notice served on such trustee must be deemed to be a proper notice as against the institution. [P 306 C 2]

B. Sitarama Rao—for Appellant.

P. Venkataramana Rao, T. Kumaraswamiah, M. Lakshman Nayak, M. R. Venkata Raman and S. V. B. Rao — for Respondents.

Venkatasubba Rao, J.—Mr. Venkataramana Rao has raised an objection in limine that the appeal is incompetent. The material words of S. 70, Hindu Religious Endowments Act, are:

"The Court shall, on the application of the President of the Board or Committee, recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned."

Mr. Venkataramana Rao contends that the effect of the section is merely to prescribe the mode of execution and that only such provisions as relate to the method of procedure become by force of this section applicable. We see no reason

for adopting this very narrow construction. When the duty to execute an order of an outside body is entrusted to a judicial tribunal, it is difficult to conceive that its function is merely to perform an executive act; and when the words employed are wide enough to include the exercise of his judicial powers, there is less reason to hold that the Court does not possess them. In construing similar words occurring in S. 40, Revenue Recovery Act, 1864 "as if the purchased lands had been decreed to the purchaser," a Bench of this Court held that the intention of the legislature was to place the purchaser in the position of a decree-holder and that he is therefore entitled to such remedies as are open to decree-holders in execution proceedings. *Gnana Sambanda Pandara Sannadhi v. David Nadar* (1). The learned Judges in that case followed a previous decision to the same effect in the unreported case, *A. A. A. O. No. 27 of 1889. Sambasiva Mudaliar v. Panchanada Pillai* (2) approves of the decision in *Gnana Sambanda v. David Nadar* (1), although the actual decision in the case relates to a different point. This view has the support also of *E. D. Sasoon & Co. v. Shivji Ram*, *A. I. R. 1929 Lahore 238* and *Krishnaji Shridhar v. Mahadeo Sekharam* (3). In *Mathura Prasad v. Sheobalak Ram* (4) the question arose under the Co-operative Societies Act, and Mr. Venkataramana Rao relies upon it as supporting his contention. It is sufficient to observe for the present that we cannot regard it as direct authority on the question raised.

It is next contended that it must be shown that an order made in execution falls within S. 47, Civil P. C., before an appeal can lie from it and that the section by its very terms excludes orders made in a proceeding of this kind. It would be contrary to the spirit of the provision conferring on the civil Court the power to execute to construe the word "suit" in S. 47 in its literal and strict sense. We must hold that the words in S. 70, Religious Endowments Act, "as if a decree had been passed" attract to the order the whole procedure in execution and the right of appeal pro-

vided under S. 47, Civil P. C. The preliminary objection is therefore overruled.

As regards the appeal itself, Mr. Sitarama Rao contends that the order of the Religious Endowments Board can operate as a decree only if the statutory conditions are satisfied, and urges that in this case the requirement of the section regarding the service of the notice has not been fulfilled. In the case of this institution, it is alleged that there are eight trustees (heads of eight mutts) and that each of them by rotation acts for a period of two years. The notice under S. 70 was served upon the active or executive trustee then in office, and Mr. Sitarama Rao maintains that, as it was not served upon the whole body of trustees, the order sought to be executed has not acquired the force of a decree. No doubt S. 70 refers to "the trustee" as the person on whom notice is to be served; but the true intention is not that the trustee should be served, but the institution, of which he is the trustee. The funds that are liable under the section are the funds of the institution, and what is intended is that no proceedings should be taken against it before a proper notice is served on it. The trustee is mentioned in that section as the person who represents that institution. The question in each case therefore is, has the institution been properly served or not? When by usage one of the several trustees acts as the managing or executive trustee the notice, served on such trustee must be deemed to be a proper notice as against the institution. The appeal fails and is dismissed with costs of respondent 1.

Reilly, J.—I agree.

P.R.S./K.S. *Appeal dismissed.*

* A. I. R. 1933 Madras 306

REILLY AND CORNISH, JJ.

(Kottamasu) Venkataratnam — Plaintiff—Appellant.

v.

Polisetty Butchayya and others — Defendants—Respondents.

Appeal No. 293 of 1929, Decided on 1st November 1932, against decree of Sub-Judge, Guntur, in O. S. No. 113 of 1927.

(a) Stamp Act (1899), S. 2 (22)—Definition of promissory note under—Promise to pay to some person or persons to their order or to

1. (1904) 14 M L J 433.

2. (1908) 31 Mad 24=17 M L J 441=3 M L T 19.

3. A I R 1922 Bom 377=64 I C 337=46 Bom 128.

4. A I R 1918 All 419=42 I C 968=40 All 89.

bearer is essential—Negotiable Instruments Act (1881), S. 4.

Though for purposes of Stamp Act "promissory note" includes more than what the expression does under Negotiable Instruments Act, it does not do away with, or in any way affect, one essential characteristic of a promissory note that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. [P 307 C 2]

A promise to pay a certain amount in one event to the payee, or in the other event to deposit the money in Court does not make the document in which it is contained a promissory note either under the Negotiable Instruments or Stamp Act. [P 308 C 1, 2]

*** (b) Negotiable Instruments Act (1881), S. 4—Promissory note—Test for determining whether document is promissory note indicated—Stamp Act (1899), S. 2 (22).**

Per *Cornish, J.*—In deciding whether the document is a promissory note the question is what is the dominant, the substantial effect of the instrument. And in the determination of the question, two tests are applicable: (1) was it the intention of the parties that the instrument should be a promissory note; and (2) is the document a promissory note in the common acceptance of the term by business men? A mere promise to pay is not sufficient to make the document a promissory note, if it appears from the context that the document was not intended to operate as a promissory note: *Mortgage Insurance Corporation v. Commissioner of Inland Revenue*, (1888) 20 Q B D 645, *Rel on*.

[P 308 C 2; P 309 C 1]

Ch. Raghava Rao and *M. Sriramamurthy*—for Appellant.

P. Satyanarayana Rao, *V. Subramaniam*, *V. Satyanarayana* and *B. Somayya*—for Respondents.

Reilly, J.—The learned Subordinate Judge has not thought it necessary to try this suit in full. He dismissed it as a result of his finding on issue 5, which he took up as a preliminary issue. That issue is: "Whether the suit document is a promissory note under the Stamp Act as contended by defendants 3 and 4 and is inadmissible in evidence." The learned Subordinate Judge has found that the document is a promissory note, and, as it has not been stamped, he has found it inadmissible in evidence. He has therefore dismissed the suit. Plaintiff 2 has appealed, contending that the document on which the plaintiff sued is not a promissory note. The crucial part of the document appears to me to be contained in two sentences:

"We shall pay to you the said sum together with interest thereon at the rate of six per cent per annum from this date as soon as you settled the High Court affair. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the

said amount in Court and pay to you the amount of interest accruing thereon till that date."

I do not think it can be reasonably contended that a document so framed is a promissory note within S. 4, Negotiable Instruments Act. It is clear that it does not contain an unconditional promise to pay the amount in question to the payees or to their order or to the bearer of the document. The promise is to pay the amount to the payee unless the Court directs that the amount shall be deposited in Court. But it is contended for the defendants that for the purpose of the Stamp Act "promissory note" includes more than that expression does as defined in the Negotiable Instruments Act. That is so. S. 2 (22), Stamp Act, runs:

"'Promissory note' means a promissory note as defined by the Negotiable Instruments Act, 1881; it also includes a note promising the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

It is contended for the defendants that this document in question though not a promissory note under the Negotiable Instruments Act, is a promissory note as the meaning of that term has been extended by S. 2 (22), Stamp Act, because the executants promise to pay the amount to the payees upon a contingency which may or may not happen. But if we examine the language of the document carefully, I think it becomes clear that they promised to pay the amount to the payee, not if something happened or did not happen but to pay to them unless something happened, unless the Court directed that the amount be deposited in Court. Grammatically I do not think that this document, properly interpreted, comes within the extended definition of "promissory note" as given in the Stamp Act. But there is something more than mere grammar in the matter, as Mr. Raghava Rao has urged. S. 2 (22), Stamp Act, extends the definition of "promissory note" as given in the Negotiable Instruments Act, in the ways I have mentioned when quoting the subsection in full. But it does not do away with, or in any way affect, one essential characteristic of a promissory note that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. Here, quite apart from any question of a contingency hap-

pening or not happening, the promise is to pay in one event to the payees, in the other event to deposit the money in Court.

Mr. Lakshmanan for the defendants has contended that in the circumstances payment into Court to the credit of a particular suit, as is provided in one event in this document, would be the same thing as payment to the payee, because the payees were judgment-debtors, who were under liability in certain circumstances to pay the amount to the credit of a suit, in which a decree had been made against them. In effect his argument is that in one event the executants had promised to pay the amount to the payees; in the other event to pay it into Court to the credit of a suit on their behalf, because it was money which in that event they would be liable to pay. It is quite true that the principal money concerned in this suit was on the pleadings money drawn by the plaintiffs from Court on security being given that they would, if they lost a certain case in the High Court, pay it back into Court; and in that sense, if in the one event the executants of the documents in question here had to deposit the amount in Court, they would be paying it into Court on behalf of the plaintiffs (judgment-debtors). But it would be a very extraordinary and to my mind unpermissible extension of the definition of a promissory note in S. 4, Negotiable Instruments Act, to say that it is the same thing for the purpose of that definition to promise to pay an amount to a person or to his order and to promise to pay that amount on his behalf to some third person on the order of that third person, though it may be equally advantageous to the payee if either course is adopted. To pay money to a third party on behalf of the payee but on the third party's order cannot be treated as the same thing as, or equivalent to, payment to the payee or to his order, which is the promise necessary in any note not payable to the bearer or to the payee only in order to bring it within the definition in S. 4, Negotiable Instruments Act. That element of a promissory note has not been extended or altered in any way by the extended definition of a promissory note given in S. 2 (22), Stamp Act. In my opinion this document with which we are con-

cerned is not a promissory note either within the meaning of the Negotiable Instruments Act or within the meaning of the Stamp Act. For these reasons, apart from other consideration in my opinion the finding of the learned Subordinate Judge was wrong.

I may mention that the learned Subordinate Judge thought that S. 13 (2), Negotiable Instruments Act, might be applicable to this case treating the document as one containing a promise to pay to alternative payees. But it is unnecessary to discuss that aspect of the matter beyond saying that his opinion is clearly wrong and that it has not been contended by Mr. Lakshmanan that that section is really applicable to this case. In my opinion therefore the decree of the learned Subordinate Judge should be set aside and the suit should be remanded to him for fresh trial, the court-fee paid by the appellant being refunded to him. Costs of this appeal should abide and follow the result.

Cornish, J.—I agree. In deciding whether the document is a promissory note, the question, as observed by Pollock, B., in *Mortgage Insurance Corporation v. Commissioners of Inland Revenue* (1), is what is the dominant, the substantial, effect of the instrument. And in the determination of the question, two tests are applicable: (1) was it the intention of the parties that the instrument should be a promissory note; and (2) is the document a promissory note in the common acceptance of the term by businessmen? Taking first the second of these tests, I find it difficult to believe that the suit document would be regarded by businessmen as a promissory note. It is addressed to the plaintiffs and purports to be written by two of the defendants, and to be signed by all three defendants. It is in these terms:

"A sum of Rs. 17,000 has been in civil Court deposited to your credit to the account of O. S. No. 31 of 1921 on the file of the Additional Sub-Court. Today I have withdrawn that amount on furnishing security of our own property. We shall repay to you the said sum together with interest thereon at the rate of six per cent per annum from this date as soon as you settle the High Court affairs. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the said amount in Court and pay to you the amount of interest accruing thereon till that date."

1. (1888) 20 Q B D 645.

It is true that the document contains a statement that the defendants would repay the money. But a mere promise to pay is not sufficient to make the document a promissory note, if it appears from the context that the document was not intended to operate as a promissory note. In my opinion, the fair interpretation of the suit document is that it was intended to be a memorandum or recital of an agreement whereby the defendants were to repay the money withdrawn from Court to the plaintiff if he succeeded in his appeal, or to the Court if the Court so directed. I also think that the document fails when tried by the first test. It was neither the plaintiff's case nor the defendant's case on the pleadings that a promissory note was executed. The plaintiff's allegation was that the document in question was an acceptance by the defendants of an offer made by the plaintiff for use of money drawn from Court on which the defendants were to pay him interest. The defendants on their part deny the genuineness of the document, and they deny that they withdrew the money on loan from the plaintiff. Their case was that there was an agreement between the parties that the moneys withdrawn from Court should be lent by defendants for the mutual benefit of both parties. When therefore it was nobody's case that a promissory note was intended to be executed, and when the document itself did not clearly reveal any such intention, I think the lower Court was not justified in holding that the document was a promissory note.

P.R S./K.S.

Suit remanded.

* A. I. R. 1933 Madras 309

VENKATASUBBA RAO AND REILLY, JJ.

Annadana Jadaya Goundar—Defendant—Appellant.

v.

Konammal and another—Plaintiffs—Respondents.

Appeal No. 294 of 1930, Decided on 12th October 1932, against order of Dist. Judge, South Arcot, D/- 27th January 1930.

* (a) **Principal and Surety**—Surety bond for allowing execution of decree pending appeal—Consent decree passed in appeal—Surety is not discharged if consent decree is not outside scope of surety bond—Contract Act (1872), S. 135—Civil P.C. (1908), S. 145

Where a surety bond is executed for allowing

execution of a decree pending an appeal from such decree, there is no ground for limiting the liability of the surety only to a decree passed after contest. His liability continues even if a consent decree is passed provided the consent order is not excluded by or is not outside the scope of the surety bond. Whether a compromise as such is or is not excluded by the terms of a surety bond, is a question of fact in each case: *A I R 1920 Mad 355, Foll.*; *A I R 1931 Bom 55* and *A I R 1932 Cal 558, Ref.*; *Tatum v. Evans*, (1885) 54 L T 336, *Held Dist.*

[P 310 C 1, 2]

(b) **Contract Act (1872), S. 135**—Agreement to discharge principal debtor with reservation of right against surety does not discharge surety,

An agreement to discharge the principal debtor with a reservation of right against the surety operates as a covenant not to sue between the creditor and debtor and does not release the surety: *A I R 1923 Mad 340* and *A I R 1920 Mad 216, Ref.*

[P 311 C 1, 2]

(c) **Contract Act (1872), S. 135**—Contract by creditor giving time to principal debtor for payment discharges surety—Principal and surety.

A surety bond was executed for allowing execution of the decree pending appeal. The appeal was compromised by which time was given to the principal debtor to pay the amount due by him. The surety was not a party to the compromise.

Held: that the surety was discharged: *A I R 1930 Bom 122*; *A I R 1927 Cal 239* and *120 I C 552, Rel. on.*

[P 312 C 1]

K. V. Sesha Ayyangar—for Appellant.

C. S. Venkatachariar—for Respondents.

Venkatasubba Rao, J.—This is an appeal against the order refusing to make the surety, the respondent (*Anganna Reddi*) liable in execution. The facts may be briefly stated. A lady by name *Konammal* obtained a decree against one *Annadana Jadaya Goundar* for possession of a jagir, and an appeal was preferred by the latter to the High Court. *Konammal* was allowed to execute the decree pending the appeal on her furnishing security. A security bond was thereupon executed by four sureties, including the respondent, *Anganna Reddi*. The material portion of that bond runs thus:

"We hereby undertake that plaintiff 1 (*Konammal*) will restore the jagir which she had taken delivery of in execution, that she will act according to the decree of the appellate Court, that she will pay whatever amount she is liable to pay in accordance with the appellate decree in connexion with the said jagir, that if she commits default in so paying, the amount that she is liable to pay may be realized from the properties hereby given as security."

In the appeal *Goundar* succeeded and got back from *Konammal* the jagir in question by way of restitution. Then he applied also by way of restitution for

payment of mesne profits. But without any inquiry by the Court, Goundar and Konammal entered into a private arrangement as to the claim to the mesne profits. To this proceeding the surety Anganna Reddi was not a party. The amount claimed in respect of mesne profits was Rs. 33,000, but by the arrangement the profits were fixed at Rs. 20,000 and it was agreed that Goundar should receive towards this amount Rs. 9,000 odd standing to the credit of Konammal in Court and that the balance Rs. 10,000 odd should be paid by Konammal within a period of two months. In default (then follow the important words) Goundar should take execution proceedings against the immoveable properties which were offered as security by the sureties. The agreement then goes on to say:

"All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement."

An order was made by the Court on 10th September 1926 embodying this compromise. It is alleged by Goundar that towards the amount due under the order, namely, Rs. 10,000 odd, one of the sureties subsequently paid Rs. 5,000, and he now claims in execution the balance of Rs. 5,000 odd against Anganna Reddi, the respondent. It is not disputed, though the instrument is not happily worded in this respect, that the claim to mesne profits by way of restitution is covered by its terms. Anganna Reddi contends that the claim made by Goundar in respect of mesne profits was an extravagant one and that the compromise and the order based thereon were collusive and fraudulent. Whether it is open to Anganna Reddi to raise this plea in these proceedings, is a question which does not arise in the view I have taken.

Three points have been urged by Anganna Reddi, the surety who contends that his liability under the surety bond has become extinguished. First, he says that the order made, not being after contest but by consent, he is not bound by it. There is no force in this contention. The true test is whether a consent order is excluded by, or is outside the scope of, the surety bond. As held in *Appunni Nair v. Isack Mackadan* (1),

1. A I R 1920 Mad 355=53 I C 367=43 Mad 272.

in the absence of any special stipulation in that behalf there is no ground for limiting the liability only to a decree passed after contest. The same case points out that, if there has been collusion between the plaintiff and defendant in obtaining the decree, the surety is not without remedy. The same view was taken in *Ahmed Karim v. Maruthi Ranji* (2). The learned Judges observe, whether a compromise as such is or is not excluded by the terms of a surety bond, is a question of fact in each case. As a compromise was not in terms excluded from the surety bond, they held that the surety was bound by the compromise, although it had been entered into without his knowledge. In this Bombay case *Appunni Nair v. Isack Mackadan* (1), was approved and followed. The view receives support also from *Jia Bai v. Johar Mull Bothra* (3). In that case Rankin, C. J., considers at length *Tatum v. Evans* (4), a decision cited for the contrary position, and points out how it is clearly distinguishable. The agreement there was the result of an elaborate arrangement embracing a great many different matters, and it would be impossible to hold that the surety, when he entered into the bond bound himself in the expectation that such an arrangement would be made. In other words, the question in each case is, would the terms of the bond reasonably warrant that the arrangement come to by consent was or was not within the contemplation of the parties? Some cases where a different view has been taken have been cited to us, and I do not think it necessary to refer to them. This contention of Mr. Venkatachari, the surety's counsel, must be overruled.

Secondly, it is argued for the surety that under the consent order the principal debtor having been discharged, his own obligation has become extinguished. Under the order quoted above, on Konammal failing to pay the balance of Rs. 10,000 odd in two months, the creditor's remedy is confined to proceeding against the surety: in other words the creditor has abandoned his remedy against the principal debtor. It is on the

2. A I R 1931 Bom 55=128 I C 903=55 Bom 97.

3. A I R 1932 Cal 858=139 I C 815=59 Cal 1450.

4. (1885) 54 L T 336.

strength of this clause that the contention has been put forward that the surety's liability has become extinguished. But Mr. Sesha Ayyangar, the learned counsel for Goundar, urges that there is a well-recognized exception to the rule that the surety is released when the principal debtor is discharged and that on the facts of this case it is the exception and not the rule that applies. This argument is clearly well founded. The rule of law that the discharge of the principal debtor necessarily carries with it the release of the surety is founded on this principle: it would be a fraud on the principal debtor, for the creditor to release him from liability, if the latter were then able to proceed against the surety, who in his turn might sue the principal debtor and thus render the alleged release nugatory: 15 Hals. S. 1056. see also *Sami Iyer v. Ramaswami Chettiar* (5), at the bottom of p. 177. But if the deed releasing the principal debtor itself contains a reservation of remedies against the surety, the release is reduced to a mere covenant not to sue: see 15 Hals. same section. The rule as well as the exception are very clearly stated in the following passage in Rowlatt on Principal and Surety, Edn. 2, p. 260:

"The doctrine under which a surety is discharged by an arrangement on the part of the creditor either not to sue, or to give time to the principal debtor, resting as it does upon the principle that otherwise a fraud would be committed upon the principal, does not apply if it is made a condition of the agreement that the rights of the creditor to sue or receive the money from the surety are reserved; for in that case the principal takes the indulgence upon the footing that he must continue exposed to a claim at the instance of the surety, and the arrangement becomes one the observance of which does not involve the suspension of any right of the surety. The surety is therefore not discharged."

The principle is this: if a creditor agrees to discharge the principal debtor, it would be a breach of the agreement so entered into, for the creditor to pursue his remedy against the surety, for the latter would in his turn enforce his remedy against the principal debtor and thus the creditor's agreement to discharge would be rendered inoperative; but if the very agreement to discharge the principal debtor contains a reservation of rights against the surety, the agreement cannot operate as an absolute release, for the obvious reason that the principal debtor has notice that the

creditor's remedies against the surety are preserved and that the latter's right of recourse against him is not extinguished. The following passage from White and Tudor expresses this idea very clearly and concisely:

"A release, with a reservation of rights against the sureties, operates as a covenant not to sue between the creditor and the debtor and does not release the sureties. And language importing an absolute release may be construed as a covenant not to sue the principal debtor, when that intention appears, leaving the debtor open to any claim of relief at the instance of his sureties: White & Tudor's Leading Cases in Equity, Vol. 2, p. 554":

see also *Murugappa Mudali v. Munuswami Mudali* (6), and the note to S. 135, Contract Act, in Pollock and Mulla's commentaries.

In this case there is such contract for a reserve against the surety, and it is the exception and not the rule that applies. I cannot therefore accept Mr. Venkatachari's contention that the surety's liability became extinguished on this ground. But the third contention of Mr. Venkatachari, the one accepted by the lower Court, must prevail. By the terms of the order passed on the arrangement come to by consent, Konammal was given two months' time for the payment of the balance of the amount declared to be due. For the surety it is contended that this giving of time has had the effect of discharging him. Can this compromise be regarded as having been within the contemplation of the surety when he executed the security bond? He agreed under it to pay whatever amount might be found due; that is to say, the payment became due on the date it was in due course ascertained. It was held in *Mahomed Ali v. Lakshmi Bai* (7) that a compromise providing for the payment of the decretal amount by instalments had the effect of discharging the surety, the test laid down being, is the compromise consistent with the obligations which the surety had undertaken to discharge? Kemp, A. C. J., observes:

"His (surety's) rights against the debtor are prejudiced by this compromise, and, I think, it can fairly be said that such a compromise was not one which was contemplated by him when he entered into the suretyship."

There are observations in the judgment of Kemp, Ag. C. J., to the effect that the very fact that the decree was one passed on consent had the effect of releasing

6. A I R 1920 Mad 216=54 I C 758.

7. A I R 1930 Bom 122=124 I C 227=54 Bom 118.

the surety. I have already said that I take a different view on this point, but I agree that if an arrangement provides for postponed payment or for the amount being paid by instalments, the surety is discharged from his obligation: *Abdul Gaffoor v. Mennatal*, A. I. R. 1927 Cal. 23-9, and *Kunjilal v. Batak Prasad* (8), support this view. The observations of Rankin, C. J., in *Jia Bai v. Johar Mull* (3) already cited are obiter. In an old English case, *Bowsfield v. Tower* (9), heard by four Judges, the headnote runs thus:

"If a plaintiff accepts from the principal defendant a cognovit, whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement."

Gibbs, J., observes:

"I was the counsel in the cause in the Court of King's Bench in which it lately was ruled that by giving a cognovit payable by instalments the bails were discharged, by analogy to the cases where a creditor, by giving time to the principal, discharges the surety."

The principle that a contract by a creditor to give time to the principal debtor discharges the surety is well recognized. The reason of the rule is this: the surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt or himself pay off the debt and when he has paid it off he is at once entitled to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed: see *Rouse v. Bradford Banking Co.* (10), and White and Tudor's Leading Cases in Equity, Vol. 2, p. 539.

Mr. Sesha Ayyangar argues that in this case also the rule does not apply, as there is a contract for reserve against the surety. The question is: Is there any reservation of rights as contended? If the arrangement, which said that Konammal was given two months' time, had also provided that Goundar could proceed against the surety in the meantime, there would then have been a reservation and Mr. Sesha Ayyangar's contention would have been right. But the consent order, far from containing any such reservation, says in terms that only in the event of Konammal failing to pay within the two months, the surety could

be proceeded against. The facts of the present case bring it within the rule as to the giving of time and not the exception relating to the reservation of rights. I must uphold therefore the third contention of the surety, and, agreeing with the lower Court, hold that he is not liable. In the result the appeal fails and is dismissed with costs.

Reilly, J.—I agree that we must uphold the learned District Judge's order for the reasons given by him, that by the consent order made between plaintiff 1, Konammal, and defendant 1 on 10th September 1926 time was given to Konammal to pay the balance of the Rs. 20,000 fixed for mesne profits and that therefore the surety was discharged. The learned District Judge has said that this is so under S. 135, Contract Act. Mr. Sesha Ayyangar is right in contending that S. 135, Contract Act, does not apply to this case. This is not a case to which the provisions of the Contract Act directly apply. But Ss. 133, 134 and 135, Contract Act, and some of the following sections embody equitable principles which have long been established in England, and I have no doubt that a surety can claim the protection of these principles in such proceedings as those. So long ago as 1795 in *Rees v. Borrington* (11) a creditor gave time to the principal debtors, and, when they did not pay in the time so given, instituted an action against the surety: the surety preferred a bill in the Court of Chancery praying for an injunction that the action should be stayed, and Lord Loughborough, L. C., held that he was clearly entitled to such an injunction on the ground that his rights had been interfered with behind his back by granting time to the principal debtors. That principle—that the granting of time without the consent of the surety to his principal discharges the surety in such a case—has been reiterated very many times. But, as Mr. Sesha Ayyangar pointed out, there is one exception to it. If, though time is granted by the creditor to the principal debtor by agreement with him, nevertheless under that agreement the creditor's right to proceed at once against the surety is reserved, then, as pointed out by Page Wood V. C. in *Webb v. Hewitt* (12), the surety is not discharged,

8. (1929) 120 I C 552.

9. 4 Taunton 454.

10. (1894) 2 Ch D 75.

11. (1795) 2 Ves 543.

12. (1857) 3 K & J 438.

the reason being obviously that the creditor may proceed at once against the surety and the surety in his turn may proceed at once against the principal debtor. Mr. Sesha Ayyangar suggests that this is such a case.

In the consent order made on 10th September 1926 it is provided that the balance of Rs. 10,000 shall be paid to the petitioner, i. e., defendant 1 by Konammal within a period of two months: in default the petitioner shall take execution proceedings against the immovable property charged as security. Mr. Sesha Ayyangar urges that we should interpret that as meaning that, although defendant 1 was not to proceed against the principal debtor, Konammal, for two months, his right to proceed against the surety at once was reserved. In my opinion it is impossible to interpret the order in that way. The order gives two months' time to Konammal and provides, not that defendant 1 may at once proceed against the security, but that he may proceed against the security in default of payment by Konammal within those two months. It is clear therefore I think that the right of the creditor to proceed at once against the security or the surety in spite of time being given to the principal debtor was not reserved in this case, and the exception to the rule in regard to granting time to the principal debtor does not apply here.

Mr. Sesha Ayyangar however contends that in this case there was no extension of time, there was really no giving of time at all to Konammal. It is quite true that we have not in this case a definite time fixed by contract which was afterwards extended. But does that take this case out of the rule about the giving of time? What the sureties undertook in this case was to discharge out of the property which they gave as security and, if that was not enough, to discharge personally whatever was eventually decided to be due in connexion with the decree to be made in respect of the jagir, if Konammal failed to pay it. That must mean that they undertook to pay what she might be found liable to pay and to pay it when she was found so liable. I do not think it is possible to attach any other reasonable meaning to their undertaking. In this particular case it was found and settled by the consent order on 10th September

1926 that what she was liable to pay was Rs. 20,000, out of which Rs. 9,900 was to be paid from money which she had deposited in Court. But, instead of her being made liable to pay the balance at once, she was given by the consent order—that is in effect by the creditor, defendant 1—two months' time to pay it. It is impossible I think to suggest seriously, when the matter is fully considered, that the sureties were not injuriously affected by that postponement, by the allowing of two months to Konammal after her liability had been finally fixed, provided that the order meant in effect, as I have no doubt it meant, that the sureties or their property could not be proceeded against for the balance during those two months and they in turn could not proceed against Konammal during those two months. It is obvious that during those two months Konammal would be at liberty to secrete any moveable property or to make away with her property in other manner, if she wished to do so. And there has been an allegation in this case that she did during that time draw Rs. 4,000 from Court and put it away somewhere. That allegation has not been proved; but at any rate it illustrates the way in which the sureties' interests might be very seriously affected by Konammal being given two months' time as she was in this case.

There is one other point taken by Mr. Sesha Ayyangar, to which I may refer. He quoted an Irish case, *Provincial Bank v. Cussen* (13) as an authority to show that the rule about a surety being discharged when time is given to his principal debtor does not apply when that is done by a judicial act with the consent of the creditor. Now that, if I may say so, is not either fully or accurately the effect of that case. But I do not think it necessary to discuss that case at length because it arose in connexion with bankruptcy proceedings, where obviously very different considerations apply. And moreover the order, which was made on 10th September 1926 in this case, though made with the consent of the creditor, was not in my opinion a "judicial act" in the sense suggested by Mr. Sesha Ayyangar in connexion with this Irish case. There was a compromise between the two parties

concerned and on the face of it a perfectly lawful compromise. All that the Court had to do was to accept the compromise and make an order accordingly. There was in no sense an adjudication between the parties. There is really not much meaning in calling that a "judicial act," nor do I think it of any use to try to show that for that reason the order so made was not one to which the principles in regard to the discharge of a surety, which we have been discussing in this case, apply.

That is really sufficient for the disposal of this case, as we uphold the decision of the learned District Judge on this objection of a surety. But, as my learned brother has mentioned, another question has been argued before us at considerable length. Among the objections raised in the surety's counter-statement in the District Court was one to the effect that, as Konammal was released altogether by the consent order of 10th September 1926, the surety was thereby discharged. Oddly enough at first sight, the learned District Judge in enumerating the three points actually pressed before him at the hearing of the case does not mention that objection at all. It was suggested by Mr. Venkatachari for the surety that the learned Judge was mistaken in supposing that the surety did not intend to press that point in the case. Certainly the learned District Judge does not say that the point was given up; but he does not enumerate it among the points pressed before him, and he says nothing whatever about it in his judgment. It was a point for serious discussion, if the surety thought fit to press it, though, as we have found, he could succeed on a narrower point. The words of the consent order have already been quoted in part. On the face of it the order provides that Konammal should pay the balance of Rs. 10,000 within two months and that in default of her so doing defendant 1 should take execution proceedings against the immovable property offered as security by bringing it to sale in pursuance of the charge created over it. But after that there is another sentence, which it is suggested is of considerable importance, namely:

"All reliefs which the petitioner prays for in this petition have been settled by the aforesaid arrangement."

It is urged that, taking those three

provisions together, Konammal was entirely released if she did not happen to pay within the two months, and the result of that would be that the surety must have been discharged. Now, it must be noticed that the order contains no explicit release of Konammal. If there is a release, we have to find it by implication. And on the other hand there is an explicit statement that in default of payment by Konammal defendant 1 is to proceed in execution against the property charged as security. In the absence of any explicit release of Konammal and in the face of the definite statement that defendant 1 is to proceed against the property given as security I cannot interpret the provision that "all reliefs which the petition prays for in this petition have been settled by the aforesaid arrangement"

as meaning that Konammal was released. On the other hand we have here something even more than a reservation of the right to proceed against the security in spite of the supposed release. Even if the language of the order was clearly in its literal meaning a release of Konammal, nevertheless, if a right to proceed against the charged property or against the surety was reserved, then the surety would not be discharged. Here we have something even more serious against the surety, namely, an explicit statement that defendant 1 is to proceed against the charged property. As my learned brother has pointed out, even if by agreement there is an explicit release of the principal debtor by his creditor, when that is combined with a reservation of the creditor's right to proceed against the surety, that does not discharge the surety. The effect of such an agreement with such a reservation is that the principal debtor agrees that the liability of the surety shall continue with the corollary that the right of the surety to exact his remedy in turn from the principal debtor also continues. There are many authorities for that, such as *Kearsley v. Cole* (14), *Bateson v. Golsing* (15) and *Cargoe v. Jones* (16).

The principle behind both the rule regarding the granting of time to the debtor and the rule regarding the release

14. (1846) 16 M & W 128=16 L J Ex 115.

15. (1871) 7 C P 9 = 41 L J C P 53 = 25 L T 570=20 W R 98.

16. (1873) 8 Ch 81=42 L J Ex 63=23 L T 36 =21 W R 403.

of the debtor is the same. If by agreement between the creditor and the principal debtor without the surety's consent the surety's right of recourse against the principal debtor is destroyed or impaired or interfered with, then the surety's liability goes and the surety is discharged. But the reservation to the creditor of a right to proceed against the surety in either class of cases prevents the discharge of the surety, as with the reservation the surety's right of recourse against the principal debtor also is preserved. In this case we cannot find, when we examine the matter carefully, that Konammal was released by the consent order of 10th September 1926; and, even if part of the wording of the order had implied that, the provision regarding execution against the security would make the release ineffective. That very probably explains why this particular point was not urged with any persistence before the learned District Judge. But the other point remains, that time was given to Konammal and thereby the surety was discharged. I agree that this appeal should be dismissed with costs.

P.R.S./R.K. *Appeal dismissed.*

*** A. I. R. 1933 Madras 315**

MADHAVAN NAIR, J.

Karuveepil Ahammad Kutty and others
—Defendants—Appellants.

v.

Kottakkat Kuttu—Plaintiff—Respondent.

Misc. Second Appeal No. 123 of 1927, Decided on 18th August 1932, against order of Sub-Judge, South Malabar, D/- 23rd March 1927.

(a) Civil P. C. (1908), O. 20, R. 7—Decree—Date.

The date of a decree is not the date on which it is actually drawn up but the date on which judgment is pronounced. [P 318 C 1]

* (b) Limitation Act (1908), Art. 182, Cl. (2)—Partition suit—Preliminary decree and appeal from such decree—Final decree passed pending appeal—Limitation for execution of final decree is from date of final decree and not date of appellate order from preliminary decree.

A preliminary decree was passed in a partition suit. An appeal was filed from such decree. While the appeal was pending the final decree was passed on 30th September 1919. The appellate order from the preliminary decree was delivered on 20th March 1923. Application for execution of final decree was filed on 24th March 1925.

Held: the limitation for execution of the final

decree was from the date of the final decree i. e. 30th September 1919 and not from the date of the appellate order from preliminary decree and that the application was barred by time: *A I R 1927 Pat 215, Diss from; 33 All 264 (P C), Expl.* [P 318 C 1, 2]

* (c) Limitation Act (1908), Art. 182, Cl. (4)—Scope.

A decree which has already become barred by limitation cannot be revived for purposes of execution by a subsequent amendment: *A I R 1920 Cal 769* and *A I R 1924 Lah 329, Rel on; A I R 1929 Cal 650, not Foll.* [P 318 C 2]

K. P. Kesava Menon and *K. Kuttikrishna Menon*—for Appellants.

P. Govinda Menon—for Respondent.

Judgment.—Defendants 2 and the legal representatives of defendant 9 are the appellants. This civil miscellaneous second appeal arises out of an application for execution made by the decree-holder in O. S. No. 105 of 1914 (Parapanangadi District Munsif's Court) to execute a partition decree. The question for decision is whether the application is barred by limitation or not. The facts are briefly these: In O. S. No. 105 of 1914 the plaintiff-respondent obtained a preliminary decree for partition on 18th April 1918. The decree was confirmed in appeal on 31st March 1919 by the first appellate Court and on 20th March 1923 by the High Court. On 18th April 1918 the plaintiff applied for a final decree and on 30th September 1919 a final judgment was pronounced. As the requisite stamp papers were not supplied in time the final decree was drawn up only on 14th December 1924. As the decree must bear the date on which the judgment was pronounced the decree that was drawn up in 1924 bears the date 30th September 1919. The plaintiff decree-holder put in an execution application E. P. No. 502 of 1924, but that petition was not pressed and was consequently dismissed. The petition out of which the present proceedings arise, E. P. No. 544 of 1925 was filed on 24th March 1925. It will be observed that the present petition as well as the previous one has been put in more than three years after the date of the final decree and the question is whether in the circumstances these petitions are time barred.

It was argued before the District Munsif that the period of three years for executing the decree in this case under Art. 182, Cl. (2), Lim. Act, should be calculated from the date of the High

Court's decree and that therefore the petitions are not time barred though they were filed beyond three years from the date of the final decree which is the one now sought to be executed. He did not accept this argument but held that the time for execution began to run from the date of the final decree. On appeal the learned Subordinate Judge came to a contrary conclusion and held that the time began to run from the date of the High Court's decree and that therefore, the applications are not time barred. He held that the applications are not time-barred for another reason also. I have already stated that the final decree was passed on 30th September 1919. But on 6th December 1924 it was amended as per order on E. A. No. 1249 of 1924. It was contended before the learned Subordinate Judge that the decree having been amended on 6th December 1924 the decree-holder has got three years' time to execute the decree from the date of the amended decree under Art. 182, Cl. (4), Lim. Act, and that, therefore, the applications are within time. This argument was accepted by the learned Subordinate Judge and on this ground also he held that the applications were not time barred. Another point was also argued before the learned Subordinate Judge and that was that the final decree in this case was drawn up only on 14th December 1924 that till then there was no decree which could have been executed and that the petitioner had therefore three years' time from 14th December 1924.

The decree that was drawn up in 1924 bears the date 30th September 1919. The learned Subordinate Judge did not express any definite opinion upon this point. But as the argument is obviously untenable, it was not pressed before me by the learned counsel for the respondent. And so, the two points arising for determination in this second appeal are: (1) whether the period for the execution of the decree should be calculated from the date of the High Court's decree (i. e. 20th March 1923), or from the date of the final decree (i. e. 30th September 1919); (2) whether time in this case can be calculated under Art. 182, Cl. (4), Lim. Act, from the date of the amended decree. I shall first deal with the question with reference to Art. 182, Cl. (2), Lim. Act. Under this

clause the period of the prescribed three years is to be calculated from:

"(where there has been an appeal) the date of final decree or order of the appellate Court or the withdrawal of the appeal."

It is argued for the appellant that since there has been no appeal against the final decree time for execution should be calculated from the date of the final decree which is the decree sought to be executed and not from the date of the High Court's decree passed in appeal against the preliminary decree. On the other hand, the respondent contends that there is nothing in the wording of Cl. (2), Art. 182, to show that the appeal therein referred to is an appeal against the decree sought to be executed and since there has been an appeal in the present case, though not against the final decree, the date of the final disposal of the appeal should be the date from which the period of limitation should be computed. In support of this view it is urged that the appeal against the preliminary decree may imperil the decree sought to be executed and the legislature therefore has deliberately extended the period by fixing the date of the disposal of the appeal as the date for calculating the period of limitation. It is somewhat curious that this question has not arisen for decision in any of the High Courts with reference to the execution of a partition decree. But the question arose in *Somar Singh v. Deonandan* (1) in connexion with the execution of the final decree in a mortgage suit in which an appeal had been filed against the preliminary decree.

In that case a preliminary decree in a mortgage suit was passed on 23rd August 1921 and there was an appeal against that decree to the High Court. During the pendency of the appeal the mortgagee decree-holder obtained a final decree for sale on 28th October 1922. The appeal to the High Court against the preliminary decree was dismissed on 29th October 1925. The application for execution was made on 2nd February 1926. The judgment-debtor contended that the application was barred by limitation. It was held by the learned Judges that limitation ran from the date of the final disposal of the appeal by the High Court and that therefore the

1. A I R 1927 Pat 215=102 I C 811=6 Pat 780.

application for execution was within time. This decision is strongly relied on by the learned counsel for the respondent. If the decision correctly lays down the law, there can be no doubt that it may be applied to this case. The fact that the decree in that case was passed in a mortgage suit while the present one was passed in a partition suit does not make any difference with regard to the application of the principle. The appellant's learned counsel argues that this decision does not lay down the correct law.

The conclusion arrived at by the learned Judges in *Somar Singh v. Deonandan* (1) is based mainly on two considerations: (1) the wording of the clause and (2) a decision of the Privy Council in *Asahfaq Hussain v. Gauri Sahai* (2). I shall first consider the Privy Council decision and see whether it supports the principle extracted from it by the learned Judges. To appreciate the decision it is necessary to state the facts of the case. These appear in the head-note as follows :

"A decree for sale on a mortgage was passed against several defendants jointly on 25th August 1900 and made absolute on 21st December 1901. As against one defendant however the decree was ex parte, and it was set aside as against her on appeal on the March 1902. Subsequently, a decree was passed on the merits against this defendant on 15th August 1902, and her appeal was dismissed by the High Court on 16th November 1904 and as against her that decree was made absolute on 27th November 1905. An application for execution was made against all the defendants on 21st December 1905, based on the decrees on 25th August 1902 the 15th August 1902, the 10th November 1904, the 21st December 1901 and the 27th November 1905."

The defendants contended that the decrees of 25th August 1900 and 21st December 1901 were time-barred. Prima facie the application was barred by limitation. But their Lordships of the Privy Council held that the decrees of 25th August 1900 and 16th November 1904 were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act began to run from the date of the latter decree, or rather from the date on which it was made absolute, the 27th November 1905,

and consequently the application was not barred. From the reasoning adopted by their Lordships it does not appear to me that this case can be used as an authority for the position contended for by the appellant. Their Lordships do not say that time should be calculated from 16th November 1904 (or rather from 27th November 1905) because this is the date of the final decree of the appellate Court, but what they say is that time should be calculated from that date because :

"It was then for the first time that the Court granted a complete decree to the respondent."

According to their Lordships the plaintiff was entitled to get a joint decree against all the defendants. But owing to an irregularity in procedure the decree which he obtained against one of the defendants was set aside and ultimately a decree was passed against that defendant. Their Lordships point out that the decree dated 15th November 1904 was the second step in granting to the plaintiff the relief to which he was entitled, the first step being the original decree of 25th August 1900. Considered in this view, the decree of 16th November 1904 :

"Supplemented and completed the decree granted on 15th August 1900 and for the first time gave to the plaintiff that which alone would justify him in applying for the joint execution to which he was entitled."

Viewed in this light the decree which the decree-holder in that case was executing was an incomplete decree of 25th August 1900 completed by the decree passed on 16th November 1904 and time was calculated from the date when the Court granted a complete decree to the decree-holder. In the present case the decree-holder had obtained a complete executable decree on the date of the final decree. Speaking with the greatest respect I do not think the decision of the Privy Council in *Asahfaq Hussain v. Gauri Sahai* (2) has been correctly applied by the learned Judges of the Patna High Court in *Somar Singh v. Deonandan* (1). Now coming to the first ground, no doubt the wording of the clause as it stands supports the conclusion arrived at by the learned Judges. But I think it is wrong to interpret the clause in this way ignoring the context in which it appears. There can be no doubt that under Cl. 1 the period for the execution of a decree is three years "from the date of

2. (1911) 33 All 264=33 I A 37=9 I C 975 (PC).

the decree or order." This clearly means from the date of the decree or order that is sought to be executed. Then comes Cl. (2) which says:

"(where there has been an appeal) the date of the final decree or order"

Appeal from what decree or order? Surely, appeal from the decree or order sought to be executed. This seems to me to be the only interpretation possible having regard to the context in which the clause stands. In the present case there has been no appeal against the final decree which is the decree sought to be executed and therefore time should be computed from the date of the final decree. It was argued for the respondent that the final decree is imperilled by the appeal preferred against the preliminary decree and in case of his success in the appeal the final decree will have to be altered. True; but nothing stands in the way of the party concerned applying for the passing of a fresh final decree in accordance with the appellate decree; and this I believe is what is generally done when after the passing of a final decree by the first Court during the pendency of the appeal the appellate Court ultimately interfered with the preliminary decree. I am not satisfied that there is much substance in the argument that the final decree is imperilled by the decree that may be passed by the appellate Court in the appeal against the preliminary decree, and that therefore the time should be calculated only from the date of the appellate decree.

Mr. Kuttikrishna Menon, on behalf of the appellant has brought to my notice various cases, such as *Pakir Chand v. Datta Charan* (3), *Profulla Kumar Basu v. Mt. Sarojbala Basu*, A. I. R. 1931 Cal. 332 at 334; *Jiraji v. Ramchandra* (4), *Sheo Prasad v. Anrudh Singh* (5), *Narasingh Sewak Singh v. Madho Das* (6) and *Mulkh Raj v. Gurditta Shah Harichand*, A. I. R. 1929 Lah. 283. Generally stated, in these cases it was held that appeals from orders refusing to set aside ex parte decrees are not to be regarded as appeals from the decrees themselves and therefore cannot be availed of by the decree-holder to

save his application to execute the decree from the bar of limitation under Art. 182, Cl. (2). These cases do not apply to the present case inasmuch as there were no appeals in these cases against the decree sought to be executed. For the above reasons, I am of opinion that in the present case the period of limitation should not be computed from the date of the High Court's decree on 20th March 1923, but should be computed from the date of the final decree on 30th September 1919. I think this conclusion follows from a true interpretation of Art. 182, Cl. (2), Lim. Act, having regard to its context.

The next question is whether time can be computed in this case from the date of the amended decree. Art. 182, Cl. (4), prescribes "(where the decree has been amended) the date of the amendment" as the starting point for limitation. Here again, if you rely merely on the express language of the clause, the respondent's contention should be upheld. In the present case before the amendment the decree had become admittedly barred. If the literal construction of Art. 182, Cl. (4) is to be accepted, then it would enable the decree-holder to execute a barred decree, but I cannot believe that this result was intended by the legislature to follow from this provision. In *Rabiuddin v. Ram Kanai Sen* (7) it was held that

"a decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment."

To the same effect is the decision in *Jhamman Lal v. Daulat Ram*, A. I. R. 1924 Lah. 329. As against these decisions Mr. Govinda Menon for the respondent relies upon the following observations in *Durga Prasad Das v. Kedar-nath Nayak*, A. I. R. 1929 Cal. 650 in support of his contention that the starting point of limitation is the date of the amended decree:

"Where the legislature has provided that the time from which period of limitation for execution of a decree should begin to run where a decree has been amended, is the date of amendment it is not for the Court of execution to inquire whether the original decree was capable of execution or whether for any other reason the Court was wrong in making the order for amendment of the decree."

I agree that is not the duty of an executing Court to consider whether the

3. A I R 1927 Cal 904=104 I C 466=54 Cal 1052.

4. (1892) 16 Bom 123.

5. (1878) 2 All 273.

6. (1882) 4 All 274=(1882) A W N 25.

7. A I R 1920 Cal 769=59 I C 186.

amendment has been properly made, but it has to decide whether the application is barred by limitation or not. I do not think it necessary to discuss this decision any further as it runs counter to the previous decision of the Calcutta High Court itself, *Rabiuddin v. Bam Kanai Sen* (7), already noticed; and as in that case when the application which was said to have been barred was filed there was already an execution application pending which was within time. The final decree in the case was made on 8th May 1924 and the first application for execution was filed on 7th May 1927. In the course of narrating this facts of the case the learned Judges say:

"It is unnecessary to mention that the execution was asked for of the amended decree in continuation of the application presented in Court on 7th May 1927."

In this view the learned Judges' conclusion that the execution application was not barred by limitation seems unobjectionable whatever may be said against their observations quoted above. In my opinion a decree which has already become barred by limitation cannot be revived for purposes of execution by a subsequent amendment. I must not fail here to point out that the appellant's learned counsel objects to the respondent relying on the amended decree for the reason that no notice was given to his client at the time when the amendment was made. The amendment of the decree was not relied on in the first Court as a ground for saying that the applications for execution were not barred by limitation. The point was taken for the first time in the appellate Court and the learned Judge has not anywhere in his judgment stated that notice of amendment was or was not sent to the appellant. In the view I take that the amended decree cannot in the present case form the starting point for limitation there is no need for considering whether the notice of amendment was as a matter of fact sent to the appellant, and if not whether the amended decree can be relied on to save limitation. In the result I set aside the decision of the lower Court and restore that of the District Munsif with costs here and in the Court below.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 319

BURN, J.

T. B. Kesava Reddiar—Petitioner.

v.

Tahsildar of Polur and another—
Opposite Parties.

Civil Misc. Petn. No. 4883 of 1932,
Decided on 25th October 1932.

(a) Specific Relief Act (1877), S. 50—Writ of mandamus.

The High Court has no power to issue a writ of mandamus. [P 319 C 2]

(b) Specific Relief Act (1877), S. 45—High Court's power to issue mandatory order—Scope.

The High Court has power under S. 45, Specific Relief Act to issue a mandatory order to public servants and to others to do specific acts within the local limits of its Ordinary Civil Jurisdiction but not against the Governor in Council nor against the Governor acting with ministers: *A I R 1930 Mad 896, Ref.* [P 319 C 2]

A. Viswanatha Ayyar—for Petitioner.

Govt. Pleader, K. Bhashyam Ayyangar
and *T. R. Srinivasan*—for Opp. Parties.

Order.—The prayer is that this Court: "should be pleased to issue a writ of certiorari to the Election Officer . . . and to direct the said officer to include my name in the list of nominated candidates and then to proceed to hold the election. . . ."

This is obviously a prayer for a direction which would be suitable in a writ of mandamus, but is quite inappropriate in a writ of certiorari. This Court has no power to issue a writ of mandamus (S. 50, Specific Relief Act). The petition must therefore be dismissed. Moreover, the relief sought is only nominally against the Election Officer; it is in reality against the Government who by their Order in G. O. No. 3810 L and M Mis., dated 24th September 1932, cancelled the order of the Election Officer, Polur, accepting the nomination papers of the petitioner, and further directed under R. 35 (1) of the Rules for the election of members of Local Boards, that the petitioner's name be excluded from the list of valid nominations and ballot papers. This Court has power under S. 45, Specific Relief Act, to issue mandatory orders to public servants and others to do specific acts within the local limits of its ordinary civil jurisdiction, but not against the Governor in Council S. 45, Proviso (f), Specific Relief Act nor against the Governor acting with ministers: *Venkataratnam v. Secy. of State* (1). That in my opinion is a sufficient reason for me to decline to

discuss the question whether the order of the Government was intra or ultra vires. Another equally good reason is that the petitioner has refrained from making the Government a party to the petition. I dismiss the petition with the costs separately of the Election Officer and respondent 2.

P.R.S. K.S. *Petition dismissed.*

*** A. I. R. 1933 Madras 320**

JACKSON AND MOCKETT, JJ.

Official Liquidator of Bellary Electric Supply Co. Ltd.—Appellant.

v.

Kanniram Rauwoothmal—Respondent.

Appeal No. 263 of 1929, Decided on 9th September 1932, against order of Dist. Judge, Bellary, D/- 11th December 1928.

*** (a) Company — Mere entry of shareholder's name in company's register does not amount to allotment—Companies Act (1914), S. 40.**

An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. Hence a mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares has in fact been made: *In re Universal Banking Corporation*, (1867) 3 Ch. A 40, *Rel. on.* [P 320 C 2]

(b) Interest—Money had and received—Interest is payable only from date of demand—Interest Act (1839), S. 1.

The provisions of the Interest Act are all comprehensive and interest can only be allowed in accordance therewith. Hence interest for money had and received can be recovered only from date of demand of the amount: *A. I. R. 1930 Mad. 727, Ref.* [P 321 C 1]

V. S. Narasimhachariar—for Appellant.

C. S. Venkatachariar and L. Krishna Doss—for Respondent.

Mockett, J. — The relevant facts in this appeal are that the respondent's firm purchased 110 shares in the Bellary Electric Supply Co., Ltd., at some time previous to 14th October 1925 and that on that date on behalf of his firm the respondent deposited Rs. 1,400 with the company in respect of 140 more shares. The application for 140 shares, Ex. 1, dated 14th October 1925, contains the words "I request you to allot 'me' 140 shares. No share certificate was admittedly issued in respect of the 140 shares nor was a letter of allotment sent. The company went into liquidation on a date subsequent to 14th October 1925, and the respondent now calls

upon the Official Liquidator to refund the Rs. 1,400 because no allotment of shares had been made to him. The Official Liquidator contends that there was such an allotment. The learned District Judge found after an elaborate examination of the facts and the documents that there was no allotment. The short point is: was there an allotment? The respondent filed an affidavit setting out the above facts. No counter-affidavit was filed. At the hearing two witnesses were called. The respondent (there the petitioner) examined one S. M. Hussain, once Managing Director of the Bellary Electric Supply Co. He stated that the Members' Register, Ex. 2, which purported to show that on 14th October 1925 140 shares were allotted to the respondent could not in fact be relied upon, as the rubber stamp of the company was not placed upon the respondent's page nor did it appear on Ex. 3, the Members' Register. The appellant examined a clerk of the company who states that although the allotment was authorized by the Managing Director and the entries made in Ex. 2 "the applicant was not notified of the allotment" The appellant relies on S. 40, Companies Act:

"The register of members shall be prima facie evidence of any matters by this Act directed or authorized to be inserted therein"

and argues that Ex. 2 raises a presumption of allotment which the respondent (who did not give evidence) has not rebutted. The respondent could of course have been cross-examined on his affidavit but the appellant did not give him notice to appear for this purpose. Any presumption under S. 40 was clearly rebutted by the evidence of the above two witnesses. But apart from this aspect of the case there is ample authority for the proposition that the mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. No Indian case in point has been cited, but in the *Universal Banking Corporation In re* (1) it was held that the principles governing the formation of a contract between

1. (1867) 3 A O. 40.

a company and a member of the public are identical in principle to those regulating the contractual relations between individuals. The facts in the above case are sufficiently similar to the facts in this appeal and it was held that a shareholder to whom the fact that an allotment of shares had been made had not been communicated was not bound by any contract. The mere entry of his name on the register was held not sufficient for this purpose. We therefore agree with the decision of the learned District Judge.

The lower Court has allowed the petitioner interest at 6 per cent from 14th October 1925, and the appellant contends that interest should be payable only from the date of demand. We think that this contention must prevail. The law relating to the payment of interest is dealt with in *Nanchappa Koundan v. Ittichathara Mannadiar* (2), the effect of which is that the provisions of the Interest Act are all comprehensive and interest can only be allowed in accordance therewith. Applying that principle it is clear that this payment of Rs. 1,400 cannot be construed to be "a debt or sum certain payable at a certain time. . . . by virtue of a written instrument".

It is payable otherwise (i. e. as money had and received) and interest is therefore only recoverable from the date of demand, that is Petition, 27th July 1923. We therefore vary the decree of the lower Court to this extent and with this variation dismiss this appeal with costs here and as decreed in the lower Court.

P.R.S./K.S.

Decree varied.

2. A I R 1930 Mad 727=127 I C 630=53 Mad 549.

* A. I. R. 1933 Madras 321

WALSH, J.

Secy. of State—Petitioner, In re.

Civil Revn. Petn. No. 936 of 1932, Decided on 7th October 1932 to revise order of Dist. Judge, Coimbatore, D/- 25th November 1930.

* **Court-fees Act (1870), Ss. 13 and 15 and Civil P. C. (1908), S. 151—Deficit court-fee cannot be recovered after disposal of case.**

Where an appeal has been disposed of the Court has no power under the Court-fees Act, or otherwise to levy the deficit court-fee as Ss. 13, 14 and 15, Court-fees Act, deal with refund of court-fees, a quite different matter and any inherent power of the Court under S. 151, Civil P. C., in cases not directly governed by them to grant

refund cannot be invoked in the matter of collecting deficient duty. [P 321 C 2]

Govt. Pleader—for Petitioner.

Judgment.—This is a petition filed on behalf of the Government to revise the court-fee levied by the District Judge, Coimbatore, on a memorandum of objections in A. S. No. 277/30. The appeal has been admittedly disposed of and the initial question is whether, assuming the stamp-fee is insufficient, there is any power under the Court-fees Act or otherwise to levy the deficit court-fee. It is obviously a mere academic exercise to argue the petition if there is not. The learned Government Pleader with great diligence and fairness has collected all the cases and they are practically unanimous against him as he admits. In *Mahadei v. Ram Kishen Das* (1) the two learned Judges Mahmood and Oldfield differed. A single Judge of the same Court held in a later decision *Mohammad Ismail v. Liyaquat Husani* (2) that recovery of deficient court-fees could not be made once the appeal was dismissed and he quotes there a recent decision of the Hon'ble the Chief Justice of that Court to the same effect.

Jotra Mohan Sen v. Secy. of State (3), *Abdulla v. Secy. of State* (4) and *Radhika Raman Prasad Singh v. Mt. Janki Kuer* (5), are also against the view that the deficient court-fees are recoverable in such a case and there is not a single case in which the opposite view is held. In the face of these decisions it seems hardly worth discussing the matter further. I had doubted on seeing the petition whether, assuming the appeal had been disposed of, any action could be taken to recover the deficient stamp-fee, if there is a deficit. The decisions quoted make me certain that it is not recoverable. S. 6, 12 (2) and 28, Court-fees Act, do not apply, O. 33, Rr. 10 and 12, Civil P. C., are obviously special provisions confined to pauper suits. Ss. 13, 14 and 15, Court-fees Act, deal with refund of court-fees, a quite different matter and any inherent power of the Court under S. 151, Civil P. C., in cases not directly governed

1. (1885) 7 All. 528=(1885) A W N 140.

2. A I R 1932 All 316=140 I C 191.

3. A I R 1919 Cal 194=52 I C 435=46 Cal 520.

4. A I R 1925 Lah 131=82 I C 588.

5. A I R 1919 Pat 9=51 I C 756=4 Pat L J 472 (FB).

by them: vide *Thammayya Naidu v. Venkataramanamma* (6) to grant refund cannot be invoked in the matter of collecting deficient duty. This application is therefore dismissed.

P.R.S./K.S. *Application dismissed.*

6. A I R 1932 Mad 438=139 I C 131=55 Mad 641.

*** * A. I. R. 1933 Madras 322
Full Bench**

JACKSON, SUNDARAM CHETTY AND
MOCKETT, JJ.

Venkatachalam Pillai— Defendant —
Appellant.

v.

Sethuram Rao and another—Plaintiffs
—Respondents.

Second Appeal No. 1118 of 1929, Decided on 22nd August 1932, against decree of Dist. Judge, West Tanjore, in A. S. No. 224 of 1927.

* (a) Vendor and Purchaser— Contract to resell — Scope—Transfer of Property Act (1882), S. 54.

A covenant in a sale deed was as follows : "If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land." In a suit by the plaintiff for a specific performance :

Held : that there was not merely a standing offer to resell which would ripen into a contract only on the buyer accepting the offer and tendering the purchase money, but that there was a completed contract to resell and purchase even on the date of sale : A I R 1928 P C 174, *Foll.*; A I R 1931 Mad 799 and 49 Mad 387=A I R 1926 Mad 699=100 I C 399, **Overruled.**

[P 324 C 2]

* * (b) Minor — Sale of minor's property by guardian — Covenant in sale deed that vendee should resell to minor or his heirs on his selling property — Minor cannot sue for specific performance of such covenant — Specific Relief Act (1871), S. 21.

In a sale deed in respect of a minor's property, executed by his guardian there was a covenant that in case the vendee sold the property, he should resell it to the minor or his heirs.

Held : that the agreement for resale in the sale deed being an executory contract without mutuality was unenforceable by either party in a suit for specific performance irrespective of the question whether the contract was for the benefit of the minor or not : 39 Cal 232, *Foll.*; 40 Mad 308 (F B), *Expl and Dist.* [P 324 C 1, 2]

K. Desikachari—for Appellant.

(Salem) Ramaswami Ayyar for T. Appaji Rao—for Respondents.

Sundaram Chetty, J. — This second appeal arises out of a suit filed by the plaintiff (respondent 1) for specific per-

formance of an agreement to resell the plaint mentioned site. The plaintiff's case is that the suit site belonged to his adoptive father, that it was sold during the minority of the plaintiff by his natural father as his guardian to defendant 1's father on 14th December 1912 under a registered sale deed, that there is a stipulation in the sale deed for the reconveyance of the property to the plaintiff and his heirs for the original price itself, that in violation of that contract defendant 1 sold the property to defendant 2 on 6th December 1923, that this sale is not binding on the plaintiff and that he is entitled to enforce specific performance of the agreement to resell on tendering the purchase money and get a conveyance in his favour. The defendants attacked the plaintiff's claim on several grounds and contended that he was not entitled to specific performance of the alleged agreement. The first Court gave a decree in plaintiff's favour, which was confirmed by the lower appellate Court.

In this second appeal preferred by defendant 2, three main contentions have been raised on his behalf in order to show that the plaintiff could not claim specific performance of the plaint mentioned agreement. The first is, that the agreement contained in the sale deed, Ex. A, was not a completed contract but only an offer by the vendee to resell the property to the vendor, which could become a completed contract only on acceptance of the offer by payment of the price and that the offer having been at an end by the sale of the property to defendant 2, there was no subsisting offer for acceptance by the plaintiff and as such there was no contract of which specific performance could be claimed on the date of the suit. The second is, that even if it should be held that there was a completed contract on the date of Ex. A itself, it was not competent for the guardian of the minor plaintiff to bind him by a contract for the purchase of the site and as the minor was not bound by that contract, there was no mutuality and consequently specific performance of such a contract is unenforceable in law. The third is, that the stipulation for resale as contained in Ex. A is void as it is obnoxious to the rule against perpetuities as laid down in S. 14, T. P. Act. The covenant in ques-

tion contained in the sale deed, Ex. A, is substantially as follows :

"If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land."

There is some dispute as regards the construction of this clause. It may be understood to mean that on the happening of the contingency, namely, the determination of the vendee or his heirs to sell the property and thus part with it, the vendee must sell it to the plaintiff or his heirs and that the latter must also purchase it as per the terms of the covenant. In the absence of any words to signify that the repurchase was only optional with the plaintiff or his heirs, it would not be unreasonable to hold that under this contract the vendee was bound to make the offer for resale and the vendor was equally bound to buy it, and we are prepared to hold accordingly. The learned District Judge however construed this clause in a different way and was of opinion that though there was an obligation on the part of the vendee to resell, the vendor's was only an option to repurchase. It is on the basis of this construction that the learned advocate for the appellant contends that the agreement in question was not a completed contract, but only a standing offer on the part of the vendee. The decision in *Papa Naidu v. Munisamy Aiyar* (1), would be on all fours with the present case and doubtless supports his contention. Following the English decision in *Helby v. Mathews* (2) and *Dickinson v. Dodds* (3), the learned Judges held that there was a binding offer to resell on the part of the vendee and no agreement to buy on the part of the vendor but only an option to repurchase. The view expressed in *Helby v. Mathews* (2), that until acceptance of the offer there was no completed contract was adopted. It is also said that an offer would be at an end by the death of the promisor or by the promisor selling it to a third party, the sale being known to the promisee before acceptance. A similar question arose for consideration in the case re-

ported in *Alagarasami v. Kathia Goundan* (4).

This case was decided by Ramesam, J., sitting as a single Judge, and he was also a party to the decision in *Papa Naidu v. Munisamy Aiyar* (1). The learned Judge seems to have adopted the same view by construing the contract as one consisting of an undertaking by the vendee to make the offer for resale whenever he thought of selling the property, and by stating that the vendor, who had only an option to repurchase, cannot sue for specific performance of the contract but may sue for damages if there was consideration for the contract. But the soundness of this view seems to be shaken by the pronouncement of their Lordships of the Privy Council in an almost similar case reported in *Sakalaguna Nayudu v. Chinna Munuswami Nayakar* (5). In that case, the counterpart to the sale deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from that date, in case the vendor wished to have the property again and upon his paying a sum of Rs. 10,000. It is thus clear that the vendor had the option of repurchasing the property or not. Their Lordships have held that it was not a case of a mere standing offer by the vendee which could ripen into a contract to buy and sell only on the acceptance of that offer by the vendor by tender of the purchase money. On the other hand, it was distinctly held that there was a completed contract between the parties even on the date of the counterpart document (27th January 1891) and that the right of the vendee under that contract was assignable to a stranger. This decision of the Privy Council was given in an appeal against the decision in *Munuswami Nayudu v. Sagalaguna Nayudu* (6) to which Ramesam, J., was a party.

It looks as if this decision of the Privy Council was not brought to the notice of the learned Judge when hearing the case reported in *Alagarasami v. Kathia Goundan* (4). We should now take it that the matter is concluded by the decision of the Privy Council, and on the strength of that

1. A I R 1922 Mad 16=65 I C 720=46 Mad 30.

2. (1895) A C 471=64 L J Q B 465=60 J P 20 =43 W R 561=72 L T 841.

3. (1876) 2 Ch D 463=45 L J Ch 777=24 L T 594=34 L T 607.

4. A I R 1931 Mad 799=135 I C 540.

5. A I R 1928 P C 174=109 I C 765=55 I A 243=51 Mad 533 (P C).

6. A I R 1926 Mad 699=100 I C 399=49 Mad 387.

authority, it must be held that there was a completed contract between the parties on the date of Ex. A itself, even adopting the construction put upon the covenant in Ex. A, by the lower appellate Court and urged for acceptance by the learned advocate for the appellant. The plea that the stipulation in question was not a completed contract and therefore specific performance could not be enforced is unsustainable. This disposes of the first point raised by the appellant. Coming now to the second point, the contention put forward on behalf of the appellant appears to rest on a much firmer ground. The leading authority on this point is the decision of the Privy Council reported in *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (7). In that case, the guardian of a minor entered into an agreement with another for the purchase of certain immovable property by the minor. The minor after attaining majority sued for specific performance of that contract. Their Lordships have laid down the principle of law in the following passage found on p. 237 :

"They are however of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

The present case is in our opinion governed by the aforesaid decision. The agreement for resale contained in Ex. A being an executory contract without mutuality, it is unenforceable by either party in a suit for specific performance. An attempt has been made by the learned advocate for respondent 1 to get over the effect of this decision, by urging that the first Court has found that this contract was for the benefit of the minor and therefore this fact should enable him to enforce specific performance of the contract. But in the case dealt with by their Lordships of the Privy Council it was found that the contract was validly entered into and was for the benefit of the minor and was even ratified by him. Still, their Lordships held that there was no mutuality and on that ground

declared the contract to be invalid and unenforceable. The validity or the enforceability of such a contract does not therefore depend upon the question whether it was conducive to the benefit of the minor or not. That being so, the argument on respondent 1's side is unacceptable. It is urged on behalf of respondent 1, that inasmuch as there was an undertaking on the part of the vendee to resell with only an option on the part of the plaintiff to repurchase, the contract may be deemed to be a unilateral contract with no reciprocal obligations and only in favour of the minor plaintiff. Reference was made to the Full Bench decision of this High Court in *Raghavachariar v. Srinivasa Raghavachariar* (8). The specific question decided in that case is that a mortgage executed in favour of a minor who has advanced already the whole of the mortgage money is enforceable by him. It has also been held that a sale to a minor under similar circumstances is quite good.

But on a careful perusal of that decision, it is clear that the mere fact that a sale or a mortgage is in favour of a minor is not enough to hold that it is valid and enforceable. Where a mortgage or sale has been effected as a completed transaction in favour of the minor and it does not involve the performance of any onerous act by the minor by reason of any contractual obligation in respect of the sale or mortgage, such a sale or mortgage would not be invalid. This is clearly indicated in the following passage on p. 313 in the judgment of Wallis, C. J. :

"The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt, according to their Lordships' decision in such a case, the minor could not bind himself by contract to pay the price or advance the mortgage money; but when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect."

It is also said by Srinivasa Ayyangar, J., that the transfer in favour of the minor cannot be void, unless the transfer is conditional on the passing of consideration and the consideration did not pass (p. 336). If the test laid down in that decision is adopted, the position in the present case is this. In the first place

7. (1912) 39 Cal 232 = 39 I A 1 = 13 I C 331 (P C).

8. (1917) 40 Mad 308 = 36 I C 921 (F B).

this is not a case where a registered conveyance has been executed in favour of the plaintiff in pursuance of the original contract. On the strength of that contract, the plaintiff seeks to get a conveyance by specifically enforcing that contract. Even granting that under the contract an option to repurchase was reserved to him, want of mutuality must be judged as on the date of that contract. On exercising his option in favour of the repurchase, he has to pay the price mentioned in Ex. A and also pay such price as may be determined by arbitrators in respect of any building constructed on the land. That being so, how can it be said that under this contract the vendee should simply execute a reconveyance in favour of the plaintiff who has no sort of corresponding obligation? It is true that no building was constructed upon the land and the necessity for payment of the price as fixed by arbitrators has not arisen, but still the plaintiff has to pay the original price for the site. That being so, the Full Bench decision in *Raghavachariar v. Srinivasa Raghavachariar* (8) is of no avail to the plaintiff. On the authority of the Privy Council decision in *Mir Sarwarjan v. Fakhrudin Mahomed* (7), it must be held that the contract in question is void for want of mutuality, and specific performance of such a contract is unenforceable by either party.

The plaintiff's claim must fail on the aforesaid short ground, and it is therefore unnecessary to discuss the third point raised on behalf of the appellant. If the contract embodied in Ex. A does not create an interest in immovable property, as is clear from the statutory provision in S. 54. T. P. Act, the case cannot come under S. 14 thereof. There is some conflict of judicial opinion on this point and several decisions have been cited at the Bar. As the decision on the second point is sufficient for the disposal of this appeal, it is unnecessary to discuss this question. In the result, the second appeal should be allowed as the plaintiff is not entitled to sue for specific performance of the plaintiff mentioned agreement, and his suit is therefore dismissed with costs of defendant 2 in all the Courts.

P.R.S./K.S.

Appeal allowed.

* A. I R. 1933 Madras 325

WALSH, J.

Bayya Naiko and others—Appellants.
v.

Desetti Krupa and others—Respondents.

Appeal No. 181 of 1929, Decided on 20th January 1933, against order of Sub-Judge, Berhampur, D/- 19th October 1928.

* Limitation Act (1908), Art. 181—Execution of decree—Appeal and stay order—Limitation for continuing execution is three years from date on which stay comes to an end.

In execution of a final decree in a mortgage suit an order to proclaim and sell was passed and the application was posted to another date for final hearing. In the meantime an appeal was filed and an order staying execution was passed. The execution application was kept pending in the Court with the order "await final order." The appeal was disposed of on 21st November 1924. An application was filed on 8th April 1927 to continue the previous execution proceedings:

Held: the application was not a fresh one, that limitation was three years from the date on which stay came to an end and that application was in time: *A I R 1927 All 16 (FB) Foll; A I R 1922 Mad 268, Dist.* [P 326 C 1,2]

B. Jagannadha Doss—for Appellants.

C. Sambasiva Rao—for Respondents.

Judgment.—This appeal concerns a question of limitation. The preliminary decree in the mortgage suit was passed on 19th April 1911. The final decree was made on 24th April 1914. E. P. No. 931 of 1922 was admittedly put in on 8th August 1922 within time. This execution petition reached a certain stage when sale had been applied for and fresh schedule and affidavit were filed. The order on 3rd March 1923 was "for settlement of proclamation 7th March 1923." The next order was "Proclaim and sell on 18th June 1923. Final hearing on 25th June 1923." This order was dated 7th March 1923. Meanwhile an appeal had been filed as regards defendant and an order staying execution had been passed, which was dated 6th March 1923, by the District Court of Ganjam and received on 9th March 1923. On this date when the stay order was received the order is "call on 28th instant." On 28th March 1923 the entry is "No final order received from District Court. Await 16th April." The last order is on 16th April 1923:

"No final orders received from District Court. Appeal intimation received. Await final orders

by 5th May. Meanwhile send up material papers for purposes of appeal."

The appeal was disposed of on 21st November 1924. The present petition was filed on 8th April 1927 to continue the previous execution petition. The trial Court did not accept the argument that this execution petition was a continuation of the previous proceedings and dismissed the execution petition. The Subordinate Judge held it was an application to continue the proceedings on which no final orders had been passed and against this order this appeal has been preferred. *Subbaroyan v. Natarajan* (1) has been quoted for the appellant. But the applicability of this depends on the question as to whether this was a fresh execution application. It seems to me clear that it was not a fresh execution application. A good deal of argument has been addressed to me for the appellant on the point that the decree-holder did not take steps within reasonable time after the disposal of the appeal on 21st November 1924. *Chhattar Singh v. Kamal Singh* (2) is exactly a case of the present sort. It was there held that a petition like the present is a petition to revive the previous execution application and that in default of any specific section or article of the Limitation Act the general Art. 181 applies so that a decree-holder has three years from the date on which stay came to an end. I see no reason for dissenting from this view and it gives a clear cut period of limitation instead of depending on what may be called reasonable diligence which is a more insuperable test. The Allahabad case is a stronger one than the present because the petition there had been struck off. Admittedly no final orders have been passed in the present case on the execution petition. It has been argued that the decree-holder should have appeared on 5th May 1923. In the first place from the context the order "Await final orders by 5th May" seems to be addressed to the office because it is followed by "meanwhile send up papers for the purpose of appeal."

There is nothing to show that this was an order to the petitioner. In the next place so long as the stay continued,

1. A I R 1922 Mad 268 = 70 I C 396 = 45 Mad 785.

2. A I R 1927 All 16 = 100 I C 692 = 49 All 276 (FB).

the decree-holder could not take any further step whatsoever in execution and therefore I think he committed no default by not turning up on 5th May. At any rate there is no such default as would have justified the petition being dismissed. In my opinion the view in *Chhattar Singh v. Kamal Singh* (2) applies to this case and the decree-holder had three years from 21st November 1924 within which to apply for revival of the execution petition. It was argued that there is no such provision in the Code to revive a petition. If that is so it would appear that the decree-holder is in a better position as regards limitation for, in that case the execution petition automatically revives and as the petitioner had been given no date by the Court on which to appear, it would not seem that it could either be dismissed, nor there would be any period of limitation whatsoever running against him. In my opinion, the order of the lower appellate Court is correct. The appeal is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 326

BURN, J.

A. Bakthavathsalu Naidu—Accused—Petitioner.

v.

P. N. K. Ramanuja Naidu — Complainant—Opposite Party.

Criminal Revn. Case No. 321 of 1932 and Criminal Revn. Petn. No. 295 of 1932, Decided on 11th October 1932 to revise the judgment of Sessions Judge, West Tanjore, in Criminal Appeal No. 51 of 1931.

(a) **Madras Local Boards Act (14 of 1920), S. 208—President who has ceased to be such refusing to hand over documents to successor is guilty under S. 208**

A person who has ceased to be President can thenceforth neither act, nor purport to act, though he may pretend to act, as President, and hence if he refuses to hand over the documents to his successor he is guilty under S. 208.

[P 327 C.1]

(b) **Madras Local Boards Act (14 of 1920), Ss. 41 (1) and 42 (b)—Failure of Panchayat President to do duty imposed on him—President of District Board has no power to interfere.**

Where a President of Panchayat fails to do a duty imposed on him, the Local Government or the President of the Taluk Board on its behalf can fix some period within which the Panchayat President should perform the omitted duty, and on his failure to do so, appoint some person to perform it. In such a case the President of the

District Board has no power to interfere. And any meeting or resolution passed by his interference is not valid. [P 327 C 1, 2]

V. L. Ethiraj and *N. Somasundaram*—for Petitioner.

S. Nagaraja Ayyar—for Respondent.

A. Narasimha Ayyar for Public Prosecutor—for the Crown.

Order.—The propriety of the conviction of the petitioner under S. 208, Madras, Local Boards Act depends upon the validity of the meeting of the Panchayat held on 8th June 1931 at which a majority of ten members out of fifteen passed a resolution of no-confidence. If that meeting was validly called and held, then the petitioner must be deemed to have vacated his office forthwith, S. 44 (4) (a), and as he admittedly failed to hand over the documents etc. to his successor he must be held guilty of an offence under S. 208 (3) of the Act. I cannot accept the argument of Mr. Ethiraj that even if he had ceased to be the President, he nevertheless purported to continue to act as the President, and therefore could not be prosecuted without the sanction of the Local Government. It seems to me self evident that a person who has ceased to be President can thenceforth neither act, nor purport to act, though he may pretend to act as President.

The validity of the meeting held on 8th June 1931 is dependent on the validity of the meeting held on 28th May 1931 at which leave to make a motion of no confidence was given to one of the members. The meeting held on 28th May 1931 was convened by the President of the Taluk Board, who took action (under the orders of the President of the District Board) because the petitioner had disobeyed the order of the President of the District Board to hold a meeting on 21st May 1931. It is quite clear that the President of the District Board had no power to direct the petitioner to summon a meeting on any particular day. Under S. 41 (1) if the petitioner made default in performing any duty imposed on him by the Act the Local Government could by order in writing fix a period for the performance of such duty by the petitioner. And under S. 41 (2) if the petitioner failed to perform the duty within the period so fixed, the Local Government could appoint some person to perform it. The petitioner be-

ing the President of a Panchayat, these powers of the Local Government could be exercised by the President of the Taluk Board (S. 42 (b)); but there is no room for the intervention of the President of the District Board. Even the President of the Taluk Board could only have (a) fixed some period within which the petitioner should perform the omitted duty and (b) on failure appoint some person to perform it.

It appears to me therefore that the meeting of 28th May 1931 was not validly summoned; consequently the leave then granted to move a resolution of no-confidence at the meeting of 8th June was not valid, and the resolution of no-confidence itself was invalid. It follows that the petitioner did not vacate his office on 8th June and the conviction under S. 208 (3), Local Boards Act, is wrong.

I may say that the "default" of which the petitioner is supposed to have been guilty has not been proved. According to Mr. A. Narasimha Ayyar who appears for the learned Public Prosecutor in support of the conviction, the dereliction of duty of which the petitioner was guilty was his refusal to place before the meeting of 21st January 1931 the application of one of the members for leave to move a resolution of no-confidence. It is very doubtful whether that application was made in accordance with S. 44 (a) of the Act. The learned Sessions Judge says that it was not considered by the petitioner on the ground that it had been given to him after the other business of the meeting had commenced. If that were so the petitioner was well within his rights in refusing to allow the application to be considered by the meeting, and his refusal was not a breach of duty at all.

I say nothing about the petitioner's conduct in general; the learned Sessions Judge's strictures are certainly not unfounded. But it is clear that the conviction under S. 208 (3), Local Boards Act, cannot be maintained. I set it aside and order that the fine, if collected, be refunded.

P.R.S./K.S.

Conviction set aside.

* A. I. R. 1933 Madras 328

MADHAVAN NAIR AND JACKSON, JJ.

(Kotikalapudi) Pakirayya—Plaintiff—Appellant.

v.

(Kodiyala) Kamasastri and another—Defendants—Respondents.

Appeal No. 154 of 1926, Decided on 7th November 1932, against decree of Sub-Judge, Narasapur, in O. S. No. 5 of 1924.

Civil P. C. (1908), O. 21, R. 63—Scope of suit under.

A suit to show that the claimant has a title to the property and that the order of attachment was not properly made would lie under O. 21 R. 63: *A I R 1926 Mad 42*; *A I R 1920 Mal 126*; *A I R 1921 Mad 163* and *A I R 1924 Cal 744, Rel on.* [P 329 C 2]

C. Rama Rao—for Appellant.

V. Suryanarayana—for Respondents.

Madhavan Nair, J.—The appeal arises out of a suit instituted by the plaintiff under O. 21, R. 63, Civil P. C. The properties involved in the appeal are half of the items in the plaint, other than items 1, 6, 9, 10 portions of 12 and items 21 and 22: see p. 19 of the judgment. These properties were in the possession of defendant 2's husband as a tenant under the zamindar. They were sold in execution for non-payment of arrears of rent under the Estates Land Act. The plaintiff's case is that at such sale the zamindar purchased the lands and afterwards gave pattas to him, constituting him a tenant under the Act. These lands were attached in execution of a decree obtained by defendant 1 against defendant 2's husband. The attachment was on 2nd September 1921. The plaintiff filed objections to the attachment in 1922. The pattas which were given to him with respect to these properties are Exs. D and D-1 dated 3rd October 1923 and 6th February 1922. At the date of the attachment he was not able therefore to show that he had a title to these properties. His petition was therefore disallowed, and he has instituted the present suit under O. 21, R. 63. The learned Judge held in the first instance that the suit was not maintainable by reason of the fact that the plaintiff had no title at the time when the attachment was made. This opinion would entail the dismissal of the suit, but he went into its merits also and held that, if a suit would lie, the plaintiff had established his title to

items 18 to 20 of the suit properties, as well as the items covered by the sale certificates, Exs. G, G-1, G-2, G-5, and G-6 and that the plaintiff had not succeeded in establishing his title to items 3, 4, 14, 16 and portions of items 13 and 15. His claim to item 4 is not pressed in this appeal.

The learned counsel for the appellant argues first that a suit is maintainable under O. 21, R. 63, in this case; and secondly, that the learned Judge should have allowed in his favour the items which he has disallowed, namely, 3, 14 and 16, and portions of items 13 and 15. So we have to decide two points in this appeal. The first point is whether in a suit under O. 21, R. 63 it is open to the plaintiff to assert the title which he has at the time when the suit was instituted to show that the order of attachment should not have been made. O. 21, Rr. 58 to 63, relate to investigation of claims and objections to attachment. Under R. 59 what the claimant or objector has to prove is that

"as the date of the attachment he had some interest in, or was possessed of, the property attached."

Whether he had any interest at the date of the attachment in the property, is the question which the Court has to decide. If the decision goes against the claimant, he has to establish his title to the property under R. 63 before the expiry of one year; otherwise the order of attachment prevails against him and becomes conclusive, and he cannot assert his title to the property. It is argued on behalf of the appellant that, though he was not able to establish his title to the property attached at the date of the attachment, still it is open to him to assert such title in his suit under O. 21, R. 63, Civil P. C., since he has obtained pattas from the zamindar establishing his title to the property; so that, if he is able to establish his title having regard to the evidence that he is able to offer in support of it, the Court may consider whether the attachment was validly made or not. The terms of O. 21, R. 63 are these:

"Where a claim or any objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute"

These terms are wide enough to include a suit based upon title. No doubt according to the decisions, what the

Court has got to consider is, whether the attachment was rightly made. But having regard to the words of the section, this question can be settled—if the claimant gives evidence in regard to his title to the property—by considering whether he has succeeded in establishing his title to it. The observations of the learned Judges in *Najimunnessa Bibi v. Nacharuddin Sirdar* (1) support this view. Rankin, J. observes:

“The suit, if brought, is not limited by any special standard of evidence or of law. The claimant may, if necessary, thresh out his title in the fullest and most ultimate sense. But if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be.”

Later on the learned Judge says:

“In either case the material date is the date of the attachment. The decree-holder has to show that the attachment was valid but has been wrongfully released. The claimant has to show that the attachment was wrongful but has been improperly retained. To show either of these things the real and ultimate right to the property may be put in issue.”

Page, J., states his view thus at p. 565 (of 51 Cal.) :

“In my opinion in a suit instituted under R. 63 the object of the suit is to establish the plaintiff's title to the property, and not merely to establish his right to have the attachment released.”

So it is open to the claimant in a suit under O. 21, Rr. 63 to show that he has a title to the property and that therefore the refusal to raise the attachment was wrong. Reference in support of this position may also be made to the decisions in *Seetharami Reddi v. Venku Reddi* (2) and *Ranganatha Ayyar v. Srinivasa Ayyangar* (3) and to the observations of the learned Judges in *Veyindra Muthu Pillai v. Maya Nadan* (4) and *Arunchalam Chetty v. Periasami Servai* (5). This position is not seriously contested by the learned counsel for the respondents. His argument is that in the plaint the claimant confined his relief for a declaration that the order of attachment was wrongly made and that he does not base it upon his title. It is true that the plaint is worded rather narrowly, but it cannot be disputed that

the claimant has given evidence to show that at the time when the suit was instituted, he had a title to the property. The learned Judge has also considered the evidence relating to the title of the claimant to the disputed properties. In these circumstances we are not inclined to construe the plaint in the narrow form suggested by the respondent. It therefore follows that a suit to show that the claimant has a title to the property and that the order of attachment was not properly made would lie under O. 21, R. 63, Civil P. C., and the present suit cannot therefore be dismissed on that account.

The next point for consideration is whether, in addition to the title to the properties which has been declared in favour of the claimant, he is entitled to get a declaration of title with regard to the disallowed items we have referred to above. In respect of items 3, 14 and 16 the learned Judge says that the plaintiff has no sale certificates. But it is not disputed that he has taken pattas from the zamindar. The learned Judge says also that the zamindar is not shown to have acquired the raiyat's interest in these lands by purchase or otherwise. This is relied upon by respondent 1 in support of the learned Judge's disallowance of the plaintiff's claim. But in his written statement he does not say that he has any title to these properties, and it cannot be denied that pattas have been given by the zamindar to the plaintiff. In these circumstances we do not see what other evidence the claimant could give in support of his title. Obviously the pattas show that the zamindar treated the claimant as his tenant, and this would never have been done by the zamindar unless he had a title to the property. We would therefore hold that the lower Court should have declared the right of the claimant to these items as well.

The other items are portions of items 13 and 15 referred to in para. 16 of the lower Court's judgment. The learned Judge disallows these items on the ground that the attachment was prior to the sale. But the learned counsel for the respondents has very frankly conceded that the ground is untenable, having regard to S. 109, Estates Land Act. The claim of the appellant to these items also should be allowed. We would there-

1. A I R 1924 Cal 714=83 I C 233=51 Cal 548.

2. (1901) 11 M L J 344.

3. A I R 1926 Mad 42=90 I C 1037.

4. A I R 1920 Mad 126=58 I C 501=43 Mad 696.

5. A I R 1921 Mad 163=70 I C 439=44 Mad 962 (F B).

fore set aside the decree of the lower Court, and give a decree to the plaintiff not only for the items which have been allowed in his favour by the lower Court but also for the other items, the title to which we have dealt with in our judgment. In the circumstances we direct each party to bear his own costs throughout. The memorandum of objections is dismissed. No costs.

P.R.S./K.S.

Appeal allowed.

* * A. I. R. 1933 Madras 330

RAMESAM AND MOCKETT, JJ.

Nukala Venkatanandam and others—
Petitioners, In re.

Civil Misc. Petn. No. 3400 of 1932,
Decided on 5th October 1932.

* * Court-fees Act (1870), S. 7 (iv) (f) —
Suits for taking accounts in partnership and
partition suits—Appellants can file appeals
on any valuation they like — Procedure for
collecting deficit court-fee indicated.

In suits for taking accounts in partnership and partition suits, it is impossible to say at the outset what exact amount the plaintiff will recover. In appeals in such suit the appellant, whether defendant or plaintiff, is in the position of a plaintiff. *A I R 1914 Mad 369* and *A I R 1920 Mad 546, Rel on.*; and he can file the appeal on any valuation he likes and pay court-fee on it and the whole case can be heard on such payment. If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee, and only then the judgment should be delivered and the decree should be allowed to be drawn up: *A I R 1929 P C 147, Expl. and Foll.*; *A I R 1931 Rang. 146, Foll.*; *A I R 1925 All 757, Ref.* [P 331 C 1, 2]

P. Somasundaram—for Petitioners.

K. Subba Rao for Government Pleader
—for the Government.

Ramesam, J. — The question arising for decision in the above civil miscellaneous petition relates to court-fees in a partnership suit. The facts of the case are as follows: A suit was filed in the Subordinate Judge's Court of Cocanada for dissolution of partnership, for settlement of accounts and for recovery of such amounts as may be due to the plaintiffs. Under S. 7 iv (f), Court-fees Act, the plaintiff tentatively valued his plaint at Rs. 7,500. A decree was passed on 22nd December 1931 under which defendants 3 to 5 were directed to pay certain sums of money with interest at 6 per cent from 1st April 1924. Defendants 3 to 5 filed the present appeal on 26th April 1932. In the memorandum of ap-

peal the valuation is stated to be Rupees 12,770-6-0 and the court-fee thereon as Rs. 847-7-0, but the court-fee actually paid was only Rs. 447-7-0. In the affidavit filed on behalf of the appellants it is stated that the valuation was calculated according to the old practice and was stated to be Rs. 12,770-6-0. But as appellant 1 had not the money with him at the time, it was filed on a court-fee of Rs. 447-7-0 with the idea of supplying the deficient court-fee afterwards.

Both according to the affidavit and on the face of the appeal memorandum, the appeal was filed on a deficient court-fee and the office ought to have returned the papers for supplying the deficit; but by some oversight the office did not return the papers. The appeal was numbered as Appeal No. 156 of 1932. From one point of view it may well be said that the appellants may as well have kept quiet. But there is the apprehension that when the appeal comes on for hearing the matter will be noticed by the opposite side or by the Court and the appellants would naturally be called upon to supply the deficit court-fee. Appellant 1 therefore not wishing to wait until then and desiring to put the matter on a proper legal basis filed the present petition. He now wishes to revise the valuation in such a way that the court-fee already paid would be adequate until the hearing of the appeal. It may be that after the hearing of the appeal he may have to pay more court-fees if he succeeds in respect of an amount larger than the amount for which the court-fee he has now paid, namely, Rs. 447-7-0, suffices, that is Rs. 5,500. In the affidavit it is stated that they were expecting the papers to be returned so that they may correct the valuation and represent the papers. But unfortunately the papers were not returned.

If the only valuation which is possible for the appeal is Rs. 12,700, then of course, he cannot do this. But it is contended on the footing of the Privy Council decision in *Faizullah Khan v. Mauladad Khan* (1) than even in an appeal relating to the accounts of a partnership a tentative valuation can be given by the appellant under S. 7 iv (f), Court-fees Act. In that case the plaintiff filed a suit on a valuation of Rs. 3,000,

1. *A I R 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737.*

but the first Court gave a decree against him for Rs. 19,991. The plaintiff filed an appeal in which he paid court-fees on the said sum of Rs. 19,991. But in the memorandum of appeal he prayed that the decree against him should not only be vacated but that he should also get a decree for Rs. 3,000. The Privy Council held that the amount actually paid is good enough for covering both the reliefs. In the judgment Lord Shaw said :

"Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other."

The view apparently taken by their Lordships is that the appellant can pay court-fee on a notional valuation as in the first Court. Even if some of the sums in respect of which he was appealing are definite amounts, the actual court-fee he pays should be supposed to cover any actual sums decreed and any uncertain sums in respect of which relief is sought. That this is the view taken by their Lordships is clear from the observations of Lord Tomlin in the course of the argument reported in *Fai-zullah Khan v. Mauladad Khan* (1) and quoted by Page, C. J., in *C. K. Ummar v. C. K. Ali Umar* (2) at p. 168 (of 9 Rang.) as follows :

"In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If therefore the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course if the appellant recovers more he pays the extra fee under S. 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover. The legislature leaves it open to him to estimate the amount. That is the scheme of the Act."

According to the view of the Privy Council, the appellant whether plaintiff or defendant, can give some valuation and one cannot complain that the amount in the memorandum is not the proper amount, the reason being that in suits

for accounts it is impossible to say at the outset what exact amount the plaintiff will recover, and they apply this principle to appeals also. The question that arises is, if appellants can file their appeals on any valuation they like and pay court-fees on it and the whole case can be heard on such payment, and if as the result of the hearing of the appeal, he can succeed for a much larger amount than the amount for which he paid court-fees, can it not be said that the Crown has been deprived of the court-fee properly due, and if so, how is this amount to be recovered. Lord Tomlin referred to S. 11 of the Act, but it seems to me that S. 11 may not give adequate remedy to the Crown, for S. 11 refers to execution and before the decree-holder seeks execution, he must pay the court-fee. But suppose the party settled the matter privately and the decree holder had not to seek execution, would not the Crown be deprived of the proper court-fees in such a case? S. 11 no doubt furnishes one method, but for the protection of the interests of the Crown, it is necessary to indicate what the proper practice should be.

If the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up. I think this protects the Crown's interests properly. Under S. 149, Civil P. C., the Court has got the power to direct the payment of court-fees at any stage of the case and this is expressly relied on by Lord Shaw at p. 743 of the Lahore judgment. In the present appeal the appellant does not want any refund of his court-fee. He simply wants permission to re-state his valuation tentatively at Rs. 5,500 so that the court-fee actually paid may be enough and so that no objection can be taken to the hearing of the appeal afterwards. He himself would have done this if the appeal papers had been returned; but they were not. In the view taken in the Privy Council decision we direct the valuation to be amended tentatively at Rs 5,500, but, as already mentioned

2. A I R 1931 Rang 146=133 I C 91=9 Rang 165 (F B).

it must be understood that when the appeal is heard and he succeeds to a larger amount, unless the court-fee is paid, the judgment and decree ought not to be issued.

In view of the decision of the Privy Council no purpose is served by referring to the earlier decisions. In the case of appeals against a preliminary decree only, the Madras High Court held that where a defendant appeals he should pay on the tentative valuation of the plaintiff in the first Court but the Privy Council decision seems to imply that the defendant can give his own tentative valuation in appeal. This is the way how the Privy Council decision with Lord Tomlin's observations are construed by Page, C. J., in *C. K. Ummar v. C. K. Ali Umar* (2) and I agree with his view. He points out that the same view was taken by the Allahabad High Court in *Chunni Lal v. Sheo Charan Lal* (3), but that was before the Privy Council decision. It is unnecessary to refer to the decision of Rankin, C. J., in *Kantichandra Tarafdar v. Radharaman Sarkar* (4), in which no reference was made to the Privy Council decision nor could it be, for the report could have reached India at the time the case was heard. I may add that an appellant, whether defendant or plaintiff, is in the position of a plaintiff in appeal at least in suits for taking accounts of a partnership and in partition suits. In such suits it has been held that every party is in the position of a plaintiff: vide *T. Adeyya v. C. Venkataragadu* (5) and *Ramamurthi v. Surampalli Reddy* (6). In the first of the above cases the defendant actually paid court-fee on the footing that his position is analogous to that of the plaintiff. In the latter case it was observed that the effect of the plaintiff being allowed to withdraw was to allow defendants 8 to 10 to become plaintiffs in his stead. The valuation of the appeal for the present will be regarded as Rs. 5,500.

Mockett, J.—I agree.

P.R.S./K.S.

Petition allowed.

3. A I R 1925 All 787=89 I C 122=47 All 756.

4. A I R 1929 Cal 815=124 I C 77=57 Cal 463.

5. A I R 1914 Mad 369=23 I C 392.

6. A I R 1920 Mad 546=60 I C 144.

* A. I. R. 1933 Madras 332

WALSH, J.

Srivilliputtur Municipal Council — Defendant—Appellant.

v.

K. G. A. Arunachala Nadar and others — Plaintiffs — Respondents.

Second Appeal No. 1098 of 1928, Decided on 15th November 1932,

(a) **Madras District Municipalities Act (1920), Ss. 44 and 45—Noncompliance with provisions of Ss. 44 and 45 makes contract void.**

If the provisions of Ss. 44 and 45, District Municipalities Act are not complied with the contract is void: *A I R 1930 Mad 600 and 97 I C 511, Ref.* [P 332 C 2]

* (b) **Contract Act (1872), S. 65—Contract void for noncompliance of provisions of Ss. 44 and 45, Madras District Municipalities Act—Neither principle of "quantum meruit" nor that of "quantum valebat" applies—Madras District Municipalities Act (1920), Ss. 44 and 45.**

Where a contract is void for noncompliance of the provisions of Ss. 44 and 45, District Municipalities Act, S. 65, Contract Act, has no application and neither the principle of "quantum meruit" nor the principle of "quantum valebat" applies: *Case law reviewed.* [P 335 C 2]

(c) **Contract Act (1872), S. 65—Contract of supply of goods—Contract being void—If S. 65 applies doctrine of "quantum valebat" applies—Obiter.**

Obiter—Where in a case of supply of goods the contract is found to be void and S. 65, Contract Act, is found to be applicable, it is the doctrine of "quantum valebat" and not that of "quantum meruit" that must be applied; and where the actual goods cannot be returned, restitution must be fixed at the price at which they were sold by the vendors. [P 338 C 2]

(d) **Limitation Act (1908), S. 19—President of Committee has authority to acknowledge.**

A President of a Committee who is authorized to purchase goods has equal authority to acknowledge. Such authority need not be express: *A I R 1919 P C 120; A I R 1925 All 176 and A I R 1925 Rang 30, Ref.* [P 336 C 1]

T. Rangachariar and S. Narayana Ayyangar—for Appellant.

K. Rajah Ayyar, V. Ramaswami Ayyar and S. Nataraja Nadar—for Respondents.

Judgment.—Under Ordinance 9 of 1914 and the rules prescribed thereunder the plaintiffs were appointed wholesale dealers of rice at Sattur. The defendant Municipal Council of Srivilliputtur appointed a Local Emergency Committee for the purchase of rice from the plaintiffs. This Local Committee used to indent for the monthly supply and the Collector allotted the quantity to be supplied. In January 1920 the defendant Municipality applied for a certain

amount of rice. The Collector ordered 460 bags of raw and 300 bags of boiled rice. The rice was despatched on 15th February 1920. The price of rice seems to have started to fall from the beginning of March: vide Ex. E letter from the President, Local Emergency Committee, to the Collector, dated 3rd September 1920. The sentence is a little obscure. Anyhow the allegation in the written statement that the fall began from about 15th February was not substantiated by evidence (para. 16 of the trial Court judgment). Under the rules, the Local Emergency Committee was to sell at the cost price and the wholesale dealer was allowed a profit of not more than eight annas per bag. This consignment of rice was, after some correspondence with the Collector, sold in September and November, 1920 at a loss, and the plaintiffs sued for the deficiency between what the defendant Municipality paid them and the cost at which the rice was supplied. A number of pleas were raised by the defendant including want of privity, limitation and the late supply of the goods.

The trial Court found that there was privity of contract, that the suit was not barred by limitation, and that it was not proved that the price had fallen when the rice was sent. In first appeal the point was taken that if the provisions of Ss. 44 and 45, District Municipalities Act, not having been complied with the contract was void. The learned Subordinate Judge found for the defendant on this point but as regards privity of contract and limitation agreed with the findings of the trial Court. He however in para. 8 of his judgment held that the defendant council was liable under S. 65, Contract Act, to pay "quantum meruit" for any profit that the Municipality had got under the contract. He appears to be under a misapprehension that the accounts had not been filed though he says the defendant council had had an opportunity of doing so. But it is not disputed before me that the accounts, Ex. 4, were filed though in another connexion. He gave plaintiffs a decree for Rs. 2,864-1-2 which he considered as the profit which the defendant had realized by the sale of the rice. It is admitted before me that on the accounts which have been signed by the plaintiffs themselves with the exception

of a trifling sum of Rs. 5 or so, defendant council credited all they got by the sales to plaintiffs after deducting legitimate expenses. Therefore on the "quantum meruit" which the learned Subordinate Judge was willing to grant there would be practically nothing due to the plaintiffs. Against this decision defendant council have preferred an appeal. It is not disputed in appeal that the contract was void. It is therefore unnecessary to go at any length into this matter. I may perhaps refer to the most recent decision of this Court in *Municipal Council, Tiruvarur v. Kannuswami Pillai* (1), a case decided by Sir Kumaraswami Sastri, J., and myself, where the difference between a contract governed by statute and one which is not so governed is pointed out and most of the cases are discussed which bear on a contract like this. I might however quote a sentence of Sir Coutts-Trotter, C. J., in *Madras Engineering Works Ltd. v. Municipal Council, Trichinopoly* (2) :

"In England the provision that Corporations should contract in a special manner, namely under seal is not a statutory provision but is a rule of the Common law, and the Judges in well-known cases have evolved a rule that the necessity for the corporate seal to be fixed to contracts does not apply to such contracts as appertain to the ordinary execution by the corporation of its daily duties; and that has been engrafted by the Judges on to the rigour of the Common law. I am quite satisfied it is quite impossible for a Judge in India to temper the ferocity of the Statute law by similar engraftments upon it. I must therefore hold that in the absence of a contract which fulfils the requirements of the Act, the plaintiffs' suit cannot succeed."

It is strenuously argued for the respondents that S. 65, Contract Act, does apply, but that it is not the doctrine of "quantum meruit" because in cases of supply of goods it is the doctrine of "quantum valebat" which should be applied: (vide Leake on Contract, p. 443). I am inclined to agree with the respondents that if S. 65, Contract Act, is applied to the case it is the doctrine of "quantum valebat" that must be applied and restitution must, in a case of this sort, where the actual goods cannot be returned, be fixed at the price at which they were sold by the vendors (plaintiffs in this case): vide Mayne on Damages, 383 and Leake on Contract above.

1. A I R 1930 Mad 690 = 53 Mad 352 = 127 I C 120.

2. (1923) 97 I C 511.

For the appellant it is contended that a breach of a statutory Regulation does not fall under S. 65, Contract Act. *Annada Mohan Roy v. Gour Mohan Mullick* (3) is strongly relied on. There, there was a contract by a Hindu to sell immovable property to which he was the next reversionary heir-expectant upon the death of a widow in possession and to transfer it upon possession accruing to him. It was held that this being void under S. 6 (a), T. P. Act, 1882 the time at which such an agreement is "discovered to be void" so that a cause of action to recover the consideration arises under S. 65, Contract Act, 1872, in the absence of special circumstances is from the date of the agreement. Their Lordships held (p. 937 of 50 Cal.) that S. 65 did not apply to such a contract. In that case another Privy Council case *Harnath Kunwar v. Indar Bahadur Singh* (4) was pressed upon their Lordships. In the latter case a Hindu, while next reversioner to an Oudh estate, obtained a decree declaring that a will which the widows of the last holder alleged authorized them to adopt was invalid and that he was entitled to the estate upon the death of the last surviving widow. Prior to that event occurring he purported to sell half the estate in consideration of Rs. 25,000 advanced to him declaring by the sale-deed that when he succeeded he would put the vendee in proprietary possession. After the death of the last surviving widow the widow of the purchaser sued the vendor for possession, or alternatively to recover the purchase money with interest. It was held that there was no effectual transfer of the villages, since the vendor had only an expectancy and the decree did not create any greater interest in him but that under S. 65, Contract Act, 1872 the purchase money was recoverable, with interest from the date of the suit, the period of limitation not running until the rights of the purchaser were discovered to be unenforceable. The facts of that case are peculiar and their Lordships held that in those peculiar circumstances there was a misapprehension as to the private rights of the vendor which he

purported to sell and that the true nature of those rights was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted. The agreement was discovered to be void and the discovery in their Lordships' view was one within the words and the meaning of S. 65, Contract Act. This difference is stressed by their Lordships in *Annada Mohan Roy v. Gour Mohan Mullick* (3) at p. 935 (of Cal. 50) where they say:

"In that case, however, there were special circumstances wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself."

These are the two important Privy Council cases relied on one by each side respectively. The case in *Harnath Kunwar v. Indra Bahadur Singh* (4) cannot be taken as authority for saying that a contract entered into in breach of the statutory provisions of Ss. 44 and 45, District Municipalities Act can be brought under S. 65, Contract Act for purposes of a "quantum meruit" or a "quantum valebat." In *Veeranna Ambalam v. Ayyachi Ambalam* (5) it was held that a contract which was necessarily invalid from its inception would not fall under S. 65. In *Radhakrishna Das v. The Municipal Board of Benares* (6) at p. 601 the learned Judges consider the applicability of S. 65, Contract Act in a case exactly similar to the present. They say:

"There was no illegality in the action of the Municipality in passing a resolution accepting the appellant's tender and therefore it cannot be said that the agreement, if any, constituted by the tender and acceptance of it, has been discovered to be void. The agreement is unobjectionable but it did not ripen into a binding contract by reason of the neglect of the parties to comply with the provisions of the section under which the Municipality could alone contract. The words of the section, namely "When a contract becomes void" evidently have no application because there was no contract. If we were to hold that this section was applicable, we should render nugatory the salutary provisions of the Municipalities Act which provide that "a contract executed otherwise than in conformity with it shall not be binding on the Board." Likewise S. 70 appears to us to have no application."

In *Wolf & Sons v. Dadiba Khimji & Co.* (7) it was held that advantage must be received before the contract becomes

3. A I R 1923 P C 189=74 I C 499=50 I A 239=50 Cal 929 (P C).

4. A I R 1922 P C 403=71 I C 629=50 I A 69=26 O C 223=45 All 179 (P C).

5. A I R 1926 Mad 118=92 I C 63.

6. (1905) 27 All 592=(1905) A W N 111.

7. A I R 1920 Bom 192=58 I C 465=44 Bom 631.

void but that is not the case here. Some cases are relied on by the respondent to show that a contract entered into in breach of a statutory regulation would nevertheless fall under S. 65. One is *Aryaprabhakara Rao v. G. Sanyasi* (8) the decision of a single Judge. It may be noted that the applicability of that section was merely examined with reference to the question of limitation. *Girraj Bakhsh v. Hamid Ali* (9) was a case of a mortgage entered into by the minor's mother without the permission of the Court. It was held that the benefit obtained on the mortgage must be refunded. This must be considered overruled by the Privy Council decision in *Mohori Bibee v. Dharmodas Ghose* (10) where it was held that a mortgagee who advanced money to a minor on the security of a mortgage is not entitled to repayment of money on decree being made declaring the mortgage invalid. In *Appasami v. Narayanaswami*, A. I. R. 1930 Mad. 945 a minor fraudulently represented himself as a major. Therefore there was in that case a mistake of fact at the time of the contract. *Thangammal Ayyar v. Krishnan* (11) is a case between a legal practitioner and his client. The agreement which had not been filed in Court was held to be void. Nevertheless it was held that the pleader was still entitled to claim any reasonable remuneration in respect of his professional services. That case is distinguishable because the pleader had a right outside the alleged agreement whereas in the present case the plaintiff's case is one founded on his contract. *Municipal Board Lucknow v. Debi Das* (12) followed *Lawford v. Billericay Rural Council* (13) and *Young & Co. v. Mayor and Corporation of Royal Leamington Spa* (14) which have been distinguished in *Municipal Council, Tiruvarur v. Kannuswami Pillai* (1) *Municipal Committee, Gujranwala v. Fazal Din* (15); followed *Sri-*

rangam Municipal Council v. Bodi (16) which is the decision of a single Judge and which is dissented from by Sir Kumaraswami Sastri, J., and myself in *Municipal Council, Tiruvarur v. Kannuswami Pillai* (1). Two cases are however relied upon to show that a "quantum meruit" can be granted in the case of a contract entered into by a Municipality in which the requirements of Ss. 44 and 45, District Municipalities Act, are not complied with. One is the case in *Municipal Council, Tiruvarur v. Kannuswami Pillai* (1) quoted above. But it would be seen therefrom that

"both the parties are agreed before us that if the contract is found invalid they should accept a decree on a 'quantum meruit' basis"

so that the legality of a "quantum meruit" was not raised. The other case is the one in *Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong* (17) to which we referred in that judgment. In that case the Commissioners for the port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract. The contract was not under seal as required by S. 29, Chittagong Port Act, 1914. It was held that the Act was imperative in its terms and the plaintiffs could not sue on the contract, but, a "quantum meruit" was allowed. This case is alluded to in Pollock on Contract, p. 378. He says:

"It appears from the report of this case that counsel for the defendant (who was the appellant before the Court) himself conceded that the plaintiffs were entitled (though not in that suit) to some compensation for the use of the tug. It is submitted that both counsel and the Court were in error in thinking that the plaintiffs were entitled to recover 'quantum meruit.' No question of payment upon a 'quantum meruit' can arise where an act is imperative."

I therefore consider that the contention of the appellant that no "quantum meruit" or "quantum valebat" can be allowed is correct. If the "quantum meruit" is to be, as given by the lower appellate Court, on the profit which the defendant had made then it is clear from the accounts Ex. 4 that the Municipality derived no profit. But on this point I should hold that if an allowance is to be made it must be a "quantum valebat" and the plaintiffs would be entitled to recover the price of the rice fixed at the time of supply.

8. A I R 1925 Mad 885=88 I C 557.

9. (1887) 9 All 340=(1887) A W N 62.

10. (1903) 30 Cal 539=30 I A 114=8 Sar 374 (P C).

11. A I R 1930 Mad 122=124 I C 502=53 Mad 209.

12. A I R 1926 Oudh 388=99 I C 643=1 Luck 444.

13. (1903) 1 K B 772=72 L J K B 554=31 W R 630=67 J P 245=1 L G R 535=19 T L R 222.

14. (1883) 8 A C 517=52 L J Q B 713.

15. A I R 1929 Lah 742=121 I C 187=11 Lah 121.

16. A I R 1924 Mad 162=72 I C 703.

17. A I R 1927 Cal 465=103 I C 2=54 Cal 189.

Turning to the ground of limitation it is argued that the letter Ex. F (2) on which the learned Subordinate Judge relies written by the President of the Local Emergency Committee will not save limitation as there is nothing to show that he represented the committee. I cannot agree with this contention. The point has not been taken at all in first appeal. The matter was only taken in a general form in the grounds of the second appeal (para. 21), viz., "The Court below ought to have held that the suit was barred by limitation." The correspondence was conducted by the President of the Committee. He was put into the witness-box, but no question was put to him that he had no authority to carry on the correspondence. In *Braja Sundar Deb v. Bhola Nath* (18) it was held that a person with authority to purchase and settle the price of goods had equal authority to acknowledge and that the authority to do so need not be express. In *Ganga Ram v. Lachman Singh* (19), it was held that it can be presumed from the attendant circumstances that acknowledgment made by the agent is authorized: see also *Rala Singh v. Bagwan Singh & Sons* (20). Such acknowledgment may be addressed to a person other than the person entitled to the property or right (Expl. 1, S. 19, Lim. Act). I agree with the learned Subordinate Judge that the letter Ex. F-2 saves limitation. One more argument is raised on behalf of the respondents, namely, that the parties are governed by the Ordinance, that the contract is made under it and that the Municipal Council was not acting as a Municipal Council in making the contract: *Douglass v. Rhyl Urban Council* (21), *Attorney-General v. Gaskill* (22), *Mathura Mohan Saha v. Ram Kumar Saha* (23) and *Leake on Contracts*, 447 were quoted. This contention was also raised before the learned Subordinate Judge who deals with it in para. 7 of his judgment. I agree with his conclusions. The Ordinance lays down that the Governor-General-in-Council or the Local Government

may require any persons or class of persons to make a return of any article of commerce of which he or any person belonging to such class is the owner, and that if any article is found to be unreasonably withheld from the market on the issue of notification under S. 6, any person empowered by the Governor-General or the Local Government may take possession of any articles so notified on paying compensation. There is nothing in this to prevent the plaintiffs from making their contract with the Municipal Council in the statutory terms prescribed in Ss. 44 and 45, District Municipalities Act. I consider that these terms were applicable.

The appeal in my opinion must be allowed with costs and the suit dismissed with costs throughout. I cannot help observing that the defendant council were put into an extremely awkward position. Correspondence shows that they were not free agents either in the matter of buying or selling and yet they were to be considered responsible for any loss which might accrue owing to fall in prices. The Emergency Committee was a purely honorary body and neither it nor the Municipal Council were going to make any profit out of the transaction. It is immaterial that the Municipality did take a sum of Rs. 500 for peace celebrations because this was returned. The Emergency Committee was at one time called on by the Collector to make good a deficiency of Rs. 285-10-0 in regard to another Union (Elayangudi Union). That sum however was also refunded by the Collector. It would appear hard to hold the Municipal Council responsible for trading losses in a matter in which they had no freedom of action and in which they and their agent, the local Emergency Committee, were serving the public in an honorary capacity. If the contract had been made in accordance with the statutory regulation it would certainly appear hard in the circumstances that the Municipal Council should have had to make good presumably from the ratepayers' money, a loss for which they were not responsible. This question does not however arise owing to the fact that the contract actually made was void.

P.R.S./K.S.

Appeal allowed.

18. A I R 1919 P C 120=55 I C 543 (P C).
19. A I R 1925 All 176=35 I C 633.
20. A I R 1925 Rang 30=84 I C 391=2 Rang 367.
21. (1913) 2 Ch 407=82 L J Ch 537=29 T L R 605=57 S J 627=109 L T 30=11 L G R 1162=77 J P 373.
22. (1833) 22 Ch D 537=52 L J Ch 163=31 W R 135=17 L T 566.
23. (1916) 43 Cal 790=35 I C 305.

A. I. R. 1933 Madras 337

BARDSWELL, J.

P. S. Anantanarayanan, Petitioner,
In re.

Criminal Revn. Case No. 743 of 1932 and Criminal Revn. Petn. No. 693 of 1932, Decided on 25th October 1932, for revision of judgment of Joint First Class Magistrate, Chingleput, D/- 14th March 1932.

Penal Code (1860), S. 71—Charge of picketing against accused — Two separate sentences under both Criminal Law Amendment Act and Ordinance is illegal—Criminal Law Amendment Act (1908), S. 17 (1) and Ordinance (5 of 1932), S. 4.

Accused was found guilty of picketing which fell both under the Criminal Law Amendment Act S. 17 (1) and Ordinance 5 of 1932. Magistrate awarded separate sentences under each of the provisions of law for the offence.

Held: that the separate sentences cannot stand and that the sentence under one of them must be set aside. [P 338 C 1]

K. S. Jayarama Ayyar for *G. Gopala-swami*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—This is a petition put in not by but on behalf of, two persons, who have been convicted by the First Class Joint Magistrate of Chingleput of an offence punishable under S. 17 (1), Criminal Law Amendment, Act 1908, and S. 4, Ordinance 5 of 1932. The point taken in this petition is that they have in fact been convicted only of one offence, that of picketing, which can fall equally under S. 17 (1), Criminal Law Amendment Act, and under S. 4 of the Ordinance and that therefore the Joint Magistrate in awarding them separate sentences for the conviction under each count has acted illegally with reference to S. 71, I. P. C. Under S. 17 (1), Criminal Law Amendment Act, a person can be punished if he is a member of an unlawful association, or for in any way assisting in the operation of any such association. By S. 4, Ordinance 5 of 1932, which is known as the Ordinance for the prevention of molestation and picketing, a person can be punished for molestation. The judgment of the Magistrate refers to the two accused as having been respectively President and Member of the Taluk Congress Committee, Conjeevaram, and of the District Congress Committee of Chingleput; and it has been suggested by the learned Public Prosecutor that the conviction under the Criminal Law Amendment

Act may have been for their being members of an unlawful association which would be a separate offence from that of picketing. It has been proved by evidence that the Taluk and District Congress Committees in question have been notified by Government as unlawful associations. In order to make clear the matter the records of the case have been sent for and scrutinized. The particulars of the accusation stated against accused 1 have thus been set out by the Joint Magistrate:

“Whereas it appears that you Dr. P. S. Srinivasa Iyer, being a President of the Taluk and District Congress Committees of Conjeevaram and Chingleput respectively, which have been declared to be unlawful associations by the Government under S. 16, Criminal Law Amendment Act, 1908 and in spite of a warning from the District Magistrate to desist from activities in furtherance of the purposes of the said unlawful associations, did, at 12-20 p. m., on 14th March 1932, in furtherance of the purposes of the said unlawful associations, picket foreign cloth shops at Hodsonpet, Conjeevaram, and thereby committed an offence under S. 17 (1), Criminal Law Amendment Act, 1908; and that you by doing the said picketing, committed the offence of molestation as defined in S. 3, Ordinance 5 of 1932, punishable under S. 4 of the said Ordinance; show cause why you should not be convicted under S. 17 (1), Criminal Law Amendment Act, 1908, and S. 4, Ordinance 5 of 1932. Do you plead guilty or not guilty?”

The accusation that was read to accused 2 is just the same as that read out to accused 1 except that he is described as a member of the Congress Committees and not as the President. It is true that in both these statements of accusation the fact of the accused being either President or Member of the Taluk and District Congress Committees is mentioned, but I am satisfied that this is only by way of description. This is shown by the use of the word “being.” Had they been charged with the offence of being members of an unlawful association the accusation should run “that you were.” This however is not a case in which one has to decide by a meticulous examination of the language that is used as from what follows later it is perfectly clear that the offence charged under S. 17 (1) was that of picketing foreign cloth shops and that the offence charged under the Ordinance was that of molestation in the said picketing. Therefore under each section alike it was the offence of picketing with which the two accused were charged. The matter is so very clear that it is hardly necessary to

mention anything that might make it even clearer, but for the sake of emphasis I will point out that what was read by the Joint Magistrate to the accused as to the accusation is practically a paraphrase of what is stated in the charge-sheet though in the charge-sheet in the place of the word "being" we have "who are." The conclusion of what appears in the charge-sheet shows that the charge against the accused was one of picketing which is shown as falling both under the Act and under the Ordinance. And, again, in the first information report nothing is mentioned about these accused being members of an unlawful association, but it is merely stated that they were guilty of picketing and thereby committed offences under the Act and under the Ordinance. Before the Magistrate accused 1 declined to plead either way and so also did accused 2. Accused 2 however went on to say:

"I wish to add however that I think I was a member of the Taluk Congress Committee only, as far as I remember, and not of the District Congress Committee."

As he had already declined to plead, it is clear that in this statement he was only correcting a possible mistake in his description and was not replying to the charge of being a member of an unlawful association, which charge indeed had not been preferred against him. I find then that the two accused have been found guilty of one offence and one only, though it is one punishable under two separate provisions of law. The two separate sentences therefore cannot stand. The convictions are confirmed but the sentence of six months' rigorous imprisonment and of fine of Rs. 200 that has been passed for the conviction under S. 4, Ordinance 5 of 1932, is set aside. I understand that they have already undergone imprisonment for six months or more. If that be the case, and, if they have no further term of imprisonment to undergo in default of payment of fine, they must at once be released and set at liberty; at any rate, they must be released as soon as their term of six months and any term of imprisonment in default of payment of fine has expired. The fines if paid should be refunded to them.

P.R.S./K.S.

Order accordingly.

* A. I. R. 1933 Madras 338

BEASLEY, C. J. AND BARDSWELL, J.

Sothavalan and others—Petitioners—Appellants.

v.

Rama Kone and others—Respondents.

Criminal Revn. No. 162 of 1932, and Criminal Revn. No. Petn. 148 of 1932 Decided on 13th December 1932 from order of Sub-divisional Magistrate, Ramnad, D/- 16th January 1932.

* Penal Code (1860), S. 71—Conviction under Ss. 147 and 323—Separate sentence is legal—Penal Code, Ss. 147 and 323.

A person convicted both under Ss. 147 and 323 can be awarded a separate sentence for each of the offences and S. 71 can have no application. For the offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting and in like manner rioting can be committed without the commission of the two other mentioned offences, as the force used in rioting may fall far short of causing bodily pain, i. e. hurt or grievous hurt: *A I R 1928 Mad 18, Foll.*; *A I R 1919 Mad 353*; 16 *Cal 75*; 40 *Cal 511*; 17 *Bom 260*; 7 *All 29* and 7 *All 757 (F B)*, *Rel. on.* *A I R 1922 Mad 405* and *A I R 1927 Mad 970, not Foll.* [P 339 C 2]

G. Gopalaswami—for Petitioners.

A. Narasimha Aiyar—for the Crown.

T. G. Singaravelu—for Respondents.

Bardswell, J. — The petitioners in this case have been convicted of rioting as punishable under S. 147, I. P. C., and of the substantive offence of voluntarily causing simple hurt as punishable under S. 323, I. P. C. They have been sentenced in all to three months' rigorous imprisonment each, two months for the rioting and one month for causing hurt. They have also each of them been fined Rs. 15 for each offence. The only point that has now to be considered is that of whether the two separate punishments were legal.

For the petitioners reliance is placed upon the decision of Curgenven, J. *In re Kunnammal Mayan* (1). In that case the learned Judge has held, though with some hesitation and while admitting that he saw a difficulty in arriving at his conclusion, that when a person is convicted both under S. 147 and S. 323 I. P. C. he could not be awarded a separate sentence for each of the offences. He has followed a decision, apparently unreported, of Krishnan, J. in C. R. P. 209/24 and a decision of the Lahore High Court reported in *Bishna v.*

1. *A I R 1927 Mad 970=105 I C 828=28 Cr L J 1004.*

Emperor (2). The principle of these decisions is that where the causing of the hurt is itself the particular form of the force or violence which contributed to the offence of rioting, the one was included as an ingredient of the other. Curgenvin, J., followed this principle and found it difficult to escape the conclusion that to convict for voluntarily causing hurt, where the only violence which formed the act of rioting was the hurt itself, offends against the provisions of S. 71, I. P. C. A different opinion however has been expressed by Wallace, J. in a decision which is also to be found in *Anthoni Udaiyan v. Royappudayar* (3). Therein he has pointed out that

"Causing hurt and using force are not the same thing and the word 'force' does not appear in the definition of 'hurt.' The use of criminal force is no doubt an ingredient of the offence of rioting and the use of force may be an ingredient in the offence of rescuing cattle, but the force necessary to constitute these offences may fall far short of 'causing bodily pain' and, if further force is used which does cause bodily pain, then, in my view, the offences which involve and are complete by more use of criminal force have been exceeded and that excess constitutes another offence, viz. that of causing hurt or causing whatever more serious form of bodily hurt has been the result."

With all respect I think that the view thus taken by Wallace, J., is correct; and what he says as to force is equally applicable to violence. The same view has also been taken by a Divisional Bench of this Court, *Krishna Ayyar v. Emperor* (4), a decision which does not appear to have been brought to the notice of either of the learned Judges whose decisions, above referred to, appear in *Kunnamal Mayan, In re* (1). In that case it is remarked that

"it has been well settled that where the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under S. 147, cannot be convicted also under S. 323 or S. 325 read with S. 149, except that such of the accused as are proved themselves to have caused hurt in the raiyat would be rightly convicted of the offence of hurt in addition to the offence of rioting."

The convictions therefore of certain of the accused under Ss. 147 and 323, I. P. C., were confirmed. With regard to the constructive S. 149, Gour's com-

mentary shows that there is a conflict of opinion between the various High Courts but with that section we are not now concerned, as all the petitioners in this case have been convicted of offences of hurt individually committed. Except in the case of the Lahore Court in *Bishna v. Emperor* (2) there seems to have been no such conflict among the other High Courts as to its being legal to inflict a separate punishment on a rioter, on a substantial conviction under S. 323, from that awarded for the offence under S. 147. This was held by the Calcutta High Court in *Mohu Mir v. Queen-Empress* (5) and more recently in *Ram Angutha Singh v. Emperor* (6). There are similar decisions in *Queen-Empress v. Bana Punja* (7) when the matter was considered by a Full Bench, and in *Queen-Empress v. Dungar Singh* (8) and in *Queen-Empress v. Ram Sarup* (9). *Queen-Empress v. Dungar Singh* (8) dissented from a previous decision of that Court to the contrary. None of these cases has been referred to by the learned Judge who decided the case in *Bishna v. Emperor* (2). It is the Allahabad view which has been followed in Calcutta and Bombay. As remarked in *Queen-Empress v. Dungar Singh* (8):

"The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting and, in like manner, rioting can be committed without the commission of the two other mentioned offences."

This is putting in general terms what has been put more particularly by Wallace, J., in the quotation from his judgment given above. Taking this as the correct position as, in my opinion, it should be and as, indeed, has been found by a Bench of this Court to be settled, S. 71, I. P. C., can have no application. I would hold, then, that the petitioners have been properly and legally awarded separate sentences, one for rioting and one for having caused simple hurt. The sentences cannot be said to be excessive, but, seeing that this case has been hanging over the petitioners for over a year, that none of the injuries caused was of a serious character, and that they have already served out about half of their several terms of

2. A I R 1922 Lah 405=73 I C 517=24 Cr L J. 629

3. A I R 1928 Mad 18=105 I C 806=28 Cr L J 982,

4. A I R 1919 Mad 353=49 I C 337=20 Cr L J 145.

5. (1889) 16 Cal 725.

6. (1913) 40 Cal 511=18 I C 402.

7. (1893) 17 Bom 260 (F B).

8. (1884) 7 All 29=(1884) A W N 220.

9. (1885) 7 All 757=(1885) A W N 195 (F B)

imprisonment, I do not think it necessary to send them back to jail. Their not being sent back is likely to be the more conducive to future harmony between them and the opposite party, and they have had their lesson. I would therefore reduce their sentences to rigorous imprisonment for the period already undergone and now set them at liberty, discharging their bail bonds. The sentences of fine and of imprisonment in default should stand as also the order for compensation to P. Ws. 1—4.

Beasley, C. J.—I agree.

P.R.S./K.S. *Sentence reduced.*

A. I. R. 1933 Madras 340

WALSH, J.

V. K. Kelu Achan and another—Defendants—Appellants.

v.

Thandavan Chettiar and another—Plaintiffs—Respondents.

Second Appeal No. 1667 of 1928, Decided on 12th December 1932, against decree of Sub-Judge, South Malabar, in Appeal Suit No. 20 of 1927.

(a) Civil P. C. (1908), S. 47—Party to suit bound by decree—Dispute in execution must be settled under S. 47.

Where the party to the suit is bound by the decree he cannot evade the rule that disputes in execution must be settled under S. 47, Civil P. C., and not by a separate suit by joining with a stranger: *A I R 1930 Mad 817*; *A I R 1920 Bom 223* and *A I R 1927 Rang 137*, *Dist*

[P 341 C 1]

(b) Civil P. C. (1908), O. 21, R. 63—Appointment of receiver under S. 92—Attachment in execution of decree—Dismissal of claim and suit under O. 21, R. 63—Sanction to sue receiver is not necessary.

A receiver was appointed under S. 92, Civil P. C. A decree was passed and in execution of the decree certain crops were attached. The plaintiff put in a claim to the property but it was dismissed. He then filed a regular suit to have his share in the property.

Held: sanction to sue the receiver was not necessary for the suit and that even if it were necessary sanction of the sub-Court was sufficient: *Case law referred*. [P 341 C 2]

K. Kutti Krishna Menon—for Appellants.

T. A. Ananta Ayyar—for Respondents.

Judgment.—The defendant in this suit was a receiver appointed by the High Court under S. 92, Civil P. C. He got a decree in O. S. No. 191 of 1921 on the file of the Additional District Munsif's Court, Palghat, against one Andy Chettiar. The suit was against Andy Chettiar and his father, Samiyappan Chettiar, but Samiyappan Chettiar was ex-

onerated and a decree was given against Andy Chettiar. In execution certain crops were attached. Andy's father, Samiyappan Chettiar, and his second son, Thandavan Chettiar put in a claim petition, and one Ramalinga Ayyar put in another claim petition. Both petitions were dismissed. Ramalinga Ayyar took no further action. But Samiyappan Chettiar and his son Thandavan Chettiar brought this suit to set aside the order of dismissal. The suit was resisted on the grounds; (1) that the suit is not maintainable without the sanction of the Court by which the defendant was appointed a receiver: (2) it was barred under S. 47, Civil P. C., because Samiyappan Chettiar was a party in O. S. No. 191 of 1921, and so a separate suit was not maintainable and (3) the crops attached really belonged to the judgment-debtor, and so the order dismissing the claim should be upheld. The trial Court held in favour of the receiver on all the three points and dismissed the suit, but the appellate Court decided all the three points against the receiver and decreed the suit. The last point being a question of fact there can be no second appeal on it. As regards the rest, this appeal is preferred by the defendant under two points of law.

I shall take the second point first because it is comparatively simple. The suit of Thandavan Chettiar is admittedly not barred as he was not a party to the original suit. Whether the suit of Samiyappan Chettiar would be barred would depend on whether he was exonerated because he had no interest in the property, and as there was no evidence on this point in the lower Court, I sent for the original records. It is clear from them that he was a proper party to the suit. So the decision in *Abdul Sac v. Sundara Mudaliar* (1) is not applicable. *Goba Nathu v. Sakaram Teju* (2) and *U Kala v. Ma Hnim U* (3), are quoted for the appellant. But in the former case it was the auction purchaser who was the plaintiff, and the Court held that he was entitled to maintain his suit against the defendants, one of whom was the original judgment-debtor, and the other a stranger, but it expressly holds that

1. *A I R 1930 Mad 817=127 I C 805=54 Mad 81 (F B)*.

2. *A I R 1920 Bom 223=59 I C 366=44 Bom 977*.

3. *A I R 1927 Rang 137=101 I C 794=5 Rang 110*.

the plaintiff brought his suit in his capacity as auction-purchaser, and acquired a different set of rights from those which he had as a decree-holder. *U Kala v. Ma Hnim U* (3), was a case where the suit was dismissed on the ground that plaintiff was wrongly joined as a party in the previous suit having no concern with it. What has been laid down in this case was followed: *Abdul Sac v. Sundara Mudaliar* (1). It seems impossible to hold that where the party to the suit is bound by the decree he can evade the rule that disputes in execution must be settled under S. 47, Civil P. C., and not by a separate suit, by joining with a stranger. This would be to defeat the purpose of S. 47, Civil P. C. The suit therefore by Samiyappan Chettiar is, I consider, already not maintainable for this reason.

The next point to be considered is whether the want of sanction of the Court with regard to the receiver invalidates the suit by Thandavan Chettiar for his half share of the property. As the plea was not taken in the written statement it is argued that the receiver waived his right. *Jagannatha Sanyasiah v. Atchanna Naidu* (4), referred to, is a case in which sanction was obtained during the course of trial. It is also argued that the sanction of the sub-Court was sufficient, and that the High Court only directed that the receiver should work according to the direction of the sub-Court. *Ammukutty v. Manavikraman* (5) was quoted in this connexion. The order of the High Court appointing the receiver is not traceable, and it is not possible to say quite definitely whether he was ordered in those proceedings to work under the direction of the sub-Court. But when the receiver took up the execution he had applied to the sub-Court and taken its leave. The evidence of D. W. 1 was that the sub-Court's order was obtained under the High Court's direction. In Ex. E, the petition filed by the plaintiffs, it is stated that the receiver was appointed to act under the direction of the sub-Court, so that it appears very likely that he was ordered by the High Court to work under the sub-Court.

On the general question of sanction

4. A I R 1921 Mad 624=70 I C 759.

5. A I R 1920 Mad 709=59 I C 568=43 Mad 793.

Miller v. Rama Ranjhan Chakravarthi (6) and *U On Maung v. Ebrahim* (7), may be referred to. In the latter case though objection was not taken in the lower Courts the trial was held to have been without jurisdiction. *Kuppuswami Aiyar v. Suppan Chetty* (8) quoted on the other side is distinguishable because the receiver had an independent duty thrown on him to grant pattas, and was liable to be sued under the Act for his failure to do so. There is however one line of argument which appears to me conclusive against the appellant. The rule forbidding the bringing of a suit against a receiver is a mere procedure of Court not resting on any statutory authority, whereas the right to bring the suit with regard to the claim under O. 21, R. 63, Civil P. C., 1908, is a statutory right: *Pokker v. Kunhammad* (9) and *Din Mahomed v. Unna Dutta Hans Raj* (10), a Lahore case, follows Madras. It is there laid down that a statutory right to sue cannot be defeated by any rule of practice. In *Raja of Ramnad v. Subramaniam Chettiar* (11), at p. 483 (of 52 Mad.) it has been held that a suit under O. 21, R. 63, is a continuation of those proceedings, and it would certainly appear to be very inequitable if a receiver disturbs a person in possession by taking action in execution that the latter should be deprived of his right and of the suit allowed under O. 21, R. 63, unless he first obtains permission to sue. I therefore agree with the lower appellate Court that permission to sue the receiver is not necessary, and even if it is necessary I hold the sanction given by the Subordinate Judge is sufficient. Therefore as regards the property falling to the share of Samiyappan Chettiar the appeal is allowed with costs, and it fails as regards Thandavan Chettiar's share and is dismissed with costs.

P.R.S./K.S. *Appeal partly allowed.*

6. (1884) 10 Cal 1014.

7. A I R 1928 Rang 175=110 I C 622=6 Rang 268.

8. (1907) 30 Mad 505=17 M L J 483.

9. A I R 1919 Mad 257=51 I C 714=42 Mad 143.

10. A I R 1931 Lah 430=133 I C 118.

11. A I R 1928 Mad 1201=116 I C 827=52 Mad 465.

A. I. R. 1933 Madras 342 (1)

WALSH, J.

G. Kuppuswamy Chetty — Appellant.
v.*Pakkiri Pillai and others* — Respondents.

Civil Revn. Petn. No. 534 of 1928 and Civil Appeal No. 25 of 1929, Decided on 11th January 1933, petition from order of Dist. Munsif, Chidambaram, D/- 5th September 1927.

(a) Civil P. C. (1908), S. 145 and O. 43, R. 1 — Order dismissing petition to arrest surety is not appealable.

An appeal does not lie from an order dismissing a petition for arrest of a surety.

[P 342 C 1]

(b) Civil P. C. (1908), S. 145—Attachment of moveables of judgment-debtor — Surety bond for production of articles — Procedure for enforcing surety bond indicated.

Where the moveables of a judgment-debtor are attached and a surety bond is executed for the production of the articles, though a separate suit to enforce the bond is not necessary, action on the bond does not fall under S. 145, Civil P. C. The proper procedure for enforcing the bond is to move the Court to make an order calling upon the surety to produce the articles or the money for which he has rendered himself liable. Without such an order under the bond, a petition for the arrest of the surety is premature: *A I R 1926 Mad 1005, Ref*; *A I R 1919 P C 55, Rel on*.

[P 342 C 2]

T. R. Srinivasa Iyengar — for Appellant.

M. S. Venkatarama Iyer — for Respondents.

Judgment. — In this case the properties of a judgment-debtor were attached and the respondents' sureties executed a bond for the production of the articles. The petitioner applied for the arrest of these persons on the ground that they did not produce the articles. The lower Court dismissed the petition mainly on two grounds: firstly that the bonds were defective as the list of articles attached had not been initialed by the parties on each page, and secondly that there must be a notice to the sureties to produce the articles for any valid order of execution to be taken against them and there was no such notice in the case of the first surety. The matter was taken in appeal to the District Court, which found that the appeal did not lie and that finding is not contested before me. The learned District Judge remarked however that

"he was not at all satisfied with the manner in which the lower Court dismissed the execution petition on the merits. The surety bond is not

incomplete in law by reason of the attachment list annexed to it having been signed by only one surety even though the surety who has not signed was the one who took charge of the moveables."

He was of opinion that it is a matter for evidence. Then he said:

"While I agree that the issue of a notice was necessary on the analogy of S. 145, the petition ought not to have been dismissed without calling upon the decree-holder to pay *batta* for notice."

He is evidently here under a misapprehension that the petition was one for notice on the sureties to produce the articles. The petitioner simply prayed for their arrest. From the decision in *Rai Raghubar Singh v. Jai Indra Bahadur Singh* (1) which has been followed in *Sankunni Variar v. Vasudevan Nambudripad* (2) it is clear that while a separate suit to enforce a bond of this nature is not necessary yet action on the bond does not fall under S. 145, Civil P. C. Their Lordships have in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1), laid down the procedure to be followed where they say:

"It remains therefore that here is the unquestioned liability and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties that the properties charged be sold unless before a day named the sureties find the money."

In that case it was a question of finding money and in the present case it is a question of producing the articles or money for which the sureties rendered themselves liable on the bond. Hence the petition to arrest the sureties without having obtained an order of Court under the bond is premature and was rightly dismissed. In these circumstances this revision petition is dismissed with costs one set. The second appeal does not lie.

P.R.S./R.K. *Order accordingly.*

1. *A I R 1919 P C 55=55 I C 550=46 I A 228=42 All 158=22 O C 212 (P C).*
2. *A I R 1926 Mad 1005=97 I C 787.*

A. I. R. 1933 Madras 342 (2)

WALSH, J.

V. S. Rm. Ramanathan Chettiar — Petitioner.

v.

V. St. N. Chidambaram Chettiar — Opposite Party.

Civil Revn. Petn. No. 1006 of 1932, Decided on 3rd January 1933, from order of Sub-Judge, Dindigul, D/- 27th July 1932.

Civil P.C. (1908), S. 63 and O. 21, Rr. 52, and 53—Money in custody Court is not assets in attaching Court unless such money is ordered to be credited to attaching Court.

There is absolutely no authority for the proposition that because a Court orders the attached property to be sent to it by a public officer, therefore the money must be considered to have been reached the Court from the date of the order or at least from the date of its receipt by the public officer.

The properties of a judgment-debtor were sold for default in payment of Government revenue and the purchase money was in the hands of the Tahsildar who conducted the sale. The decree-holder in execution of his decree asked for attachment of the money in the hands of the Tahsildar. Attachment was ordered and the Munsif wrote to the Tahsildar for sending the money. In the meantime the Tahsildar had sent the money to the Sub-Court and wrote to the Munsif that there were several notices of attachment. The decree-holder claimed priority in payment of his decree debt as he got the first attachment.

Held: that the decree-holder cannot get priority as the money continued to be in custody Court and as it was not transferred to the attaching Court to the credit of his decree: *A I R 1921 Mad 213, Rel on; 7 Mad 47, Ref. [P 344 C 1, 2]*

Judgment.—This is a civil revision petition preferred by the decree-holder in O. S. No. 41 of 1930, who got a decree on 2nd September 1930 in the District Munsif's Court of Palni against one Venkatachala Chetti, Zemindar of Chatrapatty. On account of default in payment of Government revenue this Venkatachalla Chetti's property (Chatrapatty village) has been brought to sale. The Tahsildar sold the village on 12th November 1931. The sale was confirmed by the Collector on 23rd December 1931 and the purchase money was in the hands of the Tahsildar who conducted the sale. The respondent, who had obtained a decree against the same judgment-debtor, filed E. P. No. 790 of 1931, on 10th December 1931, asking for attachment of the money in the hands of the Tahsildar. The District Munsif ordered attachment on 12th December 1931, which was made absolute on 15th January 1932. On 16th January 1932 the respondent asked the District Munsif of Palni to send for the amount and issue a cheque. The Tahsildar was addressed by the District Munsif, as he had not sent the money, as to why it had not been sent and whether there were any prior attachments on it. As a matter of fact the Tahsildar sent the money to the Sub-Court, Dindigul, on 6th January 1932. In his reply dated 25th February

1932 the Tahsildar stated that the first attachment was that of the District Munsif's Court. He has wrongly stated there that there was no direction from the Court to credit the amount to O. S. No. 21 of 1929 and he also said that as he had received several attachment notices the amounts could not be credited to any of the suits. The respondent claimed that he was entitled to priority in payment because he got the first attachment order on 12th December 1931. This claim has been recognized by the Subordinate Judge, and it is against this decision that this revision petition is put in.

Although the matter has been very elaborately argued for nearly two days the point in issue is perfectly simple. The matter falls under O. 21, Rr. 52 and 53 and under S. 63, Civil P. C. The property while it was being attached under decrees of more Courts than one was in the custody of a public officer, the Tahsildar. It is not disputed that the Sub-Court of Dindigul being the Court of a superior grade is the Court which had to realize such property and determine all claims thereto. Since the decision in *Viswanadhan Chetty v. Arunachalam Chetty* (1), it is perfectly clear that the custody Court cannot distribute money or adjudicate claims to it. It must remit it to the attaching Court and all that it can settle is which attachment was made first if the attaching Courts are of equal standing. That was a very strong case since the custody Court happened itself to be the attaching Court, yet it was held that until the money was actually transferred to the decree in which it was sought to be attached the Court continued to be merely the custody Court. Consequently, the only argument which is open to the respondent to claim priority and which has actually been adopted before me is this. Because public officers are supposed to perform their duties properly it must be held that when the attachment order was issued by the District Munsif of Palni to remit the money the Tahsildar did by a legal fiction remit it, and the assets therefore came into the hands of the Palni Court either on the date of the order itself or at least on the date when the order reached the Tahsildar. Consequently they were assets in his hands

1. *A I R 1921 Mad 213=44 Mad 100 (FB).*

under S. 73 at the time when attachment applications had not been made by the other decree-holders to the Sub-Court of Dindigul.

Now it is clear that if this argument is to be allowed it must cover any sort of delay whether caused by negligence, delays incidental to official business, or delays in transmission through the post. There is absolutely no authority for the novel proposition that because the Court ordered the attached property to be sent to it by a public officer, therefore the money must be considered to have reached the Court from the date of the order or at least from the date of its receipt by the public officer. Admittedly the attachment per se does not create any charge or interest on the property so as to give the first attaching creditor any preferential claim. In *Muthukaruppan v. Muthuramalinga* (2) it was held that the words "in the custody of any Court" imply actual custody and relate back to S. 272 (a) of the old Code. That case is also authority for the proposition that there is no difference in this respect between moveable or immovable property which is attached. The learned pleader for the respondent sought to found an argument on O. 21, R. 56 which says:

"Where the property attached is current coin or currency notes, the Court may, at any time, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same."

It is not necessary in this case to say whether, if the District Munsif of Palni had passed such an order before the property had been also attached by the Subordinate Judge of Dindigul this would have amounted to a receipt of the assets by the District Munsif of Palni under S. 73 because as a matter of fact no such order was passed. I do not think it is necessary to discuss the immense volume of case law which has been quoted before me in this revision petition, because the order appealed against cannot be sustained excepting on the fiction alluded to above that when the order directing the Tahsildar to remit the money to the District Munsif of Palni was passed, or at least when it reached the Tahsildar, the Court not only got the custody of the money, but that it was actually transferred to the decree in O. S. No. 21 of

2. (1884) 7 Mad 47.

1929. There is absolutely no authority in support of either of these propositions. As stated above, *Viswanathan Chetty v. Arunachalam Chetty* (1) shows that even where the attaching and the custody Court are the same the assets would not reach the attaching Court under S. 73 until it has actually been ordered to be credited to the decree in question.

Both the learned advocates agree that the question as to whether the respondent can apply for rateable distribution at all may be left open by this Court. It is therefore not necessary for me to express any opinion on that point. The order of the learned Subordinate Judge that the respondent has priority merely on account of his being the first attaching decree-holder cannot be sustained. The revision petition is therefore allowed with costs throughout and the respondent's application is sent back to the Subordinate Judge for disposal along with the other applications.

P.R.S./K.S. *Petition allowed.*

* A. I. R. 1933 Madras 344

WALSH, J.

Sathiaavel Pillai—Petitioner.

v.

Sivasami Pillai—Opposite Party.

Civil Revn. Petn No. 186 of 1929,
Decided on 14th December 1932.

*** Contract Act (1872), S. 65—Suit for wages based on alleged contract — Contract not proved—Relief on quantum meruit cannot be granted unless asked.**

Where a plaintiff sues for wages for work done on the basis of an alleged contract but the contract is not proved, the Court has no jurisdiction to grant relief on the principle of quantum meruit unless it has been asked for alternatively: 11 I C 820 and A I R 1930 All 545, *Rel. on.*

[P 344 C 2]

T. E. Ramabhadrachari—for Petitioner.

S. Nagaraja Ayyar—for Opp. Party.

Judgment.—In this case the plaintiff, the brother-in-law of the defendant, claimed that he worked in the press of the latter for about 10 months on contract at Rs. 10 a month for wages. The contract was denied, and the Court found that it was not proved. However his claim was decreed at Rs. 5 a month, in addition to the boarding which he admittedly had from the defendant.

It is contended in revision that no alternative relief on the footing of quantum meruit having been asked for, the lower Court had no jurisdiction to grant any.

I agree with that contention. *Krishna Prosad Sinha v. Purnendu Narain Sinha* (1), is a much stronger case, because the service there was admitted. It was held that the plea of quantum meruit not having been raised, it could not be granted : see also *Roopji & Sons v. Dyer Meanken & Co. Ltd.*, A. I. R. 1930 All. 545 at p. 549. The plaintiff's own evidence shows that he entered on the work knowing nothing about it and learned it under a man employed by the defendant. He was getting board, and I can find in the circumstances no evidence at all from which it could be inferred with any certainty to what, if any, wages the plaintiff would be entitled. But it is unnecessary to go further into the facts of the case. The civil revision petition is allowed and the suit is dismissed with costs throughout.

P.R.S./K.S. *Petition allowed.*

1. (1912) 11 I C 820.

A. I. R. 1933 Madras 345

CURGENVEN, J.

P. Ramaraja Nadar and others—Petitioners.

v.

T. M. P. Chidambara Nadar and others—Opposite Parties.

Civil Revn. Petn. No. 67 of 1929, Decided on 22nd November 1932, from order of Dist. Judge, Madura, D/- 3rd March 1928.

Provincial Insolvency Act (1920), S. 75—Ex parte order regarding binding nature of debts of father on sons—Sale—Ex parte order as to delivery of property is void—Duty of Court indicated—Civil P. C. (1908), O. 47, R. 1 and S. 151.

The father of the minor petitioners was adjudicated insolvent and the Official Receiver obtained an ex parte order that his debts were binding upon them. The property including their interests was sold by the Official Receiver and an ex parte order for delivery to the purchaser was passed.

Held: that the order passed by the Judge without notice to the petitioners was beyond his competence and void, that it was his duty ex debito justitiae to take the matter up at their instance and give them a hearing, that in such cases, there is no question of review procedure and that the order was appealable under S. 75, Insolvency Act: A I R 1932 Mad 164, Rel. on.; 6 All 65; 9 All 51 and A I R 1919 Mad 844, Expl; A I R 1922 P C 112 and A I R 1926 Mad 980, Ref.

[P 346 C 1]

M. Patanjali Sastri—for Petitioners.

K. Raja Ayyar, V. Ramaswamy Ayyar, S. Nataraja Nadar and R. Sundaralingam—for Opposite Parties.

Judgment.—The father of the four minor petitioners was adjudicated insolvent and the Official Receiver obtained an ex parte order that his debts were binding upon them. The property, including their interest, was sold by the Official Receiver and purchased by respondent 1 who applied for and obtained from the Subordinate Judge, an ex parte order for the delivery of the property. After delivery had been given the minor petitioners through their mother filed an application, so styled, for review of the Subordinate Judge's order, and the learned Subordinate Judge, after framing issues and considering the circumstances, dismissed the petition. An appeal was taken from this dismissal to the District Judge who however decided that, since the order was in the nature of a refusal to grant an application for review, it fell under O. 47, R. 7 and no appeal would lie. This finding of the District Judge has been challenged in this revision petition.

It is no doubt true that the petition preferred by the petitioners to the Subordinate Judge was in form an application to review his former order and it quoted R. 1, O. 47, Civil P. C., as well as S. 151 of the Code, both being attracted by S. 5, Provincial Insolvency Act. But I think we have to look at the general circumstances in which that application came to be made. It may be regarded, I think, from two points of view. In the first place, it was in the nature of an application to set aside an ex parte order, and the question therefore arises whether the review machinery is appropriate to achieve such a purpose. There are some older cases such as *Bibi Mutto v. Illahi Begam* (1) and *Ghansham Singh v. Lal Singh* (2) which hold that the absence of a party owing to failure of notice is a sufficient reason within O. 47, R. 1. In these cases a review of judgment was given on such a ground. The same opinion was expressed by Kumaraswami Sastri, J., in *Virupakshigowd v. Bandappa* (3) the learned Judge holding that the party could resort to either of the two alternative procedures, O. 9, R. 13 or O. 47, R. 1. Since those judgments were passed however the Privy

1. (1884) 6 All 65.

2. (1887) 9 All 61 (FB).

3. A I R 1919 Mad 844=50 I C 327.

Council in *Chhajju Ram v. Neki* (4) has given a construction of R. 1, O. 47 which no longer, I think, permits such a broad meaning to be put upon the words "sufficient reason." Following that decision Devadoss and Waller, JJ., in *Narayana Chettiar v. Muthu Chettiar* (5) came to the conclusion that the absence of a party's pleader is not a fit ground for review. It appears to me therefore that the circumstances in which the application was made to the Subordinate Judge would not justify recourse to the review procedure and that if he was competent to reconsider his former order it must have been under the general powers conferred by S. 151, Civil P. C.

It is upon this broader ground, I think, that his second order can be justified. Whatever power he had to give delivery of the property belonging to the insolvent and the petitioners, I think it is quite clear that an order passed without notice to the petitioners was beyond his competence and, so far as they were concerned, void. I have dealt in very similar circumstances with the effect of such an order and with the power of the Court to remedy it in *Guruvammal v. Arumuga Padayachi* (6) and I would beg that the observations made there be considered as equally applicable to the circumstances of the present case. It seems to me that the first order of the Subordinate Judge was passed without jurisdiction and was void against the petitioners and that it was no less than his duty *ex debito justitiae* to take the matter up at their instance and to give them a hearing after rectifying his omission in the first place to give them notice. In circumstances such as these there is no question about resorting to the review procedure, and no question therefore of the restriction of appeals in the case of reviews can arise. Regarding then the second order, which was taken in appeal to the learned District Judge, as properly speaking, the first valid order passed by the Subordinate Judge, I do not think there is any question that it would be appealable under S. 75, Provincial Insolvency Act. I must accordingly hold that it is so appealable,

4. A I R 1922 P C 112=72 I C 566=19 I A 144=3 Lah 127 (P C).

5. A I R 1926 Mad 980=97 I C 1008=50 Mad 67.

6. A I R 1932 Mad 164=136 I C 769.

and allowing this petition I set aside the order of the lower appellate Court and remand the case for hearing upon the merits. Costs to abide and to be provided for in the appellate decree.

P.R.S./K.S.

Case remanded.

A. I. R. 1933 Madras 346

WALSH, J.

Rethinasami Thevar — Defendant —
Petitioner.

v.

Nataraja Thevar—Plaintiff—Opposite
Party.

Civil Revn. Petn. No. 171 of 1931, Decided on 25th October 1932, from decree of Sub-Judge, Tiruvarur, D/- 22nd December 1930.

(a) Provincial Small Cause Courts Act (1887), Sch. 2. Art. 28—Suit for recovery of property as heir of deceased daughter is not cognizable by Small Cause Court.

A suit by a father for recovery of property as heir of his deceased daughter is not cognizable by a Small Cause Court: *A I R 1926 Mad 37, Foll*; 27 All 622 and 27 I C 773, not *Foll*.

[P 347 C 1]

(b) Civil P. C. (1908), S. 21—Acquiescence of parties cannot give jurisdiction.

Even when objection is not taken, when there is a complete absence of jurisdiction, acquiescence of the parties cannot give the Court jurisdiction in the matter: 41 I C 276; 36 I C 457 and *A I R 1924 Cal 536, Rel on*, [P 347 C 1]

Watrap S. Subrahmanya Ayyar—for
Petitioner.

N. S. Srinivasa Ayyar—for Opposite
Party.

Judgment.—The suit was one for the recovery of jewels and vessels given by the plaintiff as stridhanam to his deceased daughter. The plaintiff's case was that the defendant paid him Rs 75 towards the price of his daughter and that the marriage was in Asura form and therefore he was the heir of his deceased daughter. The defendant's case was that the marriage was in the Brahma form. In the written statement a preliminary ground was taken in para. 6 that the suit was not maintainable on the small cause side. There is no reference to this matter of jurisdiction in the judgment, but there is nothing to show that it was given up. The plaintiff was given a decree and this revision petition is put in on the initial point that the suit was not maintainable as a small cause one as it falls under Art. 28, Sch. 2, Provincial Small Cause Courts Act. There is a decision of this Court,

Samu Asari v. Anachi Ammal (1), directly in point where Ramesam, J., held that such a suit will not be cognizable as a small cause suit and declined to follow *Chhedi v. Gulabo* (2) which latter case was followed in *Fika Sahu v. Chirkat Sahu* (3). Although the decision in this Court was that of a single Judge with great respect I agree with it. It was sought to distinguish that case by saying that it was proved that the deceased had no other property and that the learned Judge said:

"under the circumstances it is obvious that the plaintiff is suing for the whole of the property of her deceased daughter who died intestate."

In this case the plaintiff also sues as the heir of his daughter and so apparently for the whole property, but even if the property sued for is not the whole property, but is only a share of property of the intestate I fail to see how it will not bring the suit under Art. 28. Even if the objection had not been taken in the lower Court, *Ram Prosad v. Sri-charan Mandal* (4), which followed *Su-randranath v. Bangsi Badan* (5) and *Priyanath Sardar v. Mohendranath Paik* (6), are authorities that even when objection is not taken when there is a complete absence of jurisdiction acquiescence of the parties cannot give the Court jurisdiction in the matter. In my opinion the petition must be allowed with costs of both the Courts and the decree set aside. The plaint should be returned by the learned Subordinate Judge, to whom it will be sent by this Court, for delivery to the party to be presented to the proper Court.

P.R.S./K.S. *Petition allowed.*

1. A I R 1926 Mad 27=91 I C 561.
2. (1905) 27 All 622=2 A L J 388 = (1905) A W N 134.
3. (1915) 27 I C 773.
4. (1917) 41 I C 276.
5. (1916) 36 I C 457.
6. A I R 1924 Cal 536=70 I C 316.

A. I. R. 1933 Madras 347

Full Bench

BEASLEY, C. J., RAMESAM, SUNDARAM
CHETTY, WALSH AND BURN, JJ.

Commissioner of Income-tax, Madras.

v.

Madura Hindu Permanent Fund, Ltd.

Ordinary Civil Petn. No. 243 of 1931,
Decided on 28th September 1932.

Income-tax Act (1922), S. 10 (2) (iii)—Capital of fund contributed by subscribers—Subscribers to get back amount paid with

fixed interest—Such guaranteed interest is interest on capital borrowed and can be deducted in computing profits.

The capital of a fund was contributed by A and B class subscribers at the rate of Re. 1 per mensem per share. The subscribers in A class went on paying their subscriptions for 45 months and those in B class for 84 months. As soon as A class subscriber had paid Rs. 45 for one share in this manner, his account, in so far as that particular share was concerned, was closed, and he was paid off with a sum of Rs. 50. A "B" class subscriber was paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to A and B class subscribers in excess of their subscriptions to the fund were called "guaranteed interest."

Held: that the fund was really a company for the purpose of income-tax even though it was registered under the Companies Act, that the subscribers occupied the position of lenders to the fund of sums of money upon which the fund contracted to pay fixed interest, that the guaranteed interest was interest on capital borrowed for the purpose of fund's business and that it could be deducted in computing the profits of the business: *The New York Life Insurance Co. v. Styles*, (1889) 14 A C 381, *Expl. and Dist.*; A I R 1923 Mad 604 (S B) and 3 I T C 385, *Diss. from.*

M. Patanjali Sastri—for Commr. of Income-tax, Madras.

S. Srinivasa Aiyangar for *K. Rajah Aiyar*—for Respondent.

Beasley, C. J.—This reference by the Commissioner of Income-tax, Madras, under S. 66 (2), Income-tax Act (11 of 1922), has arisen out of an assessment to income-tax of the profits of the Madura Hindu Permanent Fund, Ltd. This fund was incorporated as a limited company in 1894 under the Companies Act (6 of 1882). Its memorandum of association shows that the objects of the fund are: (a) to enable persons to save money; (b) to invest their savings in landed property and Government promissory notes; (c) to secure loans at favourable rates of interest and to grant loans on sound securities; to grant loans to societies registered under the Co-operative Credit Societies Act; and (d) to do all such other things as are incidental or conducive to the attainment of the above objects. The nominal capital of the fund at its inception was stated to be Rupees 2,99,964 divided into 3,571 shares of Rs. 84 each to be paid in monthly instalments of one rupee. This was raised in 1896 and again in 1902 by the addition of further shares of the same denomination. In 1906 a new class of shares of Rs. 45 each was introduced, and in 1909, 1914, 1915, 1923, 1927 and 1929

the numbers of the shares in both classes were raised until in the last year the capital was stated to be Rupees 38,70,000 divided into 30,000 shares of Rs. 84 each ("B" class shares) and 30,000 shares of Rs. 45 each ("A" class shares).

The capital of the fund is contributed by these "A" and "B" class subscribers at the rate of Re. 1 per mensem per share. The subscribers in "A" class go on paying their subscriptions for 45 months and those in "B" class for 84 months. As soon as an "A" class subscriber has paid Rs. 45 for one share in this manner, his account in so far as that particular share is concerned, is closed, and he is paid off with a sum of Rs. 50. A "B" class subscriber is paid off at the end of 84 months with Rs. 102-8-0. The amounts of Rs. 5 and Rs. 18-8-0 thus paid out to "A" and "B" class subscribers in excess of their subscriptions to the fund are called "guaranteed interest." During the year of account (ending with 20th January 1930) there was also a third class of subscribers ("C" class). These subscribers did not pay any periodical contributions but paid a subscription of Rs. 2 on entry into the fund. They had no share in the profits but were entitled to obtain loans from the fund and their accounts were closed when they repaid their loans or at the expiry of three years from the date of admission if they did not take any loan. For the purpose of this reference it is not necessary to take into account the existence of these subscribers in "C" class.

The rules make provision for the receipt of fixed and current deposits from any person, whether a subscriber to the fund or not. The rules also make provision for the grant of loans not only to subscribers but also to non-subscribers and to registered Co-operative Societies. But in fact no fixed deposits have been received, and no loans have been made either to non-subscribers or to Co-operative Societies. The reference has therefore been made, and falls to be dealt with on the assumption that all the transactions of the fund are with its own members. It is the members of the fund who subscribe the capital, and it is to the members of the fund that the subscribed capital is lent. During the year of account the fund received a total in-

come of Rs. 1,00,907-8-10 made up as follows:

	Rs.	as.	ps.
From 'A' and 'B' class subscribers. ...	84,205	14	2.
From 'C' class subscribers ...	2,808	4	8.
„ others ...	12,698	8	0.
House rent ...	1,194	14	0.

From this the fund claimed to be entitled to deduct Rs. 86,559-3-8 made up as follows:

	Rs.	as.	ps.
Guaranteed interest to 'A' and 'B' class subscribers ...	68,462	13	3.
Interest paid to 'A' and 'B' class subscribers on fixed deposits ...	6	9	3.
Interest paid on security deposits and provident fund ...	850	14	5.
Interest paid to non-subscribers ...	139	12	0.
Establishment ...	10,308	5	1.
Contingencies ...	6,790	13	10.

This left a net profit according to the fund of Rs. 14,348-5-2, and that figure was returned to the income-tax officer. The income-tax officer made certain minor adjustments. He allowed in the main all the items of expenditure except the item of Rs. 68,462-13-3. He held that this was a profit earned during the year and therefore liable to be assessed to income-tax. His decision was based mainly upon the point that the fund had dealings with C class shareholders who were not subscribers of capital and not sharers in the profits. He was influenced also by the fact that according to the by-laws loans could be made to persons who were not members of the fund and to Co-operative Societies. As already indicated, these circumstances have to be left out of account in dealing with this reference.

The Fund appealed to the Assistant Commissioner of Income-tax and the appeal was dismissed. The Fund thereupon applied to the Commissioner of Income-tax to make a reference to this Court under S. 66 (2), Income-tax Act. The Commissioner considers, agreeing with the income-tax officer and the Assistant Commissioner, that this amount of Rs. 68,000 distributed in the shape of "guaranteed interest" forms part of the profit earned by the fund, (by trading with its own members), and that this would be assessable to income-tax if it were not for the decision of this Court in *Board of Revenue v. Mylapore Hindu Permanent Fund* (1). The Commissioner admits that the facts

1. A I R 1923 Mad 684=76 I C 833=47 Mad 1 (SB).

of the present case are very similar to those of the *Mylapore Fund* case (1), and as the decision in the *Mylapore Fund* case (1) was based upon the case of *New York Life Insurance Co. v. Styles* (2), he has framed the questions which he desired to refer in the following form:

Question 1.—Are the facts of this case such that the ruling in *New York Life Insurance Co. v. Styles* (2), can be applied to them?

Question 2.—If the fund is conducting a business and making a profit, is the “guaranteed interest” to be deducted in computing that profit as being “interest on borrowed capital” within the meaning of S. 10 (2) (iii) of the Act?

With regard to the first question what were the facts in *New York Life Insurance Co. v. Styles* (2)? They were that the life insurance company had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the company of the probable death-rate among the members and of the probable expenses and other liabilities, and the amount claimed for premiums from members was commensurate therewith. An account was annually taken and the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy-holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of members. It was admitted that the income derived by the company from investments and from all transactions with persons not members, was assessable to income-tax. It was held by Lords Watson, Bramwell, Herschell and Macnaghten, Lord Halsbury L. C., and Lord Fitz Gerald dissenting, that no part of the premium income received under participating policies was liable to be assessed to income-tax as profits or gains under Sch. D. Lord Halsbury, L. C. and Lord Fitz Gerald held that the surplus returned or credited to members was liable to income-tax. In this case the majority of their Lordships distinguished the case from

Last v. London Assurance Corporation (3), the income in that case being derived from transactions with persons not members and not from mutual insurance between members only. That is what the headnote to *Styles*' case (2) states. Lord Watson on p. 393 says:

“The main and to my mind essential difference between *Last*'s case (3) and the present consists in the fact that in this case the policy-holders are not outsiders, because they, and they alone, are members of the company. In *Last*'s case (3) the insured and the corporation stood to each other in no other relation than that of creditor and debtor; they were in all respects separate and independent bodies, without community of rights and interests, their sole connexion being a right on the one part to pay premiums, with a counter obligation, when these had been duly settled, to pay the sum insured,”

and on p. 394:

“When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the time and under the conditions specified in their policies.”

On p. 396 Lord Bramwell stated with reference to the facts in *Last v. London Assurance Corporation* (3) as follows:

“Certain persons agree to insure their lives among themselves on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities, and to leave a margin for contingencies. What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities and to give the insured the benefit of the surplus, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their

2. (1889) 14 A C 381=59 L J Q B 291=61 R T 201.

3. (1885) 10 A C 438=55 L J Q B 92=53 L T 634=34 W R 233=50 J P 116.

mutual benefit—having no dealings or relations with any outside body—can be said to have made a profit when they find that they have overcharged themselves and that some portion of their contributions may be safely refunded. If profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion."

At the bottom of p. 412 he continues:

"I do not think that that decision *Last v. London Assurance Corporation* (3) compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more than is wanted, and then get back the difference, are earning gains or profits, and so liable to income tax."

On p. 410 Lord Herschell says:

"Once show that profits are made by trading and they are taxable, whatever the purpose to which they may be applied. But in the present case I cannot see that the income sought to be taxed is profit arising from trading."

It is obvious that in one respect—and it certainly is an important one—the facts of this case differ from those in *New York Life Insurance Co. v. Styles* (2). In the latter case the fund sought to be taxed was the surplus arising out of an over-estimate. It was nothing that had been earned. A member who paid a premium of £50 got back not more than £50 contributed by him either by means of a cash bonus or by reduction of premium. Their Lordships in that case were therefore dealing only with a surplus. Here the facts are quite different because the guaranteed interest is certainly interest which has been earned. *New York Life Insurance Co. v. Styles* (2) therefore can have no application here; nor could the decision in *Board of Revenue v. Mylapore Hindu Permanent Fund* (1) have been rightly based upon it. The only support that it gives to that case are the observations of Lord Bramwell, Lord Watson, Lord Macnaghten and Lord Herschell, where the fact that the business was a mutual undertaking pure and simple was so strongly emphasized. *Style's* case (2) was also the basis of this High Court's decision in *English and Scottish Co-operative Society v. Commissioner of Income tax* (4). It is not necessary to refer to the facts of that case because the point for consideration is shortly set out in the concluding portion of Odgers, J.'s judgment as follows:

"If therefore this return of interest on the share capital to the persons called share holders, namely, the Co-operative Wholesale Society and Scottish Co-operative Wholesale Society is simple, as it appears to be and as is sworn by

the affidavit of Sir Fairless Barber, merely a return on the amount of its subscribed capital or handing back of a portion of the amount subscribed and in no sense a dividend on the profits earned by the company, then I think it falls within the ambit of *Styles' case* (2); and that if that is so, it is simply a return in another form of the rateable dividend in R. 20 (e). It is clearly not a division of profits in the ordinary sense but is purely notional, for we are told that no money changes hands. This notional profit is calculated on the difference between the market price of the commodities at the time they are distributed to the members of this society and the actual cost of their production to the society when ascertained. This so-called profit is distributed in the six ways provided for by R. 20, and on this so-called profit after allowing for depreciation, interest is to be paid on the share capital, i. e., to the only two members of the society in proportion to their contributions to the capital. I am unable to see on the facts of this case as disclosed in the rules and on the only evidence we have, namely, the affidavit of Sir Fairless Barber, any evidence of a profit being made by sales to persons outside the membership of the society. There is no evidence as stated above that any other societies except the two named in R. 5 have been admitted to membership. It seems to me that this is a case of a purely mutual concern. We know that the whole of the produce raised and exported by the Association is in fact divided among these two members."

I think that it is hardly right to say that *New York Life Insurance Co. v. Styles* (2) governed either of the two cases referred to—and it does not govern this case—although the observations made by their Lordships in their judgment certainly support the result arrived at in both. I am not disposed to say therefore that those two cases were wrongly decided although, in my opinion *New York Life Insurance Co. v. Styles* (2) does not govern them. I would answer question 1 in that way although in my opinion it is not necessary here to consider the effect of the ruling in *New York Life Insurance Co. v. Styles* (2) on the two income-tax decisions of this High Court to which reference has already been made, because I think that this question can be answered favourably to the assessee in question 2 for reasons which I will now give. Of course if no profit has been earned, then no question of deductions under S. 10 (2) (iii), Income-tax Act, arises. But on the assumption that the assessee has earned a profit, I will proceed to the consideration of question 2. Is this guaranteed interest on capital borrowed for the purposes of the business where the payment of interest thereon is not in any way

dependent on the earning of profits? For the Income-tax Commissioner it is contended that this 'guaranteed interest is interest on the share capital, that interest on share capital must always be dependent upon its being earned by profits being made and that it is not capital borrowed for the purposes of the business within S. 10 (2) (iii), Income-tax Act.

It is to be observed that by Cl. (5), Memorandum of Association, there is to be a nominal capital divided into shares and it is further argued that there is here a share capital, that the proprietors of the shares are share-holders and that the interest earned is profit made by the assesseees. On the other hand the contention of the assesseees is that this is not really share capital at all but subscription capital raised by recurring subscriptions paid periodically by the share-holders or subscribers, that the share-holders or subscribers are creditors of the company and that as they must under the Articles of Association be repaid the accumulated subscriptions plus the guaranteed interest at the end of the specified period, these subscriptions cannot really be share capital, although so described, and of course a share-holder cannot demand repayment of his share-capital. The Income-tax Commissioner meets this point with the argument that the provision for the return to the share-holders of the amounts contributed by them is ultra vires because this fund has chosen to get itself registered under the Companies Act and it is therefore a company and it must have capital and it is repugnant to the provisions of the Companies Act for the capital of the registered companies to be returned to its share-holders. Capital, of course, can be reduced but only with the sanction of the Court. In my opinion, the fact that the fund is registered under the Companies Act and is subject to its provisions is not by any means conclusive of a question which arises under the Income-tax Act.

The fact is that the machineries of the Companies Act cannot be in its entirety adopted to a fund such as this. This fund and many similar are not really companies but Mutual Benefit Societies with a fluctuating capital dependent entirely upon the amount subscribed by their members and the repayment of

subscriptions plus guaranteed interest to the members. The capital is bound to vary from time to time and to say that, whenever this capital is reduced by a repayment to the members, it is necessary to get the sanction of the Court would be to make such funds unworkable. In my opinion although these subscriptions are called share-capital, they are not really so as that description is understood in its ordinary sense; nor is this capital borrowed for the purpose of the business as that capital is ordinarily understood. It is something different from both. That this is so and that the legislature recognized the distinction is clearly shown by the explanation to S. 10 (2) (iii), Income-tax Act, where recurring subscriptions paid periodically by share-holders or subscribers in such Mutual Benefit Societies as may be prescribed are to be "deemed" to be capital borrowed within the meaning of S. 10 (2) (iii). If it is "deemed" to be capital borrowed then it is not really capital borrowed but is for the purpose of the Income-tax Act to be so considered. The fact that no Mutual Benefit Societies have as yet been prescribed may be due to various causes with which we are not really here concerned. What we are concerned with is the apparent intention of the legislature to recognize an association of persons not having share-capital but borrowing and lending from and to themselves for the mutual benefit of themselves.

This borrowing is to be deemed to be a borrowing of capital and that being so, the interest on it can be deducted from the profits and gains of the Association under S. 10 (2) (iii), Income-tax-Act, if the payment of interest upon it is not in any way dependent on the earning of profit. For the Income-tax Commissioner it is argued that if the subscriptions to this fund are to be treated as capital borrowed for the purpose of the business, the payment of interest upon that capital is dependent upon the earning of profits. If there are no profits, it is argued, there can be no interest; and a company can only pay interest out of profits and cannot pay interest out of capital. The answer to that contention is that this fund is really not a company and that it is not paying interest on its share-capital but is paying a fixed interest to its members or subscribers.

who occupy the position of lenders to the fund of sums of money upon which the fund contracts to pay fixed interest and for which I am of the opinion the lender can sue the fund in the same manner as anyone who has lent money to a partnership or firm at a certain rate of interest could sue that partnership or firm for repayment of the principal and interest. It seems to me therefore that the guaranteed interest is interest on capital borrowed for the purpose of the fund's business and that its payment is not in any way dependent on the earning of profits. I would accordingly answer Question No. 2 in the affirmative.

Ramesam, J. — I entirely agree with my Lord's judgment. As I delivered the judgment in *Board of Revenue v. Mylapore Hindu Permanent Fund, Ltd.* (1), it is only proper to add that I also agree with my Lord in thinking that the actual decision in *Style's case* (2), did not govern the *Mylapore Fund case* (1) :

"although the observations made by their Lordships in their judgment certainly support the result arrived at"

in the latter case, and that it cannot be said that the case in *Board of Revenue v. Mylapore Hindu Permanent Fund, Ltd.* (1) was wrongly decided. That case arose under S. 9, Act 7 of 1918. It is unnecessary now to say how exactly that decision ought to have been put, whether the guaranteed interest payable to subscribers was not "profits" at all within the meaning of S. 9, Act 7 of 1918, or whether the subscriptions paid by the subscribers should be considered to be analogous to borrowed capital. It seems to me that the legislature considered the decision right and sought to put it on the latter basis by adding the explanation to sub-Cl. (iii), S. 10 (2) of the present Act, the sections being otherwise similar. The fact that no Mutual Benefit Societies have been prescribed under the explanation does not, as pointed out by my Lord, prevent us from adopting the construction now adopted. The assesses will have his costs which we fix at Rs. 500.

Sundaram Chetty, J. — I am in entire agreement with the judgment of my Lord the Chief Justice and have nothing to add.

Walsh, J. — I agree with my Lord and have nothing to add.

Burn, J. — I agree with my Lord the Chief Justice.

P.R.S./K.S.

Reference answered.

A. I. R. 1933 Madras 352

CURGENVEN, J.

Thangavelu and another—Plaintiffs—Appellants.

v.

Nachu Narayana Padayachi and others—Defendants—Respondents.

Second Appeal No. 1670 of 1928, Decided on 6th December 1932, against decree of Sub-Judge, Trichinopoly, in Appeal Suit No. 13 of 1927.

Minor—Sale by guardian—Two-thirds of purchase money for purpose binding on minor—Sale is binding on minor.

A sale of a piece of land was executed by the mother of the minors for Rs. 600 out of which Rs. 400 which was binding on the minor was to discharge a debt incurred by their father and the balance was spent for purchasing another piece of land for the minor :

Held : that the sale must be held binding on the minor because the preponderance of the purchase money was for a binding purpose : *A I R 1927 P C 37*; *A I R 1927 P C 244* ; *A I R 1927 P C 246* and *A I R 1929 P C 143, Ref.*

[P 353 C 1]

K. S. Desikan—for Appellants.

K. Bhashyam Ayyangar and T. R. Srinivasan—for Respondents.

Judgment.—The suit was brought by two minor plaintiffs to set aside a sale-deed executed by their mother to defendant 1. The consideration for the sale, which was of a piece of land, was Rs. 600 of which Rs. 400 is now admitted to be binding upon the minors, both the Courts having found that it was in discharge of a debt incurred by the father. The remaining Rs. 200, it is said, was expended upon purchasing another piece of land for the minors. It is unnecessary here to go into the question whether a guardian has ordinarily a right to spend money for a purpose like this as the case, in my view, is one of those in which the sale must be held binding because the preponderance of the purchase money was for a binding purpose. That as a legal principle has been laid down now by the Privy Council in a series of cases such as *Sri Krishna Das v. Nathu Ram* (1); *Suraj Bhan Singh v. Sah Chain Sukh* (2) and *Gowri Shankar v. Jiwan Singh* (3). It

1. *A I R 1927 P C 37=100 I C 130=54 I A 79=49 All 149 (P C).*

2. *A I R 1927 P C 244=105 I C 257 (P C).*

3. *A I R 1927 P C 246=107 I C 4 (P C).*

must always remain a question of applying this principle and therefore of the discretion of the Court as to what proportion should be found to be binding in order to constitute the sale binding as a whole. In the present case a third of the money was not appropriated to an incontestably binding purpose. My attention is drawn to a Privy Council case: *Ram Sunder Lal v. Lachhmi Narain* (4) in which out of a total consideration of Rs. 10,000 and odd some Rs. 7,000 had been found to be not of this character. I cannot accordingly say that the lower appellate Court has committed any error of law in holding that in the circumstances of this case the sale ought to be confirmed and the suit dismissed. I accordingly dismiss the second appeal with costs.

P.R.S./K.S. *Appeal dismissed.*

4. A I R 1929 P C 143=51 All 430 (P C).

A. I. R. 1933 Madras 353 (1)

PANDALAI, J.

Balgis Beevi Ammal—Petitioner.

v.

Hathija Beevi Ammal—Opposite Party.

Civil Revn. Petn. No. 1755 of 1931,
Decided on 23rd March 1932.

Court-fees—Defendant making claims as to items in account to be taken in suit, is not required to pay court-fees on sums claimed—Accounts.

Where the defendant is not putting forward any counter-claim, but is making various claims as to items in the particular account to be taken in the suit, he cannot be asked to pay court-fees on those sums. [P 353 C 1, 2]

C. A. Seshagiri Sastri—for Petitioner.

P. Rajamannar for Govt. Pleader—
for the Crown.

Judgment.—In deciding that defendant 1 should pay court-fees on the four sums mentioned in paras. 6 to 9 and the postscript of his order, the learned Judge would have been well advised in not relying so much on check slips issued by the court-fee examiner, but on some provision of law which requires the payment of the court-fee. The learned Government Pleader is quite rightly unable to support the order as it is quite erroneous. The defendant is not putting forward any counter-claim, if such a proceeding is known to the procedure laid down by the Code of Civil Procedure, but making various claims as to items in the partition account to be taken in the suit. The order of the learned Judge

is set aside. The costs of this petition will be costs in the cause.

P.R.S./S.N.

Order set aside.

A. I. R. 1933 Madras 353 (2)

WALSH AND BARDSWELL, JJ.

Srinivasalu Naidu—Appellant.

v.

Ramakrishna Naidu—Respondent.

Letters Patent Appeal No. 75 of 1929.
Decided on 26th October 1932.

(a) Civil P. C. (1908), S. 100—**Finding of fact.**

No second appeal lies from a concurrent finding of fact of the lower Courts if such finding has been given on a point raised by the parties and on which the parties had let in evidence: 29 Bom 1 (P C), Dist. [P 355 C 1]

(b) Contract Act (1872), S. 253—**Partnership—Dissolution may be inferred from circumstances.**

A partnership is not dissolved merely because it is closed, but it must be dissolved in one way or other known to and recognized by the law.

[P 355 C 2]

A dissolution of partnership at will can be inferred from circumstances of the case. In a suit for partnership accounts neither the plaintiff in his plaint nor the defendant in his written statement had stated that the partnership had dissolved; there was only the allegation that the partnership came to an end. But the plaintiff in his examination-in-chief and cross-examination let in evidence which tended to prove dissolution:

Held: that there was dissolution of the partnership even though it was not expressly stated or raised in the plaint: A I R 1925 All 787; A I R 1930 Lah 378 and A I R 1921 Cal 538, Appr.; 36 Mad 185, Rel on. [P 356 C 2]

(c) Practice—**Burden of proof—Point that onus had been wrongly thrown cannot be taken for first time in Letters Patent Appeal.**

The point that onus of proof had been wrongly thrown on a party cannot be taken for the first time in Letters Patent Appeal when it has not been taken either in the first appeal or second appeal: A I R 1927 P C 238, Rel on. [P 356 C 2]

(d) Limitation Act (1908), Arts. 106 and 120—**Suit for accounts of dissolved partnership—Art. 106 applies and not Art. 120.**

A suit for accounts in respect of a partnership which has already been dissolved is governed by Art. 106 and not by Art. 120: A I R 1919 Mad 838, Dist.; A I R 1921 Cal 538 and A I R 1930 Lah 378, Ref. [P 357 C 2]

(e) Civil P. C. (1908), S. 103—**Evidence not properly considered—High Court will interfere.**

Even with the concurrent findings of the two lower Courts as to fact, if they have not properly and fully considered all the evidence put before them, the High Court will interfere.

[P 357 C 2]

A. Viswanatha Ayyar and *A. Ramaswami Ayyar*—for Appellant.

K. Krishnaswami Ayyangar and *A. Seshachari*—for Respondents.

Bardswell, J.—This is an appeal from the decree and judgment of Reilly, J., in S. A. No. 1223 of 1927. The suit was originally filed in the Court of the District Munsif of Arni by two plaintiffs who are now the respondents before us. Their case was that on 20th December 1916 they and the defendant, who is now the appellant, entered into an oral agreement that they should invest capital in equal shares and carry on at Arni a business in groundnuts, paddy and rice on certain terms, under the name and style of Sri R. A. Subbarayulu Naidu Co. They carried on business accordingly at Arni from 20th December 1916 till August-September 1918. Then they stopped the mandi business at Arni as they found it unprofitable; but, after an interval, they "decided to continue the said company" and carry on business instead at their own village, Vallam, by buying groundnuts and stocking them. This business at Vallam, in which they were assisted by sub-partners, was carried on from 17th November 1919 till January-February 1930, after which misunderstandings arose.

The suit was brought for dissolution of the "company" and the taking of accounts. In a written statement, which is by no means as clear as could be wished, the defendant has admitted that there was the partnership at Arni, though he denies the truth of some of the details of the partnership as set out in the plaint. The written statement goes on to say that "the partnership came to an end in 1918 as alleged in the plaint," though the plaint has alleged no such thing, and that :

"it is wrong to state that it was continued into fresh partnership as alleged by the plaintiffs. Both of them were independent and unconnected transactions."

In para. 5 it speaks of a new business, but in para. 6 it talks of a new partnership. In para. 9 it says that the "partnership property" was stored in the plaintiff's house; in para. 11 it refers to the "partnership accounts;" in para. 18 it speaks of the "partnership concern" and in para. 19 the "partnership assets" are mentioned, but in none of these paragraphs is it stated whether the partnership referred to was at Arni or at Vallam or at both places. In conclusion it is prayed in the written statement that the accounts may be looked into and

settled. It nowhere says in so many words that there was a dissolution of the Arni partnership or sets up that the claim of the plaintiffs in respect of that partnership was barred by limitation. The suit was contested, and decided by the District Munsif, with reference to the first part of issue 2 which runs thus : "Was the partnership at Arni continued at Vallam?"

The learned District Munsif has found, on dealing with that issue, that the Vallam trade was not a continuation of the Arni partnership, but that it was an entirely new business, with no relation to the old one except that the men among whom disputes have arisen are the same in respect of both the trades. He has also found that, in this view, the Arni partnership must be deemed to have been dissolved, at the latest, on 2nd November 1919, and that, as the suit was filed more than three years after that date, the claim for accounts in respect of the Arni partnership was barred under Art. 106, Lim. Act. He has therefore granted a decree for the taking of accounts of the Vallam partnership only. This decree was confirmed in a brief judgment on first appeal by the District Judge of North Arcot; but, on second appeal, Reilly, J., ordered that accounts should be taken of the Arni business also. In his judgment he has said that, even if the business conducted by the parties at Arni was that of a different partnership from that which subsequently conducted business at Vallam, the plaintiffs are entitled to have accounts taken of the Arni business, unless the partnership concerned in that business was dissolved more than three years before the date of the suit.

He remarks that the defendant did not allege dissolution of that partnership at any particular date, nor can his written statement be reasonably construed as pleading dissolution at all. He also expresses the opinion that the evidence on which the two lower Courts have held that there was a dissolution of the Arni partnership was not, in the circumstances, sufficient to establish the fact of such dissolution, and says that the two lower Courts appear to have been confused by the question whether the business at Arni was the business of the same partnership as that which conducted the business at Vallam, and to

have overlooked the importance of the question whether and when there was a dissolution of the first partnership, if there was more than one partnership. This confusion he attributes mainly to the way in which the defendant's written statement was drafted.

On this appeal the main contentions are that Reilly, J., erred in setting aside the concurrent judgment of the two first Courts, failing to note that they were based on a finding of fact, and that in any case the evidence conclusively shows that the Arni business was dissolved over three years before the suit was filed. Now in this case there has certainly been a concurrent finding, both in the first Court and the appellate Court, that there was a dissolution of the Arni partnership. The learned District Munsif has found that

“there was a radical change contemplated in the partners inter se and the firm became dissolved.”

The learned District Judge finds it clearly established that “the Arni partnership came to an end” by which he evidently means that it was dissolved, as he has expressly discussed the question of whether the first Court was correct in holding that there had been a dissolution of the partnership. Under S. 100, Civil P. C., a second appeal does not lie to the High Court on a pure question of fact. Our attention has however been called to *Shivabasava v. Sangappa* (1) in which it was held that S. 584, to which the present S. 100 corresponds, applied to a case in which the lower appellate Court had disposed of a suit upon a case not raised by the parties and to which the evidence had not been directed. We shall have occasion to show that evidence has been directed to the point of whether the Arni partnership had been dissolved. What has to be considered more carefully is the point as to the suit having been decided upon a case not raised by the parties. These and various connected points have to be dealt with and decided by us, before we can come to a conclusion as to whether or no the learned Judge who heard the second appeal disposed of it on a pure question of fact.

That there was a dissolution of the Arni partnership was not at all the case

1. (1904) 29 Bom 1=31 I A 154 = 8 Sar 720 (P C).

as set up in the plaint. The plaintiff's case was that the partnership was continuing, and so the learned District Munsif should not have attached importance as he has done, to there being no allegation in the plaint “that the Arni trade dissolved within three years of the suit.” Naturally there could be no such allegation. Even the written statement does not say in so many words that the Arni partnership was dissolved. The word “dissolution” does not occur in the written statement at all. The most that it says is that the partnership, meaning the Arni partnership, came to an end in 1918. It has been held by the Allahabad High Court, in *Chunilal v. Sheo Charan Lal* (2) that a partnership will not be dissolved merely because it is closed, but it must be dissolved in one way or other known to and recognized by the law. S. 253, Contract Act, provides that a partnership is dissolved by the death of any partner, or if any member of a partnership ceases, from any cause whatever, to be so. *Dinmahomed v. Khansi Ram*, A. I. R 1930 Lah. 378, shows that a partnership is not necessarily dissolved because the work of the partnership ceases, though at the same time it indicates that dissolution of a partnership can be inferred from the facts of the case. We may however note that this decision uses the expression “came to an end” as an equivalent for dissolution and that that very expression “came to an end” is what is used in the written statement with reference to the Arni partnership though it is, unfortunately, qualified by the words “as alleged by the plaintiffs,” whereas the plaint has no such allegation. In *Harimohandas Poddar v. Sundarson Poddar* (3) the Calcutta High Court held that the stoppage of a business cannot be treated as the dissolution of a firm. The defendant in this case has, indeed, set up in his written statement something more than a mere stoppage but, at the same time, he has not explicitly and definitely set up the fact of dissolution. Nor is there any issue framed as to dissolution. These points, no doubt, tell in favour of the plaintiffs.

But the matter does not rest there. It is represented that the plaintiffs were

2. A I R 1925 All 787=47 All 756 = 89 I C 122.

3. A I R 1921 Cal 538=66 I C 811.

prejudiced in that they were taken un-awares by the first Court's taking for the first time at the trial a point that was not covered by the issues. But we have to point out that if a new point was thus taken it was due to what was stated by plaintiff 1 himself even in his examination-in-chief. In the course of it he has produced Ex. 4, a rough calculation which he says was written by the defendant in his presence though the defendant is noted in the first Court's judgment as having denied that he wrote it. This document is dated 2nd November 1919, 15 days before the new business at Vallam was started, and the plaintiff has said as to it :

"The defendant directed me to receive the debts due from the debtors of the firm at Arni. He also calculated the interest due on my capital and his capital. It was ascertained that the defendant owed Rs. 446-15-8. It was prepared to find out how much the defendant owed me. The Arni accounts were not settled and they were not carried forward to the Vallam accounts."

This evidence shows that he was perfectly aware that there was a question as to whether the partnership at Arni had been dissolved. He may have thought that the question was involved in the first part of issue 2, or he may have had some other reason of his own for letting in evidence on the subject. At any rate there we have his evidence in chief, on which he was, of course, cross-examined. In his cross-examination he admits that Ex. H was prepared before the Vallam business began though he says it was ten days before, which is not quite accurate. He says, further, that

"all that remained to do in connexion with the Arni business was to collect the outstandings, pay up the debts and ascertain the profit and loss,"

and he explains the figure of Rupees 446-15-8 in the following way: A certain amount was found due to the defendant and a certain amount to the plaintiffs. These amounts were totalled, and divided by three. The defendant then deducted what was to his credit and said that he owed Rs. 446-15-8. If he had paid that amount there was nothing more to adjust "as between ourselves." Plaintiff 1 himself accepted the correctness of Ex. H. And, again, plaintiff 1 says :

"When the Vallam trade commenced no money or assets of the Arni trade were taken for

the Vallam trade. We invested a separate capital for the Vallam trade."

No doubt what was elicited in his cross-examination gave far clearer evidence on which a finding of a dissolution of partnership could be based than what he stated in his examination-in-chief, but when he had given evidence in chief that bore on the subject of dissolution, he cannot be said to have been taken by surprise by that subject being raised, and it was only in the natural course of events, following on what he had said in chief, that his further statements in cross-examination were elicited from him. It is true that there was no re-examination but we cannot hold in the circumstances that this was because he was unaware that the question of dissolution had been raised. It may very well have been because no re-examination could explain away what he had admitted. It has been argued that no heed should be paid to the evidence of P. W. 1 as the onus had been wrongly laid on the plaintiffs who should therefore not have been called upon to lead evidence. *Peddi Reddi Jogi Reddi v. Chinvaibbi Reddi*, A. I. R. 1929 P. C. 13, has been cited to us in this connexion and also, among other cases the Privy Council decision in *Official Assignee of the estate Cheah Sova Taun v. Khoo San Chcow* (4) and *The Official Receiver v. W. K. M. R. M. Chettiar Firm* (5). We do not however find it necessary to go into the various decisions that have been cited to us in this connexion as even 'taking it that the burden of proof was wrongly thrown on the plaintiffs, that appears to have been done with their acquiescence, and certainly no point as to the onus of proof having been wrongly thrown was taken on either first appeal or second appeal. It is too late for the point to be taken now, even if it be taken correctly. It was decided by the Privy Council in *Secy. of State v. Girijabai* (6) that when the plaintiff had accepted the onus on the issues as they were framed and evidence was gone into on that basis and the parties proceeded to trial accordingly it was too late for the plaintiff to raise before their Lordships, on appeal from an appellate decision of the High Court

4. A I R 1930 P C 265=128 I C 662.

5. A I R 1931 P C 75=58 I A 115 = 9 Rang 170=131 I C 767 (P C).

6. A I R 1927 P C 238=106 I C 1=54 I A 359 =51 Bom 957 (P C).

of Bombay, the question of whether the onus of proof had been wrongly thrown on him. We may also add that this is not a case where the evidence is nicely balanced, so as to make it material, when all the evidence is before the appellate Court, where the onus lies. The concrete evidence, in fact, is practically all one way, and it is the evidence of one of the plaintiffs.

Next as to the point of limitation. When the learned District Munsif found that a question of limitation arose from the evidence for the plaintiffs he was entitled and indeed obliged to deal with it. He had evidence before him from which it was open to him to draw the inference that the Arni partnership was dissolved on 2nd November 1919, over three years before the suit. It is however contended before us that, even taking it that the partnership was dissolved on 2nd November 1919, the suit was within time in that Art. 120, which allows a period of six years within which to bring a suit, applies and not Art. 106 which allows only three years. Art. 106 is as to a suit for an account and share of the profits of a dissolved partnership, while Art. 120 is as to suits for which no period is provided in Sch. 1. In this connexion we are referred to *Narayana-swami Mudali v. Gangadhara Mudali* (7) in which it was held that Art. 106 is inapplicable to a suit which is in terms one for dissolution of a partnership even though the parties treated it as one for an account of a dissolved partnership. That decision however dealt with a partnership which had not been dissolved at the time when the suit was filed, and the Court had to fix the time from which the partnership should cease to exist. In the present instance, though the suit was brought as one for the dissolution of an existing partnership, it has been found as a fact that the partnership had been dissolved over three years before the suit was filed. As pointed out by the Calcutta High Court in *Haramohandas Poddar v. Sudarshan Poddar* (3) Art. 106 applies only to dissolved partnerships, but the finding in this case is that the Arni partnership has been dissolved. *Dinmohamed v. Kanshi Ram*, A. I. R. 1930 Lah. 378, is to a similar effect to *Haramohandas Poddar v. Sudarshan Poddar* (3). Had

7. A I R 1919 Mad 838=48 I C 89.

the suit been brought for the dissolution and taking of accounts of a partnership that had not been dissolved, then we should have to follow these decisions and hold that not Art. 106 but Art. 120 was applicable; but, when the suit was brought in respect of a partnership that had already been dissolved, the matter is otherwise. We cannot hold that it is open to a party to bring a suit saying that a partnership still subsists when it has, in fact, been dissolved, and then claim the benefit of Art. 120 on the basis of an untrue contention. We agree with the two lower Courts that, on their findings of fact, Art. 106 applied to the case so as to make the relief prayed for in respect of the Arni partnership barred by limitation.

There remains one more point to be dealt with. Reilly, J., has remarked that Exs. K and Z (1) had not been considered. Were this the case there might be ground for interfering, even with the concurrent findings of the two lower Courts as to fact, in that they had not properly and fully considered all the evidence that was put before them. But, with all respect, we have to point out that the learned Judge is not accurate in this remark. The learned District Munsif has very specifically dealt with Ex. Z (1) along with which Ex. K, which he has not mentioned, has to be read, and found that no weight attaches to it. By Ex. K the parties jointly sold some properties of the Arni business on 12th December 1919, that being after the Vallam business had started, and the sale proceeds of Rs. 1,000 were utilized for the Vallam business, and credited to it in Ex. Z-1 on the following day. It is admitted that the entry as to these sale proceeds is the only entry in the Vallam accounts relating to the Arni business, and the view of the District Munsif is that:

"all that it amounts to is that the parties brought in their common property as their contribution for the Vallam trade,"

a view which he was entitled to take. The learned District Judge has not referred in terms to Exs. K and Z (1) in his appeal judgment, but he has relied on the admissions of plaintiff 1 as P. W. 1, and one of these admissions he could legitimately take as covering the case of these exhibits. This is when P. W. 1 says that it was a separate capital that was

invested for the Vallam trade. Reilly, J., has discussed the effect of Ex. H and the statements of P. W. 1 as to it, but the findings of the two lower Courts on that matter were findings of fact which could not be questioned on second appeal. Lindley on Partnership states that a dissolution of partnership at will can be inferred from circumstances, and this has also been held in the Privy Council decision in *Joopody Sarayya v. Lakshmanaswamy* (8) from which the learned District Munsif has extracted a long quotation which is applicable to the facts in this case. In this case there were undoubtedly circumstances from which it was open to the two lower Courts to draw the inference which has been drawn by them as to the partnership having been dissolved. In conclusion we hold that the two lower Courts have arrived at a finding of fact, and that as there was no legal impediment or objection to their arriving thereat, it was not competent for the learned Judge who heard the second appeal to interfere with their decrees on the grounds stated by him, which amount to a difference from them on a question of fact, the point of limitation being merely a corollary to what they found as to the facts. We therefore allow the appeal and restore the decree of the learned District Munsif, with costs to the appellant-defendant in the Court of the District Munsif and the District Judge and in this Court in second appeal and on this appeal.

P. R. S. / K. S. *Appeal allowed.*

8. (1913) 36 Mad 185 = 19 I C 513 (P C).

A. I. R. 1933 Madras 358

BARDSWELL, J.

Chintapatla Venkatanarasimha Ramchandra Rao and others—Petitioners, In re.

Civil Misc. Petn. No. 3987 of 1932, Decided on 4th October 1932 against order of Dist. Judge, Kistna, D/- 30th October 1929.

Civil P. C. (1908), O. 41, R. 3—Memorandum of appeal not registered is not appeal—Continuance of concession for completing it cannot be given

A memorandum of appeal which has not been registered is not to be regarded as an appeal but only as a memorandum of appeal presented to the Court. As long as there are defects in it, all that the Court can do under O. 41, R. 3 is to return it and give the party a chance of putting it again in a complete form; and any time that

it allows for re-presentation is only by way of concession. Hence a continuance or extension of the concession cannot be demanded as a matter of right at any rate after the expiry of the nominal period of limitation within which the appeal can be presented: *A I R 1927 Cal 775 Rel. on.* and *A I R 1932 P C 165, Dist.*

A party failed to complete the memorandum of appeal even though it was returned to him thrice and sufficient time was allowed each time to represent it in a complete form.

Held: that it must be rejected. [P 360 C 1]

P. Satyanarayana Rao—for Petitioners.

Order.—This is a petition for excusing the delay in representing a Memorandum of Civil Miscellaneous Second Appeal. The memorandum of appeal was first filed on 14th April 1930. It was returned on 11th June 1930 for revision of the cause-title and preamble and of certain affidavits and the stamping of the decree of the first Court. The time allowed was one week but the re-presentation was not made till 19th December 1930, that is after a delay of 155 days. The memorandum was again returned on 24th December 1930, because provisions of law had not been entered, because the affidavit did not contain certain information, because the cause title and preamble needed revision and because the petitions had not been properly stamped. The re-presentation this time was on 30th April 1931, the delay being one of 114 days. Once again the memorandum was returned because the decretal order of the first Court still remained unstamped, because some of the requisitions made on the previous return had not been satisfied and for other reasons. The re-presentation on this occasion was not till 2nd August 1932, after a delay of 386 days. Even then, after all this immense delay, all the requisitions had not been complied with. The actual period of delay that tells against the petitioners is 627 days.

The reasons given for the delay by Mr. P. Satyanarayana Rao are that the clients did not send him the full instructions to comply with the requisitions of the office, and that as soon as the papers were returned he wrote to his clients to send the money, but that, owing to the dullness of the money market, they sent the money only recently. The petition for excusing delay was put in on 19th December 1930 and relates only to the

delay in first re-presentation. There has been no supplementary petition and no supplement to the first petition in respect of the delays which have subsequently occurred. The reasons given for the first delay are not adequate while those given for the subsequent delays are nil. The delays cannot therefore be excused.

On my holding that the delays could not be excused Mr. Satyanarayana has gone on to contend that it is not open to me to reject or dismiss the memorandum of appeal, but that the most that I can do is to order that his clients must pay the costs of the appeal in any event. He has referred to the various provisions of law under which an appeal can be rejected or dismissed, but the only one to which I find it necessary to refer is O. 41, R. 3 which allows for the rejection of a memorandum of appeal that has not been admitted. Provisions of law as to how an appeal can be dealt with after admission have nothing to do with this case. Mr. Satyanarayana, indeed, calls to notice the Privy Council decision in *Nagendranath v. Suresh Chandra*, A. I. R. 1932 P. C. 165, in which it was held that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptance of the term, and that it is no less an appeal because it is irregular or incompetent. But that case, which has to deal with a matter of limitation and has no concern with the point now under consideration, was one in which what was held to count as an appeal had been admitted and heard as such. It does not overrule the decision of the Calcutta High Court in *Bidhu Bhusan Bakshi v. Kalachand Roy*, A. I. R. 1927 Cal. 775, in which it has been held that an appeal cannot be held to have come properly before a Court until it has been registered. Neither does it deal with the case, with which I shall have to deal later, of a memorandum of appeal which, at the time of presentation, is incomplete. In agreement with the Calcutta decision I shall, then take it that the memorandum of appeal now under notice, in that it has not been registered, is not to be regarded as an appeal that is before this Court but has only to be considered as a memorandum of appeal that has been

presented to the Court. I have next to consider O. 41, R. 3 (1). This provides that

"when a memorandum of appeal is not drawn up in the manner hereinbefore described it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court, or be amended then and there."

How a memorandum of appeal is to be drawn up is set out in O. 41, R. 2 (1) which provides that it shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from. Now in the present case the memorandum of appeal, as at first presented, was defective in some of its grounds. Three of them contained clerical errors and from a fourth there was an omission. But still, in spite of these defects, the grounds as originally stated were intelligible, and I think that it would be standing too much on technicalities to say that the appeal was not drawn up in the prescribed manner because of the defects that were found in them; while of course there were other grounds to which no objection was found and in respect of which the memorandum of appeal was in time. I do not then think that the memorandum of appeal under notice can be rejected under the provisions of O. 41, R. 3.

I cannot, however, follow Mr. Satyanarayana when he contends that, if the memorandum of appeal cannot be rejected under that rule, it cannot be rejected at all. As I have already said, this case has to be regarded as one of appeal that has not yet been admitted and not as one of an appeal that is before the Court as such. Before an appeal is admitted it has to be completed. This is a matter so obvious that no rule is necessary for it, and I can find nothing in the Privy Council case already referred to that runs at all to the contrary. Now, in the present instance, the memorandum of appeal as presented was not complete. Not only were there the defects, to which I would not attach too much importance, in some of the grounds, but there were also a number of other defects which were of a more serious nature. One of these was that the decree in the Court of first instance had not been stamped, nor indeed has it been stamped even yet. Another was the absence of affidavits as to how persons named as legal representatives held

that position. Even yet those affidavits are not sufficient. As long as there are such defects the memorandum of appeal cannot be entertained and all that the Court can do is to return it and give the petitioners the chance of putting it again in a complete form. Any time that it allows for re-presentation is only by way of concession, and a continuance or extension of the concession cannot be demanded of it as a matter of right, at any rate after the expiry of the normal period of limitation within which an appeal can be presented. In the present instance, at the time of the first return, a week was allowed for re-presentation, but the re-presentation was only made after 155 days by which time the limitation period had long expired. On the occasions of the other two returns no time was fixed, but it has to be taken that the representation was to be made within a reasonable time and representations cannot be said to have been made in a reasonable time when they have been made after intervals, respectively of 114 and 386 days. Nor can it be said that the petitioners had no notice that they should not be dilatory. After the first return the case was put on the board on 17th July 1930 and yet the re-presentation was not till 19th December 1930. After the second return the case was put on the board on 6th January 1931 and the re-presentation was not till 30th April 1931; and after the third return it was put on the board on 13th July 1931 and the representation was not till 2nd August 1932.

Even now the memorandum of appeal is not complete, and certainly no further time can be given for putting it in proper form. I hold that it is hopelessly out of time and I therefore reject it.

P.R.S./K.S.

Petition rejected.

A. I. R. 1933 Madras 360

ANANTAKRISHNA AYYAR, J.

Kandaswami Chettiar—Petitioner.

v.

A. R. M. Annamalai Chettiar—Opposite Party.

Civil Revn. Petn. No. 407 of 1928, Decided on 14th July 1931, against order of Sub-Judge, Tuticorin, D/- 7th September 1927.

(a) Civil P. C. (1908), S. 55 — Arrest of A in execution—B filing surety bond—On con-

struction of his bond held that B could not be discharged from his liability in circumstances of the case—Deed—Construction.

A was arrested in execution of a decree. A surety bond the construction of which was in dispute was then executed by B. The surety bond was as follows: The said A has been brought under arrest before the Court. The said A intends to present an insolvency petition within one month from this date. I have deposited the decree amount in Court as security for the due presentation of the insolvency petition, and, until its disposal, I shall hereby undertake to produce the said A either before this Court or before the Official Receiver until he presents the insolvency petition and is adjudicated and discharged. If the said A fails to present the insolvency petition within one month from this date, or if I fail to produce the said A when so ordered by the Court in the course of those proceedings or in execution, I hereby agree to make the deposit amount liable for the decree debt of the said A. A applied to be adjudicated an insolvent. He was directed to apply for discharge. Subsequently he applied for his discharge. The Court however dismissed the application relying on the report of the Official Receiver that the outstandings shown were unrealizable and that a large credit was given to a woman without any security. After the said order refusing to grant a discharge to the insolvent, the surety filed an application that he may be discharged from his liability under the surety bond.

Held: that the words of the surety bond in the case were clear that the liability enured not only till an application for discharge was filed, but till there was discharge, therefore the surety's obligation could not be deemed to have ceased the moment the application for discharge was filed by the insolvent. The wordings of the bond were on a proper construction, within the scope of S. 55, Cl. (4). Unfortunately for the surety no order of discharge, not even a conditional discharge having been passed according to the terms of the bond, the application was premature and he was not entitled to the relief claimed by him: *Mad. Appeal No. 224 of 1927, Dist.; 16 All 37 and AIR 1929 Lah 262, Ref. [P 361 C 1, 2; P 362 C 1]*

(b) Provincial Insolvency Act (1920), S. 41 — Insolvency proceedings do not end on mere adjudication—Discharge has to be obtained.

The insolvency proceedings do not end on mere adjudication. The insolvent's presence and help are greatly needed so long as the estate has not been fully administered but continues to be in the hands of the Official Receiver. Simply because a person has been adjudicated insolvent, and he has applied for discharge it cannot be said that the proceedings in insolvency have terminated, and so long as no order of discharge has been obtained the insolvency proceedings should be deemed as pending. [P 362 C 2]

K. S. Ramabhadra Ayyar — for Petitioner.

K. Venguswami Iyer — for Opposite Party.

Judgment.—Kulandavelu Chettiar defendant in S. C. Suit No. 1319 of 1922 on the file of the Sub-Court, Madura, was arrested in execution of that decree. Then the present petitioner Kandasami

Chettiar executed a surety bond the construction of which is in dispute before me. The surety bond is dated 24th September 1923 and the relevant portion is as follows:

"The said Kulandavelu Chettiar has been brought under arrest before the Court. The said Kulandavelu Chettiar intends to present an insolvency petition within one month from this date. I have deposited the decree amount in Court as security for the due presentation of the insolvency petition, and, until its disposal, I shall hereby undertake to produce the said Kulandavelu Chettiar either before this Court or before the Official Receiver until he presents the insolvency petition and is adjudicated and discharged. If the said Kulandavelu Chettiar fails to present the insolvency petition within one month from this date, or if I fail to produce the said Kulandavelu Chettiar when so ordered by the Court in the course of those proceedings or in execution, I hereby agree to make the deposit amount liable for the decree debt of the said Kulandavelu Chettiar."

Kulandavelu Chettiar applied in I. P. No. 12 of 1923 to be adjudicated an insolvent. He was directed to apply for discharge by 17th December 1926. Subsequently he applied for his discharge. The Court however dismissed the application relying on the report of the Official Receiver that the outstandings shown were unrealizable and that a large credit of over Rs. 500 was given to a woman without any security. After the said order refusing to grant a discharge to the insolvent, the surety filed the present application on 4th May 1927 praying that he may be discharged from his liability under the surety bond. The learned Subordinate Judge has dismissed the application on the ground that the surety bond stipulates that the surety is liable until a discharge is obtained; and as no discharge has been obtained the learned Subordinate Judge held that under the terms of the surety bond the surety was not entitled to the relief claimed by him. The surety has accordingly filed the present revision petition to the High Court. On his behalf it was argued by his learned advocate that on a proper construction of the surety bond it must be held that the obligation subsists only so long as an application for discharge has not been filed; and in support of that argument an unreported decision of a Bench of this Court was strongly relied upon. I am unable to agree with that contention. In my view the words of the surety bond in the present case are clear that the liability

enures not only till an application for discharge is filed but till there is discharge. I have already quoted the relevant portion of the surety bond. It clearly says "until he presents the insolvency petition and is adjudicated and discharged." I am therefore unable to agree that the surety's obligation ceased the moment the application for discharge was filed by the insolvent. The unreported case relied upon by the learned advocate for the petitioner, namely, A. A. A. O. 224 of 1927, does not apply to the facts of the present case. The wordings of the surety bond in that case were

"this surety bond shall remain operative until the above insolvent shall put in a discharge application and an order is passed therein."

The learned Judges held that the moment a discharge application was filed and an order was passed the surety's obligation under his bond ceased. The bond in that case did not specify that the obligation was to enure till discharge was obtained. It therefore seems to me that the unreported judgment is not really applicable having regard to the wordings of the surety bond before me. Then it was argued that so much of the surety bond as contained any provision outside S. 55, Civil P. C., should be taken to be ultra vires and not enforceable in those proceedings, and reliance was placed on *Janaki Das v. Ram Parthab* (1) and *Aishan Bi v. Mahabir Parshad* (2). The answer to this contention will largely depend upon the interpretation of S. 55, Cl. 4, Civil P. C. That clause is to the following effect:

"Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree."

It will be seen that the section contemplates a security bond to be in order if it contains words to the effect that the judgment-debtor would appear when called upon "in any proceeding upon the application," etc., the application contemplated being the application for insolvency. In my view the wordings

1. (1893) 16 All 37=(1893) A W N 203.

2. A I R 1929 Lah 262=118 I O 438.

of the present bond are, on a proper construction, within the scope of S. 55, Cl. (4). I construe the words:

"if I fail to produce the said Kulandavelu Chettiar when so ordered by the Court in the course of these proceedings,"

to mean that so long as the insolvency proceedings are in force and are pending in Court, the judgment-debtor—insolvent—shall—when called upon—appear before the Court and if he should commit default the surety's liability should continue. Therefore as I construe the surety bond in question, the clause in question is not beyond the scope of S. 55 of the Code. Then it was argued that having regard to the fact that the opposing creditor has not really taken any active steps in the course of insolvency, he should not be heard to argue against the prayers in the surety's application. For my part I cannot understand the conduct of the opposing decree-holder in this case. But the question before me is not whether his conduct is up to the high water mark or not, but whether having regard to the wordings of the surety bond and to the fact that no order of discharge—absolute or conditional—has been obtained by the insolvent, the surety is entitled to the relief claimed in this application at present. Ss. 41, 42 and 43, Provincial Insolvency Act, have been referred to. Discharge may be either absolute or conditional. And any order of discharge, however conditional it might be would, according to my construction of the surety bond, be enough to discharge the surety from the obligations of his bond. But unfortunately for the surety no order of discharge—not even a conditional discharge—has been passed in this case. That being so according to the terms of the bond, his application is I think premature and he is not at present entitled to the relief claimed by him.

Finally it was contended that all that the surety can be called upon to do under the terms of his bond at present is that the insolvent should be asked to appear before the Court, and if the surety manages to produce the insolvent before the Court, the learned advocate for the petitioner argues that the obligations under the surety bond cease. I am unable to agree with that contention however much I might sympathize with the surety having regard to the circum-

stances of the case. The insolvency proceedings do not end on mere adjudication. The insolvent's presence and help would be greatly needed so long as the estate has not been fully administered, but continues to be in the hands of the Official Receiver. Simply because the judgment debtor has been adjudicated insolvent and he has applied for discharge (which application has not been granted), it cannot be said that the proceedings in insolvency have terminated; and it seems to me that so long as the insolvency proceedings are really pending and so long as (according to the terms of the surety bond in question) no order of discharge has been obtained the surety should be under an obligation to produce the judgment-debtor whenever called upon to do so by the Court. That being so I am unable to grant the request of the surety in the present case. I therefore dismiss this revision petition; but having regard to the conduct of the decree-holder, who now opposes the petition, I think this is a proper case in which I should decline to give him his costs of this petition.

P.R.S./B.V.

Petition dismissed.

A. I. R. 1933 Madras 362

WALSH, J.

R. V. Ranga Ayyar—Appellant.

v.

Sundararaja Ayyangar and others — Respondents.

Appeal No. 27 of 1929, Decided on 4th January 1933, against appellate order of Dist. Judge, Ramnad, D/- 20th August 1928.

Civil P. C. (1908), O. 21, R. 7—Power of executing Court to go into the disputed points of fact stated—Civil P. C. (1908), S. 47.

When there is no want of the jurisdiction apparent on the face of the decree the party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter : 28 *Mad* 84 ; *A I R* 1922 *Mad* 197 and *A I R* 1921 *All* 118 (F B), *Dist.*

[P 363 C 2]

A. Nagaswami Ayyar—for Appellant.

S. Narayana Ayyangar—for Respondents.

Judgment.—The appellant is the assignee of a mortgage decree against certain property passed on 20th September 1924. Defendants 1 and 2 filed written statements, but they were subsequently declared *ex parte*. The assignment to the appellant was recognized, but when

he went to take out execution defendant 2 raised objections that the land in question was service inam and not alienable. The executing Court, the District Munsif's Court of Srivilliputtur, wrote a very short judgment as follows :

"The inam title deed Ex. 2 is proof positive that the inam in question is an enfranchised one. So items 2 to 5 are liable to be sold."

It is abundantly clear both from this judgment and from that of the lower appellate Court that the assignee decree-holder contested as a question of fact that this was an enfranchised inam and on the facts the executing Court found in his favour. In the lower appellate Court the learned District Judge held that the executing Court misconstrued the inam title-deed when it construed it as an enfranchised inam. He clearly puts before himself the question he has to decide in para. 4 :

"The first question to decide is whether the inam is an unenfranchised one and could not be sold."

Then in para. 10 he says that it is argued that even assuming that the inam had been unenfranchised, the inam may have been that of the melwaram only and not of the land itself. The learned District Judge concludes on the strength of the inam register as regards this that the lands themselves were inam. Before him a very serious objection was taken that it was not open to the executing Court to go into this question at all or to question the decree as there was no apparent want of jurisdiction on the face of it. This objection the learned District Judge overruled. But it seems to me to be absolutely sound. The cases relied upon by him and also for the respondent before me are clearly distinguishable. *Rajah of Vizianagaram v. Dantivada Chelliah* (1) was cited. There it is stated :

"Though the record prior to and inclusive of the decree makes no allusion to the fact, yet in the subsequent proceedings the land is admitted to be service inam being the emoluments attached to the office of village carpenter which is among the offices comprised in the Madras Hereditary Village Offices Act (Act 3 of 1895)."

I need not go into the question here whether when there is such a decree which in its form does not disclose any want of jurisdiction but when the property to be proceeded against is admittedly inalienable the executing Court can go into the question and decide whe-

ther the Court which passed the decree had no jurisdiction. *Anjaneyalu v. Sri Venugopala Rice Mill Ltd.* (2) is also a case where there was no dispute about the fact that the properties sought to be sold by the Court was the property whose alienation was forbidden as opposed to public policy. In *Katwari v. Sita Ram Tiwari* (3) there was also no question that the land sought to be alienated was land which could not be alienated under specific enactments on the ground of public policy. The question therefore in this case is very simple, and it is whether when there is no want of jurisdiction apparent on the face of the decree the party in execution can raise a disputed point of fact which if his contention is true would have deprived the Court of its jurisdiction to pass a decree in that matter.

I am quite clear that there is no authority quoted to this effect and the doctrine would obviously have most disastrous consequences ; for instance in a suit for rent in raiyati lands in an estate tried by a revenue Court without objection and where a decree passed therein becomes final it is clearly not open in execution proceedings for the judgment-debtor to urge that after all the lands are not raiyati lands but kamatom lands and that therefore the trying Court had no jurisdiction, and it would be clearly most improper for the executing Court to embark in execution on an investigation into a disputed matter of fact of this sort. The point of fact in this case was, so far, from having been admitted, that the executing Court came to one conclusion and found that the land was an enfranchised inam whereas the lower appellate Court came to the opposite conclusion. I consider that neither Court had any jurisdiction to go into this disputed question of fact at all and as there was no want of jurisdiction apparent on the face of the decree they were bound to execute it. It is not necessary therefore to discuss the other points raised by the appellant since I consider that the appeal must be allowed with costs here and in the Court below. The order of the District Munsif will be restored.

P.R.S./K.S.

Appeal allowed.

2. A I R 1922 Mad 197=45 Mad 620.

3. A I R 1921 All 118=63 I C 264=43 All 547 (F B).

1. (1905) 28 Mad 84=14 M L J 468.

A. I. R. 1933 Madras 364

MADHAVAN NAIR, J.

Medavarapu Narasayya—Appellant.
v.*Vadlamudi Somayya and another*—
Respondents.

Second Appeal No. 2291 of 1927, Decided on 23rd March 1931, against decree of Sub-Judge, Ellore, in A. S. No. 17 of 1927.

Part-performance—Doctrine applies where contract is in its own nature enforceable.

One of the necessary conditions for applying the doctrine of part performance is that the contract to which the doctrine of part performance refers must be such as in its own nature is enforceable. Agreement of sale of immovable property of a Hindu minor entered into on his behalf by his guardian is not binding on the minor and enforceable specifically against him even though the debts binding on the minor are discharged by the consideration paid for the sale and consequently the doctrine of part performance does not apply to such a contract: *A I R 1928 Mad 407*; *A I R 1930 Mad 298* and *A I R 1930 Mad 84, Rel on*; *39 Cal 232*; *A I R 1930 Cal 457*; *A I R 1921 Bom 401* and *A I R 1928 Mad 830, Ref.* [P 366 C 1]

N. Rama Rao—for Appellant.

S. Varadachariar and V. Pattabhirama Sastri—for Respondents.

Judgment.—Defendant 2 is the appellant. Defendant 1 was a minor. On his behalf his guardian executed a contract of sale of the suit lands in favour of the plaintiff on 19th May 1923. The appellant (defendant 2) obtained a sale-deed of the same lands from defendant 1 on 13th July 1925. The suit out of which this second appeal arises was instituted by the plaintiff for the specific performance of the contract of sale executed in his favour by the guardian of the minor, defendant 1, on his behalf. Defendant 2 contended that he was a bona fide purchaser of the suit lands for proper consideration, without notice of the contract of sale in favour of the plaintiff and that the contract in plaintiff's favour is not binding on him.

Both the Courts found that the contract in plaintiff's favour executed by defendant 1's guardian was supported by proper consideration and was for purposes binding on the minor. The lower Courts also found that the appellant had notice of the contract of sale in favour of the plaintiff and that he was not a bona fide purchaser for proper consideration. On these findings the plaintiff was given a decree for specific performance of the contract in his favour. In support

of the decree the learned Subordinate Judge relied on the decision in *Chidambaram Swamigal v. Ramakrishna Reddiar* (1) in which it was held by Devadoss, J., that under the Hindu law it is competent to the guardian of a minor to enter into a valid contract for the sale of his immovable property for the purpose of discharging the debts of the minor's father for which the property in the minor's hands would be liable and that such a contract of sale can be enforced against the subsequent purchaser of property with notice, even though the latter has brought it for a higher price than that stipulated under the prior contract.

Subsequent to the disposal of the appeal by the Subordinate Judge, the decision in *Chidambaram Swamigal v. Ramakrishna Reddiar* (1) was reversed by Wallace and Thiruvengkatachariar, JJ., in a Letters Patent appeal preferred against that decision: see *Ramakrishna Reddiar v. Chidmabara Swamigal* (2). The learned Judges held that an agreement of sale of immovable property of a Hindu minor entered into on his behalf by his natural guardian, assuming the same to have been entered into for necessity, is not binding on the minor and enforceable specifically against him or a subsequent transferee of the properties from the guardian who took with notice of the agreement. The appellant relying on this decision argues that the second appeal shall be allowed and that the plaintiff's suit should be dismissed.

Having regard to the decision in *Ramakrishna Reddiar v. Chidamabara Swamigal* (2), Mr. Varadachariar for the plaintiff-respondent frankly conceded that he could not support the lower Court's judgment on the ground on which it has been based by the learned Subordinate Judge, but he contended that the judgment could be maintained on the statement appearing in the appellate judgment under point 4 (whether defendant 2 had notice of the contract of sale in favour of plaintiff and whether he was a bona fide purchaser for proper consideration)

"that the plaintiff has been in possession of the suit property since the date of Ex. A in 1923"

1. *A I R 1924 Mad 863=82 I C 926.*

2. *A I R 1928 Mad 407=108 I C 282.*

His argument is, since the debts binding on the minor were discharged by the consideration paid by the plaintiff for the sale, and since he was put in possession of the property in pursuance of the contract, though the contract is not itself enforceable, the plaintiff has a good title to the property on the equitable ground of "part performance." I may say that "part performance of the contract" as an alternative title to the property was not put forward at any stage of the suit till now and the sole basis of the argument is the statement occurring in the Subordinate Judge's judgment referred to above. The question is how far this argument can be accepted.

No direct authority in support of his argument was referred to by the learned counsel, but he has drawn my attention to a decision in *Nageswara Rao v. M. Kotamma* (3), in which there is a dictum of the learned Judges which appears to support him. In that case two suits were filed, O. S. Nos. 484 and 338 of 1919, and the first suit was a suit for specific performance of a contract for the sale of the plaintiff-mentioned lands entered into between the plaintiff and defendant 2 as guardian of defendant 1; while the second was to recover possession of the self same lands by defendant 3 in the first suit from the plaintiff therein and his sons, he having purchased the suit lands under a sale deed executed by defendant 1 in his favour. Defences similar to those raised in the present case were raised by the parties in those two suits.

The Courts found that the contract set up by the plaintiff in O. S. No. 484 of 1919 was supported by consideration and necessity and defendant 3, the plaintiff in O. S. No. 334 of 1919, purchased the property with the knowledge of the contract with the plaintiff. The lower Courts granted specific performance against the minor in O. S. No. 484 of 1919, and in O. S. No. 334 of 1919 refused to the plaintiff a decree for delivery of possession. Two second appeals were filed in this Court. The learned Judges on the authority of the decisions in *Rama Krishna Reddiar v. Chidambara Swamikal* (2) held that the lower Courts were clearly wrong in granting specific performance against the minor and in the other case in refusing to the plaintiff a

decree for delivery of possession. Then they stated the argument based upon "part performance" that might have been raised in support of the claim of the plaintiff against the minor in the "specific performance suit" and answered it in the following manner; and in that answer occurs the dictum relied on by the learned counsel for the respondent:

"The only possible question that might have been raised and argued is in the case whether the matter could be regarded as different if, as in the present case, there was not only a contract by the guardian to convey the property, but pursuant to the contract the guardian by way of partly performing the contract had placed the other party in actual possession. But we believe that a satisfactory answer to this has been furnished by Mr. S. Varadachariar, the learned vakil for the appellant. The doctrine of part performance being a doctrine of equitable relief could be held to apply only to the person concerned and if, as in this case, the contract was not a contract of the plaintiff who is suing, it follows that the equitable principle cannot be invoked as against him."

Having regard to the facts of the case, the latter part of the answer explaining the learned Judges' refusal to apply the doctrine is not very clear and if the observation refers to the specific performance suit, as it obviously does, the statement that "the equitable principle cannot be invoked as against him" should, I think, be that the "equitable principle cannot be invoked in his favour." The counsel was not able to explain this difficulty very satisfactorily, but that does not affect in any way the statement expressed in the first part of the answer that the doctrine of equitable relief could be held to apply "to the persons concerned." Mr. Varadachariar relying upon this dictum argues that in this case the persons concerned in the contract, the specific performance of which is sought against defendant 1, are defendant 1 and the plaintiff and that the latter is entitled to invoke that doctrine in his favour and claim a decree in the suit on the ground that he has been in possession of the suit lands since 1923. I was referred to no authority in support of this position. Mr. Varadachariar, who appeared in the case in *Nageswara Rao v. M. Kotamma* (3) and who appears in this case also, intimated to me that he quoted before the learned Judges the decision in *Robert Blore v. Sir Richard Sutton* (4) in support of the proposition. It is conceded that, except

3. A I R 1928 Mad 830=110 I C 492.

4. 36 E R 91.

suggesting such a doctrine, that decision has no direct bearing on this question. I am not able to find much support for the proposition contended for in that judgment.

In *Subba Rao v. Veeranjanyaswami*, A. I. R. 1930 Mad. 298, Ramesam and Jackson, JJ., observed with regard to the doctrine of part performance that the doctrine is only used to complete an intended transfer between the transferor and the transferee where there is no other objection to complete the transfer. It has never been used to complete a transaction against a third person, such as the idol of a temple or cesti que trust or a minor against whom it cannot be regarded as operative. No doubt these observations were made in connexion with the application of Art. 134, Lim. Act, to the facts of that case. But I do not think that that would affect the principle enunciated by the learned Judges. In that case it was found impossible to hold that the suit was barred under Art. 134 as there was nothing to show that there was a valid transfer of the suit lands between the transferor and the transferee, and reliance was placed on the doctrine of part performance in support of their title by the defendants.

The learned Judges held that the doctrine could not be relied on for the reasons mentioned in the extract already quoted. If the doctrine cannot be invoked to complete a transaction against a minor against whom the transaction could not be regarded as operative then in the present case I do not think it is possible for the plaintiff respondent to rely on it in his favour, defendant 1 being a minor and the contract for specific performance being invalid and not operative as against him in law. One of the necessary conditions for applying the doctrine of part performance is stated by Fry in his book on Specific Performance (Edn. 6, p. 276) to be that the contract to which the act of part performance referred must be such as in its own nature is enforceable by the Court. As already pointed out, the decision in *Rama Krishna Reddiar v. Chidambaram Swamikal* (2) has declared that the contract in the present case is not enforceable by the Court against defendant 1.

That being the case, this necessary

condition is lacking in this case and there is no room for the application of the doctrine of part performance. In this connexion attention may be drawn to the decision of this Court in *C. Venkataratnam v. B. Guravayya* (5), which contains general observations in support of the contentions urged by the appellant. I do not think that the other cases cited by the learned counsel on both sides, *Mir Sarwarjan v. Fakhruddin Mahomed* (6), *Nipendra Chandra v. Ekherali Joardar* (7) and *Hiralal Ramanarayan v. Shankar Hirachand* (8), afford any direct help for deciding this question. There being no room for the application of the doctrine of part performance for the reasons above mentioned I am of opinion that this second appeal should be allowed and the plaintiff's suit dismissed. The appellant will get the costs of this second appeal from the plaintiff. The lower Court's order as to costs will stand.

P.R.S /P.N. *Appeal allowed.*

5. A I R 1930 Mad 84=121 I C 18.

6. (1912) 39 Cal 232=39 I A 1=13 I C 331 (P C).

7. A I R 1930 Cal 457=57 Cal 268=121 I C 66.

8 A I R 1921 Bom 401=45 Bom 1170=62 I C 637.

A. I. R. 1933 Madras 366

PANDALAI, J.

N. P. Subbiah Pillai—Decree-holder—Petitioner.

v.

M. Nellayappa Pillai—Judgment-debtor—Opposite Party.

Civil Revn. Retn. No. 1205 of 1932, Decided on 3rd November 1932, from order of Dist. Munsif, Ambasamudram, D/- 13th August 1932.

Civil P. C. (1908), O. 26 and O. 5, R. 4—Refusal of witness in foreign territory within 200 miles from the Court to attend on service of summons—Evidence should be taken on commission.

Where a witness in a foreign territory refuses to attend on a process of summons, his evidence should be taken on commission though the witness resides in such foreign territory within 200 miles from the Court. [P 367 C 1]

Judgment.—The District Munsif was wrong in refusing to issue a commission on the mere ground that the distance to Trivandrum where the witnesses reside is less than 200 miles from the Court. Trivandrum is in foreign territory. The rule applies to distances in British India. I am not aware of any law by which witnesses in Native States which

have made arrangements for mutual service of processes with British India can be compelled to obey these processes i. e., punished if they fail to do so. The arrangement for mutual service of processes is made in pursuance of S. 29, and O. 5, R. 26, Civil P. C. Though such processes may be served as if they had been issued by territorial Courts, the effect of non-compliance is a different matter. If therefore the Trivandrum witnesses refused to attend on service of summons, the only way to take their evidence, if necessary, was by commission. It appears from the reply affidavit that the witnesses were summoned to appear but did not do so. For these reasons the District Munsif should now issue a commission for the examination of witnesses 1 to 6. The petitioner and his agent, witnesses 7 and 8, must appear before the lower Court and be examined there. The order of the District Munsif is varied accordingly. The petitioner has won and must have his costs of this petition.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 367 (1)

WALSH, J.

T. K. M. Alagappa Chetty—Plaintiff—Petitioner.

v.

Saminathan Chetty and others—Defendants—Opposite Parties.

Civil Revn, Petn. No. 183 of 1932, Decided on 7th December 1932, from order of Sub-Judge, Sivaganga, D/- 4th December 1931.

(a) **Madras Estates Land Act (1 of 1908), Ss. 11 and 151—Suit for recovery of raiyati land held on patta—Plaint cannot be valued on value of land as building site—Court-fees Act (1870), S. 7 (v) (xi).**

In a suit for ejectment and to recover possession of a raiyati land held on patta in an estate on an objection as to valuation the Subordinate Judge valued it on the value of land as a building site on the hypothetical assumption that the landlord would for some nazzar be willing to allow it to be so used as a building site.

Held: that it was not open to the Court to value property on such a basis: 16 *Mad* 407 and 24 *Mad* 65, *Ref.* [P 367 C 2]

(b) **Court-fees Act (1870), S. 12—Wrong principle applied in question of court-fees—High Court can interfere in revision.**

Where the lower Court applied wrong principle in question of court-fees, though in exercise of jurisdiction vested in it, the High Court can interfere in revision. [P 367 C 2]

Judgment.—This is a suit for ejectment and to recover possession of land

which measures about 2 acres and 16 cents. It is admittedly a raiyati land held on patta in an estate i. e., the Sivaganga Estate. It was objected that the plaint was under-valued: so the Court had to determine the market value of the property. The learned Subordinate Judge valued it on the value of the land as a building site on the hypothetical assumption that the landlord would for some nazzar, for which the Court deducted Rs. 20, be willing to allow it to be so used as a building site.

It is objected that it was not open to the Court to value property on such a basis. Reading Ss. 11 and 151, Estates Land Act, it is clear that the land cannot be used for building purposes without the consent of the landlord: *Ramanadhan v. Zamindar of Ramnad* (1) and *Orr. v. Mrithyunjaya Gurukkal* (2) have been quoted. It is not argued for the respondent that the method by which the lower Court assessed the market value can be justified. But it is contended that the Court is exercising a jurisdiction which is vested in it when it proceeded to determine the market value on this basis. But when it is a question of a principle to be applied to the levying of court-fees, this Court has frequently interfered in revision. There is, in fact, no other remedy open if the Court proceeds on a wrong principle. It is clear that the principle on which the Court has proceeded to levy court-fees in this case is wrong; it is not entitled to proceed on a principle, at variance with the provisions of the Estates Land Act, by which without the consent of the landlord the land cannot be converted into one for building purposes. The revision must therefore be allowed with costs, and the order of the lower Court is set aside.

P.R.S./K.S.

*Petition allowed.*1. (1893) 16 *Mad* 407=3 M L J 185.2. (1909) 24 *Mad* 65.

* A. I. R. 1933 Madras 367 (2)

Full Bench

BEASLEY, C. J., STONE AND BURN, JJ.

Mounagurusami Naicker and others—Accused, Petitioners, In re.

Criminal Misc. Petn. No. 1014 of 1932, Decided on 24th November 1932.

* **Criminal Trial—Case and counter case—Procedure to be followed indicated.**

No hard and fast rule can be laid down as regards the procedure in the trial of case and

counter case. There can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. But it is necessary (1) that the trial must be separate, i. e., before different assessors and separate judgments delivered; (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment: *A I R 1930 Mad 190, Expl.*; (1932) *M W N 692* and (1929) *M W N 881, Ref.*

[P 369 C 1]

Nugent Grant for B. R. Sethuraman—
for Petitioners.

Public Prosecutor—for the Crown.

Beasley, C. J.—This transfer petition was directed by me to be placed before this Full Bench not because of any difficulty which arises in the petition which is not opposed, but because it is a favourable opportunity for resolving difficulties with regard to procedure which have arisen on account of conflicting opinions expressed by this High Court.

One of these is *Krishna Pannadi v. Emperor* (1) a decision of Jackson, J., and another is *K. Jaggu Naidu v. Emperor* (2) a decision of Reilly and Krishnan Pandalai, JJ. Some difficulty has probably been created also by *Krishtamma v. Emperor* (3), a decision of Waller and Cornish, JJ. These cases lay down the procedure to be adopted at the trial of cases and counter-cases, the two former by Sessions Judges and the latter by Magistrates. In *Krishna Pannadi v. Emperor* (1), Jackson, J., stated:

"There is no clear law as regards the procedure in counter-cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge who should not pronounce judgment till the hearing of both cases is finished. This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts."

Jackson, J., then points out that there is obvious difficulty in the adoption of this rule as it seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record. He then proceeds to state his view that the only way in which such a procedure can be justified is by setting up a fiction

that the case and counter-case are really one and suggests that this fiction should be made a reality by statute. This judgment has been severely criticised in *Kandregula Jaggu Naidu v. Emperor* (2) but I am bound to say that I think that most of the criticism is due to a misunderstanding of Jackson, J.'s judgment because on p. 696 Reilly, J., says:

"I understand Jackson J's opinion to have been that not only should the same Assistant Sessions Judge have heard both cases to the end and have had the evidence of both of them in his mind before he pronounced judgment in either but also that he should have tried both cases with the aid of same assessors That is how the learned Sessions Judge of Vizagapatam has understood Jackson, J's directions and it is that procedure he has followed."

I do not understand Jackson, J., to have meant that both cases should be tried with the aid of the same assessors. What he does say is that both cases should be tried in quick succession by the same Judge who should not pronounce judgment until the hearing of both cases is finished. If that is what Jackson, J., meant, then there is really no difference between the procedure Jackson, J., has in mind and that indicated by Reilly and Krishnan Pandalai, JJ. It seems to me that all the three are agreed upon the desirability of the Judge withholding judgment until he has heard both the case and the counter-case but since Jackson, J., states that this procedure may allow the facts in the one case to impress or influence the Judge in the other case, it is as well to observe that if the Judge withholds his judgment until he has heard both cases for the purpose of considering the cases as if they were one case, then that would be an irregular procedure; and the suggestion made by Jackson, J., that a fiction should be set up that the case and the counter-case are really one and should be made a reality by statute seems to me to be one which it would be very difficult to adopt. Waller and Cornish, JJ., who were dealing with the procedure in the Magistrates' Courts are of opinion that "no Court can grasp the real facts unless it tries both cases." If by that it is meant that the fundamental principle that the Court must not have regard in one case to the facts in another is not to be observed, then that view cannot be supported. Possibly if the Judge reserves judgment in both cases in order that he may consider both for purpose of,

1. *A I R 1930 Mad 190=31 Cr L J 451=123 I C 10.*

2. (1932) *M W N 692.*

3. (1929) *M W N 881.*

arriving at the truth, he is likely to reach a more satisfactory result than by trying each case without reference to any of the facts in the other. But since this procedure is irregular, it cannot receive our support. No hard and fast rule can be laid down. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts in the other. Should the Judge however feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter case to the file of another Sessions Judge. What must be made clear is: (1) that the trial must be separate, i. e., before different assessors and separate judgments delivered (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment. We are much obliged to Mr. Nugent Grant and Mr. Bewes for their great assistance to us as *amicus curiae*.

Stone, J.—I agree.

Burn, J.—I agree.

P.R.S./K.S. *Reference answered.*

A. I. R. 1933 Madras 369

RAMESAM, J.

B. Iswarudu—Petitioner—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 436 of 1932, and Criminal Revn. Petn. No 405 of 1932, Decided on 21st July 1932, from judgment of Joint Magistrate, Narasapur, in Criminal Appeal No. 20 of 1932.

Criminal Law Amendment Act (1908), S. 17 (1)—Simply because object of unlawful association and object of some individual person are identical, such person cannot be held to be assisting the association unless connexion between two is proved.

Simply because the object of an association and the object of some individual person in his own individual activities are identical it cannot be said that the individual is helping the operations of the association. Unless the operations of the association are in the person's mind and an intention to assist them is also there, such intention to assist the operations of that association can be inferred by an unambiguous overt act. The mere advocating by an individual of boycott, the shouting of slogans and the carrying

of a national flag do not constitute an offence under S. 17 (1) unless it is proved that such individual is in any way connected or assisting with such intention the object of the All India Congress Committee: *A I R 1931 Bom 200, Inf.* [P 370 C 2; P 371 C 1, 2]

P. Satyanarayana Rao and *N. V. Shama Rao*—for Accused.

K. N. Ganapathi—for the Crown.

Order.—In this case one B. Iswarudu of Narsapur has been convicted by the Stationary Sub-Magistrate of Narsapur for an offence under S. 17 (2), Criminal Law Amendment Act of 1908, and is sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 200. On appeal to the Joint Magistrate of Narasapur the fine was reduced to Rs. 100; otherwise the conviction was confirmed. The present revision petition is filed against the appellate judgment of the Joint Magistrate.

It will be convenient now to set forth the facts of the case which gave rise to this revision petition. By notification dated 4th January 1932 the association known as the Working Committee of the All India Congress Committee was declared an unlawful association under sub-S. 1, S. 8, Ordinance 4 of 1932. This was published in the Fort Saint George Gazette dated 12th January 1932. On 13th March 1932 the accused in this case at about 6 p. m. is said to have taken part in a demonstration accompanied by a national flag and the singing of political songs. In the course of the demonstration he is said to have visited the streets of Narsapur wherein foreign cloths and British goods are sold, advocated the boycott of British goods and foreign cloth; thereby he was charged with having acted in furtherance of the resolution of the All India Congress Working Committee which was declared an unlawful association and having therefore committed an offence under S. 17 (1), Criminal Law Amendment Act of 1908. Two witnesses were examined for the prosecution, a Police Inspector and a constable. The Police Inspector is the same person who sent the confidential report of the occurrence on the same day, and this report is filed as Ex. A. Fourteen witnesses were examined for the defence. Both the Magistrates have dealt with the defence evidence at great length. It is unnecessary to refer to it in detail. Most of it relates to the beating of the

accused by the police, a matter which is now irrelevant to the present revision petition.

The Joint Magistrate in dealing with the case divided the activities of the accused into two parts, namely, what he did up to the arrival of the police and what happened after the arrival of the police. So far as the first part is concerned, the Joint Magistrate refers to the evidence of D. Ws 1, 3, 4 and 13. D. W. 1 is the Government Pleader of Narsapur. D. Ws 3 and 4 are also pleaders. According to their evidence the accused was only carrying placards and was not saying anything at all. The learned Joint Magistrate accepts their evidence and points out that though up to that stage the accused was not guilty of anything objectionable this does not prevent later developments which are unlawful. The second part of the accused's activities relates to what happened after the arrival of the police, which is not touched by the defence witnesses already mentioned. P. W. 1, the Sub-Inspector, says that he was carrying a national flag and singing political songs. He also says:

"I saw the accused and five or six non-co-operators holding a demonstration near the house of Ponnappalli Veeraraghavaya Somayajulu advocating the boycott of British goods and foreign cloths The accused did all this to assist the operations of the All India Congress Working Committee."

The witness then proceeds to say that the All India Congress Working Committee advocated the boycott of foreign cloth, manufacture of salt, etc. In cross-examination he says:

"I do not know if the accused is a member of the All India Congress Committee. I do not know if the accused was authorized by the All India Congress Committee."

The witness also refers in chief examination to some non-co-operation meetings attended by the accused, but in cross-examination he says he cannot give the dates of those meetings. There is also some reference to the Narasapur Taluk Congress Committee. I refer to these two matters merely to eliminate them from further discussion. The charge actually made against the accused has nothing to do either with the non-co-operation meetings held in Narasapur itself or the working of the Narasapur Taluk Congress Committee. We have only to see what he did to bring himself within S. 17 (1) of the Act, in connexion

with the Working Committee of the All India Congress Committee. It is clear from the evidence which I set forth above that the accused is not a member of that unlawful association, nor has he contributed or received or solicited any subscriptions for the purpose of that association. The only question that remains is, has he in any way assisted the operations of that association. In Ex. A the Police Inspector reported that he noticed volunteers carrying a national flag and some cardboards containing seditious matter. The cardboards and the national flag were seized from these people and the national flag is a material object before me. (After discussing the value of the evidence afforded by the flag and placards, the judgment proceeded). Neither do the placards refer to the Working Committee of the All India Congress Committee or any of its operations.

Then on what does the conviction of the accused rest? On this matter I find some difficulty in following the appellate judgment. In para. 2 it refers to the evidence of P. Ws. 1 and 2 and the particular portion of the evidence mentioned is:

"They were advocating boycott of British goods and foreign cloth. P. W. 2 also says they started advocating boycott."

Paragraphs 3, 4 and 5 deal with the defence evidence. Para. 6 deals with the discrepancies of the defence evidence. So far as these paragraphs are concerned, it is unnecessary for me to say anything about them nor have I anything to say about para. 7 subject to one remark. In this paragraph the learned Joint Magistrate says:

"There are also some other discrepancies as regards what was written on the placards and as to the direction from which the police came."

One refers to the discrepancies in dealing with evidence relating to the events that happened but not when the evidence relates to the contents of a document. The placards are before the Court. What purpose do the discrepancies in the oral evidence relating to their contents serve? It can only show that the witnesses are so very loose and inaccurate in describing the simple contents of a cardboard just as the Police Inspector is very inaccurate in describing the contents of the same cardboard. However, as I have already said, I have

nothing to say about these paragraphs.

Then in para. 8 the Magistrate says:

"The prosecution case is that the appellant and others were advocating boycott, shouting out slogans and carrying a congress flag. The defence denies this and says appellant was saying nothing."

The learned Joint Magistrate says:

"These assertions and counter-assertions cannot be to any extent tested by cross-examination. It is only by the evidence as to surrounding circumstances that it can be decided which side is telling the truth. From the numerous discrepancies and the exaggerations of the defence I consider the lower Court was right in disbelieving their evidence."

The Joint Magistrate then explains the delay of the police in putting up the case. I take it that this paragraph is intended to express the conclusion of the Magistrate that the prosecution case, namely, that the appellant and others were advocating boycott, shouting out slogans and carrying the congress flag, is true, and the defence case denying this is false. I accept the finding of the Joint Magistrate. But is this finding enough to convict the appellant of an offence under S. 17 (1), Criminal Law Amendment Act, to which the Joint Magistrate's judgment makes no reference. As the judgment stands, the impression is created in me that the Magistrate thinks that his finding that the prosecution case that the appellant was advocating boycott, shouting out slogans and carrying the congress flag is true, is enough to dispose of the case. Unfortunately it is not. This finding does not bring the accused within the clutches of S. 17 (1). That section does not make the advocating of boycott, the shouting out of slogans and the carrying of congress flags an offence. Incidentally we may observe that no reasons are given for describing the flag as the congress flag. As I said, it contains nothing on it. One may call it a national flag or any other flag as his fancy dictates. Earlier in the judgment in para. 2 it was described as a national flag. Why it was referred to as congress flag, I do not know. No details are mentioned about the slogans. If they also referred to boycott they do not add to the previous phrase advocating boycott. I accept the finding of the learned Joint Magistrate that the accused was advocating boycott, but that does not necessarily amount to assisting the operations of any unlawful association. A

man may individually advocate boycott without even knowing the existence of any unlawful association and without thinking of helping the operations of any unlawful association.

Simply because the object of an association and the object of some individual person in his own individual activities are identical it cannot be said that the individual is helping the operations of the association. Identity of objects with no other connexion does not amount to assisting the operations of associations. Of course I do not mean to say that only if a man is secretary or a member or a salaried servant that he can be said to assist. He may be guilty of assisting in other ways than these. It may be he is an honorary worker on behalf of that association in which case he may be guilty. He may get leaflets or placards from that association for distribution, in which case he will be guilty. But when there is no kind of connexion proved between a person and an unlawful association, it cannot be said that the person is assisting the operations of that association simply because there is the identity of objects. The words "assisting the operations of an association" would become meaningless unless the operations of the association are in the person's mind and an intention to assist them is also there and such intention to assist the operations of that association can be inferred by an unambiguous overt act. A different construction of the words of the act will lead to startling results.

First, as I have already said, a person may be convicted under this section even if he has never heard of the existence of such an unlawful association and knows nothing of its operations. I can mention other anomalies, but they would not be relevant to this case and it is unnecessary to advert to them. The Bombay High Court has held to the same effect, namely, that it cannot be said that a person is assisting an association unless he has its operations in his mind and has an intention to help them or they are within his intention as evidenced by the Act: vide *Gangubai v. Emperor*, A. I. R. 1931 Bom. 200. In this case accepting the whole of the prosecution story there is no act of the accused on which one's fingers can be laid to say that the accused had the oper-

ations of the All India Congress Committee in his mind and he intended to assist the operations of that Committee by his activities. In my opinion no case has been made out under S. 17 (1). The conviction is set aside and the accused is directed to be set at liberty. The fine, if paid, will be refunded.

P.R.S./K.S. *Conviction set aside.*

A. I. R. 1933 Madras 372 (1)

CURGENVEN, J.

Modali Lakshmi Narasimham Sarma,
—Accused—Petitioner In re.

Criminal Revn. Case No. 568 and Criminal Revn Petn. No. 525 of 1932, Decided on 24th November 1932.

Railways Act (9 of 1890), S. 122 (1)—Crossing railway line to reach platform is offence.

In order to reach the platform accused crossed the line instead of entering it by ordinary route even though there was a notice board put at the station prohibiting such trespass:

Held: that persons cannot wander about railway lines at their own will and pleasure without rendering themselves liable under some provision of law which prohibits so dangerous a practice and that the conviction was justified.

[P 372 C 1,2]

T. V. Ramanatha Aiyar—for Petitioner.

Parakat Govinda Menon, for Public Prosecutor—for the Crown.

Order.—The petitioner has been convicted under S. 122 (1), Railways Act, of unlawfully entering upon a railway and sentenced to pay a fine of Rs. 10. The evidence shows that in order to reach the platform of the Nellore Railway Station he crossed the line instead of entering it by the ordinary route. The only point taken is that the prosecution has not demonstrated that such action constitutes an unlawful entry or a trespass. There is evidence, which the Courts have accepted, that there was a notice-board put at the station prohibiting such trespass and the accused's conduct was said to have constituted a breach of that notice. Inasmuch as this point was not specifically challenged at the trial the prosecution was not put to the proof of the authority upon which that notice was based. Had this been done, I have no doubt that it could have been shown that the notice was perfectly justified by some rule or regulation. I am not going to believe that persons can wander about railway lines at their own will and pleasure

without rendering themselves liable under some provision of law which prohibits so dangerous a practice. The criminal revision petition is dismissed.

P.R.S./K.S. *Petition dismissed.*

* A. I. R. 1933 Madras 372 (2)

BURN, J.

Ponnusami Chetty—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 14 of 1933, (Criminal Revn. Petn. No. 14 of 1933), Decided on 16th January 1933, from order of Stationary Sub Magistrate, Negapatam, D/- 9th December 1932.

* Criminal P. C. (1898), S. 162—Assertion made before police in order to show that witness is making statement in witness box which he did not make before police cannot be filed.

A statement made by a witness to the police in an investigation under S. 162 cannot be filed, or exhibited, or, in short, used, when the witness is under examination in an inquiry under Chap. 18 in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police: *A I R 1932 Lah 103* and *A I R 1926 Pat 20, Rel on*; *A I R 1926 Pat 362, Expl.*; *16 All 207, Ref.* [P 372 C 2]

K.S. Jayarama Ayyar and *K. Venkataramani*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The point raised in this case is whether a statement made by a witness to the police in an investigation under S. 162, Criminal P. C., can be filed, or exhibited, or, in short, used, when the witness is under examination in an inquiry under Chap. 18, Criminal P. C., in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police.

Statements recorded under S. 162, Criminal P. C., can be used at a subsequent inquiry or trial for one purpose only: to contradict the witness. If they are to be used for this purpose the statements made under S. 162 must be duly proved, and used in the manner laid down in S. 145, Evidence Act. It follows, of course, that unless there is a contradiction between the statement recorded under S. 162 and the statement made by the witness in the course of his deposition, the statement recorded under S. 162 cannot be used at all. It is therefore obvious that the question raised in this case must be answered in the nega-

tive, unless an *omission* from a statement under S. 162 can be said to be a *contradiction* of a statement made in the witness-box. Reduced to these terms the matter appears to me to be too simple to admit of any argument. Whether it is considered as a question of logic or of language, "omission" and "contradiction" can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To "contradict" means to "speak against" or in one word to gainsay." It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not "diction," and therefore it cannot be "contradiction." It is clear therefore that a statement under S. 162, Criminal P. C., cannot be used during an inquiry or trial in order to show that a witness is making statements in the witness-box which he did not make to the police.

The same conclusion follows from a consideration of S. 145, Evidence Act. If it is intended to contradict the witness *by the writing*, his attention must be called to those parts of the writing which are to be used to contradict him. It would be, in my opinion, sheer misuse of words to say that you are contradicting a witness *by the writing*, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that:

"a witness cannot be confronted with the unwritten record of an unmade statement: *Mohinder Singh v. Emperor*, A. I. R. 1932 Lah. 103, at p. 110."

In the case cited, it was held by Coldstream, J., that the view of the learned Sessions Judge was not correct. Reference was made to the judgment of Dalip Singh, J., in *Hazara Singh v. Emperor* (1), but in neither of these cases was it explained how an omission could amount to a contradiction. The instance given by Dalip Singh, J., was that of a witness who should state under S. 162, Criminal P. C., that three persons were beating a man, and should later allege that four persons were beating the same man. I would say with all respect that such statement would be, in fact contradictory. It is impossible to state a case in which

an omission amounts to a contradiction. There is apparently no decided case in this High Court, but I cannot see that there is any real difficulty in the matter. There is some apparent divergence of view in the Patna High Court. Mr. K. S. Jayarama Ayyar for the petitioner relies on the case of *Iltaf Khan v. Emperor* (2) whereas the learned Public Prosecutor relies on the observations of Macpherson, J., in *Badri Chaudhry v. Emperor*, A. I. R. 1926 Pat. 20. In the former case it appears to me (with all respect) that there is a slight confusion of thought. A witness named Mahabir Dubey, who during the trial had given evidence against the accused, had stated in cross-examination that when examined by the police he had said that he had seen the accused that evening. This statement was contradicted by the Sub-Inspector of Police who apparently referred to his record of the statement made by the witness under S. 162, Criminal P. C., and found therein no record of any statement by Mahabir Dubey of the fact that he has seen the accused that evening. In such a case as that, the statement of Mahabir Dubey in the witness-box, that he had seen the accused, was not contradicted either by the record of his statement under S. 162 or by the evidence of the Sub-Inspector. What the Sub-Inspector contradicted (refreshing his memory no doubt by reading the record he had made under S. 162) was the statement of the witness that he had told the police so and so. It was a contradiction not of his evidence against the accused but of what he had said to the Sub-Inspector. And moreover it was a contradiction not between two statements made by the witness, but between a statement made by the witness and a statement made by the Sub-Inspector. For such a purpose as this, the statement under S. 162, Criminal P. C., cannot be used; it can only be used in order to show that the witness in the box is contradicting something he has said before. It appears to me, with respect, that the reasoning of Macpherson, J., in the case cited, *Badri Chaudhry v. Emperor*, A. I. R. 1926 Pat. 20, is entirely correct.

The evidence in the case now in question is not before me. Mr. K. S. Jaya-

1. A I R 1923 Lah 257=29 Cr L J 348=9 Lah 389=108 I C 167.

2. A I R 1926 Pat 362=27 Cr L J 796=5 Pat 346=95 I C 396.

rama Ayyar tells me that certain witnesses appear to have stated to the police merely that all the accused beat some one. In the witness-box these witnesses, I am told, have added allegations against particular accused of particular acts. The defence wants to file their statement under S. 162, Criminal P. C., in order to show that when examined by the police they did not attribute any particular acts to any particular accused. As the learned Public Prosecutor points out, the defence thus wants to use the statement under S. 162, Criminal P. C., for a purpose not sanctioned by the Code. It is not permissible to use such statements in order to show "development" of the prosecution case; it is only permissible to use them to prove contradictions. In the present case there are no contradictions.

Mr. Jayarama Ayyar then asks how he is to contradict the witnesses when they say that they told the police exactly what they are telling the Court. The answer is simply that he must contradict the witnesses on this point by adducing counter-evidence, exactly in the same way as he would contradict on any other point. He can put questions to the police officer to whom they made the statements under S. 162, Criminal P. C., or he can cite witnesses, if any, who were present when those statements were recorded. He cannot however use the statements themselves. It is not difficult to understand why the legislature has restricted the use of such statements to a single purpose. Some of the reasons have been enunciated by Enoz, J., so long ago as 1894 and most of the language is still appropriate even after the changes introduced into S. 162, Criminal P. C., in 1923: see *Queen Empress v. Nasiruddin* (3):

"Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the police during the investigation. Such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases, they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders; over and above all,

they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel."

The learned Sub-Magistrate's view of the provisions of S. 162, Criminal, P. C., is substantially correct. His actual order is not quite accurately worded. It is impossible to "read over" portions alleged to have been omitted; but the learned Sub-Magistrate only means that the witnesses are to be particularly questioned about the statements in their depositions which according to the defence were not made when the police questioned them under S. 162, Criminal P. C. There is no ground for interference in revision.

P.R.S./V.S.

Revision dismissed.

A. I. R. 1933 Madras 374

SUNDARAM CHETTY, J.

Nallakaruppan Ambalam and another
—Defendants—Appellants.

v.

Vellamarunthan Ambalam and others
—Plaintiffs—Respondents.

Second Appeals Nos. 983 and 984 of 1929, Decided on 22nd August 1932, against decrees of Sub-Judge, Sivaganga, in Appeal Suits Nos. 22 and 23 of 1928.

(a) **Madras Estates Land Act (1908), S. 112**
—None-service of notice on defaulter is fatal and renders sale illegal.

The non-service of notice required by S. 112 upon a registered pattadar who 'alone is the defaulter for the purposes of that section is an illegality, and by reason of such an illegality, the civil Court has jurisdiction to set aside the sale of the holding for arrears of rent: *A I R* 1923 *Mad* 6, *Foll.* [P 375 C 2]

(b) **Madras Estates Land Act (1908), S. 112**
—In case of more than one pattadar service must be on each pattadar.

There is no presumption that if a patta for certain lands stands in the names of two persons, they are necessarily co-owners of those lands. The existence of the patta in the names of both may be due to so many causes. Moreover, when S. 112 distinctly requires service of notice on the defaulter, if it happens that the defaulters are more than one notice must be served on all of them. [P 375 C 2; P 376 C 1]

K. P. Ramakrishna Ayyar — for Appellants.

V. Ramaswami Ayyar — for Respondents.

Judgment.—These two appeals arise out of two connected suits for setting aside a sale for arrears of rent, after declaring the same to be illegal, and also in the alternative for possession. The first Court decreed these suits in favour of the plaintiffs and these decrees have been confirmed by the lower appellate Court. Land No. 139 is the subject-matter of O. S. No. 28 of 1926 and land No. 140 is the subject-matter of O. S. No. 453 of 1925. Both these lands were originally comprised in patta No. 57 which stood in the name of plaintiff 1 in O. S. No. 453 of 1925. It appears that that patta included some other lands also. By reason of a sale effected in favour of one Velayutha, the patta in respect of lands Nos. 139 and 140 was transferred to his name and a fresh patta viz., patta No. 2, was also issued to him. For arrears of rent these two lands were brought to sale under the Estates Land Act; but it is admitted that no notice of the intention to sell as required by S. 112 of the Act was issued to Velayutha. It is however alleged that a notice was served on plaintiff 1 in O. S. No. 453 of 1925. The first Court held that there was no sufficient service of notice on him, whereas the lower appellate Court found that service to be sufficient.

The main question argued in these second appeals is whether the sale sought to be set aside was illegal on account of the non-service of notice on Velayutha who was the registered pattadar in respect of these lands under patta No. 2. There is no doubt that the procedure prescribed under S. 146 of the Act should have been adopted in effecting the transfer of patta in respect of lands Nos. 139 and 140 in favour of the purchaser Velayutha. Consequent on the recognition of Velayutha as a raiyat by the land-holder, patta No. 2 was issued in his favour. In the circumstances set forth above, it is reasonable to hold that so far as lands Nos. 139 and 140 are concerned, the fresh patta No. 2 was issued in supersession of the old patta No. 57. It is however contended that plaintiff 1 in O. S. No. 453 of 1925 should also be deemed to be a pattadar, as these two numbers were not deleted from patta No. 57. The omission to amend patta No. 57 seems, to my mind, to be due to a mistake and it could never have been the intention of the land-holder to treat

the pattadar of No. 57 patta to be a raiyat in respect of lands Nos. 139 and 140 even after the recognition of Velayutha as a raiyat in respect of these lands by issuing in his favour patta No. 2. If this is a correct understanding of the facts of this case, as I believe it is, we must hold that the defaulter within the meaning of S. 112 of the Act was only Velayutha and nobody else, as he was the properly constituted registered pattadar. The non-service of notice required by S. 112 upon a registered pattadar who alone is the defaulter for the purpose of that section is an illegality, and by reason of such an illegality, the civil Court has jurisdiction to set aside the sale of the holding. It has been so held by a Full Bench of this Court in a decision reported in *Rajah of Ramnad v. Venkataramaiyar* (1). On this short ground, the sale in question must be declared to be illegal and the decisions of this Courts below should be upheld.

It is however contended by Mr. Ramakrishna Ayyar for the appellants that by reason of the retention of lands Nos. 139 and 140 in the old patta, we may consider plaintiff 1 in O. S. No. 453 of 1925, and also Velayutham as joint pattadars as regards the suit lands. If No. 2 patta was issued in supersession of patta No. 57, it would not be possible to hold both of them as joint pattadars. Even treating them as joint pattadars, the question still remains whether a notice required by S. 112 of the Act should be served on both of them or not. It is contended on the analogy of S. 106, T. P. Act, that notice to quit issued to one of the co-owners would be sufficient and therefore notice served on one of the joint pattadars must also be taken to be sufficient. I fail to appreciate the force of this analogy. There is no presumption that if a patta for certain lands stands in the names of two persons they are necessarily co-owners of those lands. The existence of the patta in the names of both may be due to so many causes. There is nothing in this case to show that plaintiff 1 in O. S. No. 453 of 1925 and Velayutha were co-owners of these lands. Moreover, when S. 112 distinctly requires service of notice on the defaulter, if it happens that the defaulters are more

1. A I R 1923 Mad 6=69 I C 923=45 Mad 890.

than one, notice must be served on all of them. On the general principle that the singular includes also the plural, I must take it that service of notice on the defaulters mentioned in S. 112 means service of notice on all the defaulters if they happen to be joint pattadars.

In any view therefore the non-service of notice on Velayutha is a fatal defect and renders the sale in question illegal. It is unnecessary to consider the other aspects of the case. The decrees of the Courts below are correct and these second appeals are therefore dismissed with costs.

P.R.S., V.S. *Appeals dismissed.*

A. I. R. 1933 Madras 376

CURGENVEN AND SUNDARAM
CHETTY, JJ.

Secy. of State — Defendant — Appellant.

v.

Kunhi Krishna Varma Valia Raja and another—Plaintiff and Defendant—Respondents.

Second Appeal No. 248 of 1930, Decided on 31st March 1932, against decree of Sub-Judge, Telicherry.

(a) **Malabar Law** — Assets of deceased Sthani go to Kovilagam from which he has sprung.

On the death of a Sthani such of his assets as originated from the income of the Sthanam go to the Kovilagam from which he has sprung. They do not under the ordinary law pass as accretions or otherwise to the Sthanam.

[P 377 C 2]

(b) **Negotiable Instruments Act (1881), Ss. 4 and 69**—War-bond is promissory note.

A war bond is a promissory note within the meaning of the Negotiable Instruments Act or the Limitation Act.

[P 378 C 1]

(c) **Indian Securities Act (10 of 1920), S. 18**—S. 18 does not give more time than what is allowed by Limitation Act.

Section 18, Securities Act, does not give the plaintiff more time than he would otherwise have under the Limitation Act. That section says no more than that when the Government has made a payment due upon a security it shall be discharged from all liability in respect of the security after the lapse of six years from the date on which the payment was due. That merely puts an unconditional limit upon the time within which the claim may be made but does not extend the time in all cases up to that limit.

[P 377 C 2]

(d) **Limitation Act (1908), Art. 80**—Suit on war-bond—Limitation runs from date of presentment.

A suit on a war-bond is governed by Art. 80, Lim. Act, and time which runs from the point of time when the note becomes payable under Art. 80, Col. 3, does not run until presentment at the specified place has been made. [P 378 C 1]

(e) **Promissory Note** — Government Securities are payable at specified places.

In the case of Government securities such as war-bonds the Government lies under no duty to seek out and pay its creditors, but that they must present their promissory notes at the place appointed for payment.

[P 378 C 2]

P. Venkataramana Rao—for Appellant.

K. P. M. Menon and D. A. Krishna Variar—for Respondents.

Curgenvén, J.—The plaintiff is a Valia Raja of Kadathanad, having succeeded to that title on the death of the previous holder, Krishna Varma, in 1919. In 1918 Krishna Varma Valia Raja had subscribed for six war bonds of Rupees 1,000 each and sixty post-office cash certificates of Rs. 100 each. The point for decision in this case is, who became entitled to these assets upon Krishna Varma's death. The succession to the Sthanam which comprises an estate as well as the title of Valia Raja, is regulated by the usual Malabar rule; there are two Kovilagams, called respectively the Edavalath and the Ayancheri Kovilagams, and the senior male member of the two Kovilagams combined succeeds as Valia Raja. Krishna Varma himself derived from the Ayancheri Kovilagam, his successor the plaintiff from the Edavalath Kovilagam. The general proposition is not now disputed before us that on the death of Valia Raja such of his assets as originated from the income of the Sthanam go to the Kovilagam from which he sprang; in the case of Krishna Varma to the Ayancheri Kovilagam. They do not under the ordinary law pass as accretions or otherwise to the Sthanam. When Krishna Varma died, the securities in question were taken possession of by the senior member of that Kovilagam, Sankara Varma, now defendant 2; and it is his case that by the ordinary rule of succession his Kovilagam is entitled to them. The plaintiff as Sthani sets up special grounds, which will be particularized later to take the case out of the ordinary rule.

Before coming to the present suit we may glance briefly at the course of proceedings which led up to it. Not long after Krishna Varma's death, which occurred on 5th September 1919, both the plaintiff and defendant 2, applied to the revenue authorities for the transfer of the securities in their respective names.

Defendant 2's letter to the Collector, Ex. 5, is dated 6th December 1919, and that of the plaintiff to the Tahsildar, Ex. 2, is dated 22nd January 1920. These applications evoked a reply from the Superintendent of Post Offices, Malabar Division (Ex. B) that the amount of the war loan could only be paid on production of an order from a competent Court of law. The plaintiff after some considerable delay then applied (Ex. 1) for a succession certificate, making Sankara Varma respondent. The District Judge dismissed the application on 16th August 1923. Thereupon the plaintiff sued the present defendant 2, in O. S. No. 23 of 1923, on the file of the Subordinate Judge of Tellicherry, for a declaration of his title to these assets. While the suit was pending Sankara Varma succeeded in obtaining payment of the amounts due upon the war loan and post office certificates, and the plaintiff was allowed to amend his plaint to include a prayer for the recovery of the money. The suit was dismissed both upon the allegation of fact with which the plaintiff endeavoured to support his title and upon the issue whether, even if the plaintiff had proved his title, he could recover the money from defendant 2. There was an appeal to this Court and the learned Judges who disposed of it, while agreeing with the Court below that the plaintiff could not recover the money, took a different view of the evidence relating to title. Having thus failed in his objective, the plaintiff then brought the present suit against the Secretary of State, on whose application Sankara Varma was impleaded as defendant 2. Substantially the same ground was travelled over, the depositions of some of the witnesses in the prior suit being by consent read as evidence. The learned Subordinate Judge of Tellicherry has found in favour of the two plaintiffs on the question of title, and has given them a decree for the recovery of the amount of the war loan, but has dismissed the claim in respect of the post office certificates as barred by limitation. The appeal is preferred by the Secretary of State in respect of the former decision and the plaintiff has filed a memorandum of objections in respect of the cash certificates.

Although the matter was at one time disputed it is now common ground that

the money with which these investments were made came from the income of the sthanam, and, as already observed, it is not disputed that according to the ordinary law of succession defendant 2's Kovilagam would have been entitled to them. The plaintiff must therefore put his case upon a special footing if he is to succeed. He in fact assumed two alternative positions. In the first place he alleges that Krishna Varma specifically appropriated these particular assets to the sthanam with the intention that they should be incorporated with the rest of the sthanam estate and pass to his successor as Valia Raja. The plaintiff's second position is that the ordinary law is overridden by a special family custom according to which all assets left by a sthani pass to his successor in the sthanam. (After discussing the evidence, the judgment proceeded). On the question of limitation I do not think that the learned Subordinate Judge is right in his view that S. 18, Securities Act (10 of 1920) will give the plaintiff more time than he would otherwise have under the Limitation Act. That section says no more than that when the Government has made a payment due upon a security it shall be discharged from all liability in respect of the security after the lapse of six years from the date on which the payment was due. That merely puts an unconditional limit upon the time within which the claim may be made but does not extend the time in all cases up to that limit.

The question remains open therefore whether this suit was in time under the ordinary law of limitation. The first point to decide is what kind of instrument is a war bond. It has been argued before us that it is not a promissory note, either as defined in the Negotiable Instruments Act, or in the Limitation Act. Now in the first place it is styled a promissory note, and the definitions in the two Acts appear to be wide enough to include it. The only specific argument advanced is that the presence of a stipulation with regard to presentment of the security at a named place (the General Treasury, Fort William) takes it out of the definition. The answer is furnished by the terms of S. 69, Negotiable Instruments Act, which provides that a promissory note payable at

a specific place must, in order to charge the maker or drawer thereof be presented for payment at that place. The Act clearly therefore contemplates promissory notes of this character. We have then to consider under what article of the Limitation Act it should fall. Since the provisions with regard to the place of presentment excludes it from the special Arts. 69, 72, and 74 to 76, it seems clear that the residuary Art. 80 for a

"suit on a bill of exchange, promissory note or bond not herein expressly provided for"

must apply and that time runs from the date when the bill, note or bond becomes payable. This raises the further question whether the promissory note becomes payable on the date of maturity, which is 15th September 1921, or whether it would only be rendered payable by presentment in accordance with its terms.

It is well-settled that where a note is drawn for payment "at sight" or "on demand" and, without more, no presentment is necessary; and in fact this is expressly stated in the exception to S. 64, Negotiable Instruments Act. Where however a note is made payable at a specified place the terms of S. 69 already quoted require that there must be presentment in order to charge the maker thereof. Whether this latter phrase is equivalent to saying that the note does not become payable until that condition is complied with may not be perfectly clear. It has been argued that the words "in order to charge" relate only to the institution of a suit. But on all ordinary principles the liability to pay and the right to sue should be governed by the same conditions. If the maker is sued upon such a note, would it not be open to him to plead that no liability to pay had arisen as no presentment had been made? It appears to me that the reasoning employed by Schwabe, C. J., in *Secy. of State v. Radhika Prasad Bapooli* (1), although it related to an instrument which was unusual in character and probably not a promissory note within the meaning of the Negotiable Instruments and Limitation Acts, was general enough in its terms to apply also to a case such as the present. If I may very briefly abstract it, it runs as

1. A I R 1923 Mad 667=74 I C 785=46 Mad 250.

follows: When money is payable on demand and nothing further is said—whether by prescribing a place for presentation or otherwise—time begins to run at once. This principle is in this country to be found expressed in Arts. 59 and 71, Lim. Act. The words "on demand" are in fact to be regarded as mere words and it is not really intended that any demand should be made before the liability to pay arises. In England it was formerly held that where a place for presentment was named, presentment at that place was necessary before a right to sue could arise. This rule has since been altered by Statute; but there has been no such statutory alteration of the law in India. We must look at the document and decide whether it was the intention of the debtor to insist on a demand at the place named.

If such an intention can be inferred, then the debtor comes under no liability to pay until such demand is made. It is when the argument has reached this point that the terms of the instrument fall to be considered. It appears to me clear in the Government securities such as the present that the Government lies under no duty to seek out and pay its creditors but that they must present their promissory notes at the place appointed for payment. I would therefore hold, with reference to the terms of Col. 3, Art. 80, that time, which runs from the point of time when the note becomes payable, does not run until presentment at the specified place has been made. This is the further difficulty that there has in fact been no presentment by the plaintiff, the notes having been presented by defendant 2 and cancelled upon payment of the amount to him. In the circumstances I am of opinion that the plaintiff would be entitled to avail himself of the presentment already made as the only reasonable conclusion on the facts. If that be so, admittedly the suit will be in time. But as my learned brother concurs in the view which I take of the merits of this case, the appeal is allowed and the suit dismissed with costs throughout. The memo. of objections is dismissed with costs.

Sundaram Chetty, J. — My learned brother has dealt with the merits of the plaintiff's claim in its several aspects and I express my concurrence in the view taken by him. I do not propose to deal

with those points once again, but I shall confine myself to the question of limitation raised in this case. The learned Subordinate Judge had held that the plaint claim in respect of the war-bonds is not barred by limitation. The correctness of that finding is challenged by the learned Government Pleader on behalf of the appellant. These war-bonds are six in number, each of them being for Rs. 1,000. They were purchased by the late Krishnavarma Valiya Raja who was the Sthani of the plaintiff mentioned Mooppu Stanam and who died on 5th September 1919. The present plaintiff is his successor to the office of sthanam above mentioned and has filed this suit for the recovery of the amount of those war-bonds as the sole legal representative of the deceased Sthani. In order to understand under what category of documents the war-bonds in question come, we may take Ex. 9 as the sample. It is styled as a promissory note. The Governor-General of India in Council on behalf of the Secretary of State for India in Council promises to pay the Accountant-General, Madras, or order at the General Treasury at Fort William on 15th September 1921, a sum of Rs. 1,000 together with interest at $5\frac{1}{2}$ per cent per annum to be paid by equal half-yearly payments. This war-bond is dated 15th September 1918.

The definition of a promissory note is given in S. 4, Negotiable Instruments Act, and a promissory note is also defined in S. 2 (9), Lim. Act 9 of 1908. There seems to be no substantial difference between the two definitions and the requisites of a promissory note as defined in either of those Acts are fulfilled in the case of the war-bonds in question. It is contended on behalf of the respondent that by reason of the specification in Ex. 9 of the place where the amount of the promissory note is payable it would not be strictly a promissory note as defined by the aforesaid Acts; but if regard be had to some of the sections in the Negotiable Instruments Act, it is clear that by reason of the specification of a place for the repayment of the amount, the document is not taken out of the category of promissory notes dealt with under that Act. S. 69 of the Act relates to a promissory note made payable at a specified place and S. 66 relates to a promissory

note made payable at a specified period after date thereof.

The wording of Ex. 9 shows that it is a promissory note of this double character coming under Ss. 66 and 69 of the Act. It is not a promissory note payable on demand, for the words "on demand" do not appear in it at all, but it is a pro-note payable at a specified period after date thereof and at a specified place. We have to see which would be the appropriate article of the Limitation Act applicable to a suit on such a pro-note. Art. 69 deals with a suit on a promissory note payable at a fixed time after date thereof. Art. 71 relates a suit on a bill of exchange accepted payable at a particular place, but this article does not provide for a promissory note made payable at a particular place, nor does Art. 69 provide for such a pro-note. Nor does the promissory note in question come under Art. 72 or Art. 73. If none of the specific articles relating to promissory notes can strictly apply to a promissory note of the type of Ex. 9 the only proper course is to apply Art. 80 which deals with a suit on a promissory note not expressly provided for in the schedule. This article provides a period of three years from the date when the note becomes payable. This is a general article applicable to promissory notes which are not expressly provided for in any other article. If the document in question is a promissory note, and I have no doubt that it is, Art. 80 cannot be overlooked, and it is only when even this general article is found to be inapplicable we should resort to the final and residuary articles, namely, Art. 120 which provides a period of six years from the time when the right to sue accrues for suits for which no period of limitation is provided elsewhere in the schedule. In my opinion the proper article applicable to the present suit, so far as it relates to the claim for the recovery of the amounts due on the war-bonds in question is Art. 80, Lim. Act.

The next and the more difficult question is, what is the starting point for limitation? According to Col. 3, Art. 80 limitation begins to run from the date when the note becomes payable. Under S. 66, Negotiable Instruments Act, a promissory note made payable at a specified period after date thereof, must be presented for payment at maturity, and

under S. 69 a promissory note made payable at a specified place must, in order to charge the maker thereof, be presented for payment at that place. According to S. 22 the maturity of a promissory note is the day at which it falls due and every promissory note which is not expressed to be payable on demand is at maturity on the third day after the day on which it is expressed to be payable. The mode of calculating the days of grace is given in S. 23. According to the terms of Ex. 9 the promissory note is expressed to be payable on 15th September 1921. It is not expressed to be payable on demand. It must be deemed to have been at maturity on the third day after that date, that is on 18th September 1921. Presentment for payment at maturity is obligatory under S. 66 and similarly presentment for payment at the specified place in order to charge the maker thereof is obligatory under S. 69. It is only where the promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof: vide exception to S. 64. This rule does not apply to the promissory note in question. It was at the maturity on 18th September 1921, and not before, and its presentment for payment must be made on the date at the specified place as required by Ss. 66 and 69. As this is not a negotiable instrument payable on demand, S. 74 of the Act does not apply and there is no question of presentment for payment within a reasonable time. The question of what is reasonable time has been held to be a mixed question of law and fact. Such a question would arise for determination when presentment is optional, in which case the holder, if he chooses to present, may do so at any time before payment.

In the case of a promissory note like Ex. 9, there is no option in the matter of presentment and, in view of Ss. 66 and 69 of the Act, it must be presented for payment at the specified place on 18th September 1921, when the note really becomes payable according to law. That date seems to my mind to be the correct starting point for limitation for a suit on this promissory note under Art. 80, Lim. Act. When the note has thus become legally payable on the aforesaid date, limitation for enforcing the payment must be deemed to have commenced

since then, and, unless a valid reason is made out of its cessation or suspense, the bar of limitation cannot be got over after the expiration of three years from the date when the limitation began to run. Where the date of the cause of action is so determined, it must be held that limitation has commenced to run from that date. Suppose the time for presentment of the note for payment was at the option of the holder, it can reasonably be urged that the note becomes payable on the date on which he chooses to exercise that option; but where the date for presentment is fixed to be a particular date according to the provisions of law applicable to a promissory note, or in other words, the date on which the promissory note becomes payable is determined to be a particular date according to the provisions of law, limitation for a suit to enforce the payment must be taken to have commenced on the date on which it ought to have been presented, and the starting point cannot be altered by the act or omission of one party alone.

Reliance has been placed by the learned advocate for the respondent on the decision reported as *Secy. of State v. Radhika Prasad Bapooli* (1). The decision rested upon the special terms of the promissory note and the main contention in that case was that, though the claim related to the amount due as per the pro-note, it had an indissoluble link with the previous agreement of 1824 entered into with the company, whereby a specific trust was created and as such the case would come under S. 10, Lim. Act. The learned trial Judge was of opinion that the claim based on the pro-note as a simple contract debt would be barred by limitation, but as it was a case of express trust coming under S. 10, Lim. Act, there would be no bar of limitation. But on appeal it was held that the claim on the promissory note even if looked upon as a simple contract debt was not barred. In the first place, according to the terms of the document dealt with in that decision, the principal amount became payable on demand after the expiration of the 15 months from the date on which the Government gives the notice set out in the document. In the second place, there was no unconditional promise to pay the principal amount because the payment depended upon the

Government exercising its option to give the notice or note: vide p. 276 of 46 *Mad*). In the next place, in order to entitle the holder to payment, a demand after the expiration of 15 months from the giving of the notice was rendered necessary by the express terms of the document.

On a proper construction of the terms thereof, it was held by Schwabe, C. J., that the words "on demand" were not mere formal words, but it was really intended that the demand should be made before the liability to pay arose. Great importance was also attached to the fact that the payment was to be made at a named place by the person liable. There was no time fixed for making the demand after the expiration of 15 months' notice to be given at some future time by the Government. No time was fixed for the giving of such a notice by the Government and it would appear that it was optional with the Government to give such notice at any time and it was equally optional with the creditor after the expiration of the aforesaid 15 months time to make a demand for payment at any time. In view of those special conditions, it was within the power of the parties to postpone the starting point of limitation as they pleased. But in the present case, such features are absent, and, as I have attempted to show, the date on which the note becomes payable has been determined to be a particular date and according to the provisions of Ss. 22, 66 and 69, Negotiable Instruments Act, which govern a promissory note such as Ex. 9, the date for the accrual of liability to pay the amount of the pro-note in question does not depend on the performance of an act at a time left to the option of one party or other as was the case dealt with in the aforesaid decision.

The present suit was filed by the plaintiff on 13th September 1926. Obviously it was filed more than three years since the date on which the war bonds (promissory notes) became payable, that is 18th September 1921. The cause of action must be deemed to have arisen when the notes became payable within the meaning of Art. 80, Lim. Act. In para. 15 of the plaint the correct dates for the accrual of the cause of action have not been given. If the

cause of action for a suit on these promissory notes should be held to have legally arisen on 18th September 1921, nothing has been stated in the plaint as a ground for exemption from the bar of limitation. The learned Subordinate Judge has however held that the suit is within time by reason of S. 18, Securities Act 10 of 1920. Ss. 17 and 18 of this Act deal with cases, wherein the Government is absolutely discharged from all liability. S. 17 deals with immediate discharge of liability in the cases specified therein. In the present case the Government has paid the amount of these war-bonds to defendant 2 in June 1924. These bonds were endorsed as discharged and cancelled on 6th June 1924 by reason of such payment. The plaintiff claiming to be the real legal representative of the deceased holder of those war-bonds seeks to recover the amount due thereunder from the Government, despite the payment made to defendant 2. His case is that his rights cannot be defeated by reason of the payment made to defendant 2 who according to his contention, was not entitled to receive the payment. S. 18 of the said Act lays down that, except as otherwise provided in this Act, the Government shall be discharged from all liability in respect of the securities on which a payment has been made after the lapse of six years from the date on which payment was due.

This section fixes a period of six years from the date on which the payment was due as the limits of time beyond which the Government is immune absolutely from liability on the pro-notes. This contemplates a case of the true owner or a person having a paramount title suing for the money due under the promissory notes in spite of the Government having paid the same to some other person. This is mainly a provision intended for the benefit of the Government who cannot, in any event, be made liable to pay the amount of such pro-notes at the instance of the rightful owner after the expiration of the time limit fixed in the section. If the claim of the rightful owner becomes barred by limitation even within the said period of six years, is it to be understood that, by reason of the provision in S. 18, Securities Act, an extension of the period of limitation afforded to him under the

general law is given to him? There is nothing in S. 18 to warrant such an inference. It is noteworthy that there are no words in S. 18 indicating that this period is fixed notwithstanding anything contained in the Limitation Act. If it was meant that the period of limitation allowed to a creditor to sue on such promissory note was overridden by the provision contained in this section the legislature would have used express words to convey such a meaning. What seems to me is that, even if the true owner has an enforceable claim against the Government according to the general law of limitation after the lapse of six years from the date on which the payment was due under the promissory notes, he could not enforce payment by the Government by reason of this special time limit. This is not a provision to enable a person disabled from suing under the ordinary law, by extending the period of limitation open to him. It is obligatory on a creditor to make out that his claim is not barred under the ordinary law. The learned Subordinate Judge states that, if the liability of the Government is discharged only after the six years mentioned in the section, the true owner is also entitled to enforce his right within the period. I think the conclusion does not necessarily follow from the premise.

For all the foregoing reasons, I am of opinion that the plaintiff's suit to enforce payment on the war bonds in question is barred under the general law of limitation, and S. 18, Securities Act, cannot be invoked for his aid in order to extend the period of limitation allowed to him under the general law. I should think that the plaintiff's claim in respect of the war bonds must fail on the ground of limitation also. The lower Court has held that the plaintiff's claim for the amount payable under the Post Office cash certificates is barred by limitation. A memo of cross-objections has been filed by the plaintiff in respect of the claim disallowed. But the plaintiff's claim to the amount of these certificates fails on the merits, as shown by my learned brother in his judgment. I agree with my learned brother, that the appeal should be allowed and the memo of objections should be dismissed, and also concur in the order as to costs.

P.R.S./K.S.

*Appeal allowed.***A. I. R. 1933 Madras 382**

SUNDARAM CHETTY, J.

(Appana Maha) Sadasiva Suryanarayana Rao—Plaintiff—Appellant.

v.

Palakurthi Rajalingam and others—Defendants—Respondents.

Second Appeal No. 1620 of 1928, Decided on 8th August 1922, from decree of Sub Judge, Bezwada, in A. S. No. 150 of 1927.

(a) **Contract Act (1872), S. 43—One of co-vendors paying compensation to vendee in pursuance of clause in sale deed is entitled to contribution from other co-vendors even though they were not consulted when payment was made.**

In sale deed executed by co-vendors, there was a provision to pay compensation to vendee for breach of covenant. One of the co-vendors paid the compensation for such breach without consulting or taking consent of the other co-vendors.

Held: that the liability was a joint and several one and that the co-vendor was entitled to contribution under S. 43 if the payment made was valid and bona fide. [P 383 C 1]

(b) **Vendor and Purchaser — Discovery of vendor's defective title in portion of property purchased subsequent to sale — Whole sale is not ab initio.**

If, with respect to a portion of the property sold under a registered sale deed it is found that the vendors had a defective title and by reason of that finding the purchaser could not take possession of that portion, it should not be said that the whole sale becomes void. It is open to the vendee to avoid the sale itself on the ground that the entire extent stipulated for was not put in his possession, or he might claim compensation or damages in respect of the portion lost, on the ground of partial failure of consideration. [P 383 C 2]

(c) **Limitation Act (1908), Arts. 97 and 116 — Suit for compensation by vendee for breach of covenant in sale deed — Limitation is six years from date of failure of consideration.**

Articles 97 and 116 must be read together; in suit for compensation by vendee for a breach of covenant in a registered sale deed, the extended period of limitation of six years should be allowed. The starting point of period of limitation is date of failure of consideration of sale. [P 383 C 2]

(d) **Civil P. C. (1908), S. 100—New plea.**

A new plea cannot be entertained in second appeal. [P 384 C 2]

P. Satyanarayana Rao — for Appellant.

V. Govindarajachari — for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff (appellant), for the recovery of a certain sum of money alleged to be due to him by way of contribution from the defendants in respect of a payment of Rs. 3,500 made by him in satisfaction of a claim

for compensation or damages on account of the breach of a covenant contained in a registered sale deed, Ex. B. The first Court gave a decree in plaintiff's favour for a sum of Rs. 562-8 0 with proportionate costs. The lower appellate Court reversed that decree and dismissed the plaintiff's suit. Hence this second appeal.

It is clear that by reason of the execution of the sale deed, Ex. B, by three persons including the plaintiff's deceased father, there was a joint covenant for title and quiet enjoyment in that sale deed. On account of a defect in the title of the vendors as regards the full extent covered by the sale deed, it is found by the first Court that the payment of Rs. 3,500 by the plaintiff's father in satisfaction of the claim for compensation or damages set up by the Cotton Press, the vendee under Ex. B, was in no sense an overpayment, but, on the other hand, it was an adequate compensation paid in respect of the loss sustained by the Cotton Press, in respect of 4,287 yards of site. That finding is, in my opinion, based upon a proper appreciation of the evidence and though the lower appellate Court has not dealt with it, I have no hesitation in accepting that finding as correct. It is true that the plaintiff's father when he made the payment in question did not previously consult the co-vendors and take their consent. There is no doubt that the liability to compensate in respect of the breach of the covenant contained in Ex. B was joint and several. This case therefore comes under S. 43, Contract Act, though there is some doubt whether S. 69 would apply or not. In order to resist such a claim the defendants may show that on the date of the alleged payment the Cotton Press was not entitled to recover so much amount as compensation and say that the claim for compensation was itself barred by limitation. As regards the first point, I have already found that the amount paid by the plaintiff's father was in no sense an overpayment.

Then, on the question of limitation, the learned District Munsif has found that the claim of the Cotton Press for compensation in respect of 4,287 yards of site lost was not barred on the date of the payment, viz., 22nd November 1924. The correctness of this finding has been attacked by the learned advocate for the

respondents with great insistence. The question though at first sight presents some difficulty is in my opinion easy of solution if the facts of this case are viewed in a proper perspective. I cannot accede to the contention that by reason of the decree of the Sub-Court, dated 23rd April 1919, the sale under Ex. B should be deemed to be a void sale, i. e. the sale was void ab initio. If, with respect to a portion of the property sold under a registered sale deed, it was found that the vendors had a defective title and by reason of that finding the purchaser could not take possession of that portion, it should not be said that the whole sale became void. It was open to the vendee to avoid the sale itself on the ground that the entire extent stipulated for was not put in his possession, or he might claim compensation or damages in respect of the portion lost, on the ground of partial failure of consideration.

In a similar case, it was held that the suit for compensation for breach of express or implied covenant of title and quiet enjoyment in respect of a registered sale deed was governed by Art. 116, Lim. Act, though the case may be brought under Art. 97, also, vide the decision in *Sigamani Pandithan v. Manibadra Nainar* (1) and also the decision in *Mahomed Ali Sheriff v. Venkatapathi Raju* (2). Under Art. 97 the starting point of limitation is the date of the failure of consideration, which would be the date of the decree of the first Court, wherein the defect in the title of the vendor has been recognized. The starting point for limitation under Art. 97 is not postponed to the date of the final decree in such a litigation, but the case may be brought under Art. 116 also which gives a period of six years' limitation, on the ground that the breach was in respect of a contract in writing registered. It seems to me that the two articles must be read together, and the extended period of limitation, viz., six years, should be allowed in the present case, taking the starting point of limitation as the date of the failure of consideration for the sale. In this view the Cotton Press had six years' time to sue for compensation from 23rd April 1919, the date of the Sub-Court's decree.

1. A I R 1926 Mad 255=91 I C 514.

2. A I R 1920 Mad 634=60 I C 235.

It follows therefore that when the payment in question was made by the plaintiff's father on 22nd November 1924 the claim of the Cotton Press was subsisting. In this case therefore the defendants cannot attack the payment in question on either of the two grounds above set forth.

If it is a valid and bona fide payment made by the plaintiff's father, he has every right to sue the joint promisors, viz. the co-vendors, under S. 43, Contract Act, for contribution. The present suit has been lodged as against one of the co-vendors. The lower appellate Court has overlooked these aspects of the case and confined its attention solely to one point, viz. that the plaintiff's father alone settled the claim with the Cotton Press without consulting the co-vendors and made the payment in question. It is not on the ground that the co-vendors have either consented to the arrangement or acquiesced in it that this claim is put forward but on the general law as set forth in S. 43, Contract Act, the claim is sought to be justified. In this connexion another contention which, I may say, is one that is set up newly in this second appeal, was raised by the learned advocate for the respondents, because of an allegation in the plaint that the plaintiff's father and the other two persons were partners and were carrying on the partnership business before the execution of the sale deed in question. It is argued that any claim of the plaintiff's father in respect of the alleged payment must be deemed to relate to an item of the partnership and it cannot be separately sued for. This objection was never raised in either of the Courts below; on the other hand, there is no warrant for holding that at the time of the payment in question by the plaintiff's father, there was a subsisting partnership between him and the other two persons. Even assuming that they were partners on the date of the sale deed Ex. B, there is no warrant for the inference that when the sum of Rs. 3,500 was paid long after the sale deed the partnership continued. If the defendants wanted to avail themselves of such a technical objection to nonsuit the plaintiff, they must have made the necessary averments in the written statement and taken an issue on this point. I am not therefore inclined to

entertain a new plea which is now raised in second appeal.

As the plaintiff's claim is not open to any legal objection, the mere fact that the previous consent of the other two persons was not obtained is no ground for disallowing it. I cannot agree with the decision of the lower appellate Court and I accordingly set it aside and restore the decree of the District Munsif with costs in all the Courts.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 384

SUNDARAM CHETTY, J.

(*Unde, Rajaha, Raje Captain, Sri Rajah Velugoti*) Govinda Krishna Yachendraravaru Bahadur — Defendant—Appellant.

v.

Kamireddi Ramakrishna Reddi — Plaintiff—Respondent.

Second Appeal No. 1114 of 1928, Decided on 5th August 1932 from decree of Dist. Judge, Nellore, in A. S. No. 109 of 1927.

(a) Practice — Party having effectual remedy by suit in revenue Court should not be allowed to seek it by means of civil suit.

If the plaintiff has an effectual remedy by a suit or an application in a revenue Court for averting the injury, he should not be allowed to seek it by means of a civil suit. [P 385 C 1]

(b) Madras Estates Land Act (1908), S. 112 — Only registered pattadar can maintain suit under S. 112.

A person who has not yet been recognized as the registered pattadar cannot maintain any suit under S. 112 of the Act, because a suit under that section could be filed only by the defaulter, who should necessarily be the registered pattadar, and that too on the service of the notice mentioned in that section on him. [P 385 C 1]

(c) Madras Estates Land Act (1908), Ss. 55 and 146 — Purchase of land from raiyat not recognized by landlord — Purchaser can file suit under S. 55 for grant of patta or apply for transfer under S. 146.

A purchaser of a land from a raiyat, though his transfer was not recognized by the landlord, could still file a suit under S. 55 of the Act for the grant of a patta in such terms as the raiyat would be entitled to receive, or apply under S. 146 for transfer of patta to his name or by instituting a proceeding in a civil Court for an order establishing the transfer. [P 385 C 1, 2]

(d) Madras Estates Land Act (1908), S. 146 — Omission to follow procedure laid down in S. 146 bars similar relief being asked in civil Court.

The policy of the Estates Land Act is to compel any person who has acquired an interest in raiyati land to follow the procedure laid down in S. 146, if he wishes to be treated as a raiyat and to have all disputes as to procedure in rent sales inquired into by revenue Court. The consequence of the omission to do so would be a

bar to asking for a similar relief in a civil Court by means of a suit, and even as a defendant he would be debarred from impeaching the validity of a rent sale which he could have otherwise disputed in a revenue proceeding: *A I R 1921 Mad 637, Foll.* [P 385 C 2]

M. Venkatasubbiah for *Advocate-General*—for Appellant.

P. Srikantham—for Respondent.

Judgment.—This second appeal arises out of a suit filed by the plaintiff-respondent for an injunction against defendant 1, the Maharajah of Venkatagiri, from seeking to recover cist on the basis of an extent of 277 acres in the holding comprised in patta No. 108 of the Kanur village. In the first Court the plaintiff succeeded in getting a decree for an injunction restraining defendant 1 from taking any proceedings for the recovery of cist on anything more than 182 acres and 50 cents. That decree was confirmed by the learned District Judge.

In this second appeal it is contended that a suit of this kind was not maintainable in a civil Court. The plaintiff is a purchaser of a major portion of the plaintiff-mentioned land from defendant 2 in 1917. The arrear of cist in respect of which defendant 1 is alleged to have taken proceedings under S. 112, Estates Land Act, for the sale of the holding is due for fasli 1333. The principle governing a case of this kind seems to be, that if the plaintiff had an effectual remedy by a suit or an application in a Revenue Court for averting the injury now complained of, he should have resorted to that remedy and should not be allowed to seek it by means of a civil suit. It is clear that the plaintiff who has not yet been recognized as the registered pattadar cannot maintain any suit under S. 112 of the Act, because a suit under that section could be filed only by the defaulter, who should necessarily be the registered pattadar, and that too on the service of the notice mentioned in that section on him. If that remedy is not open to the plaintiff, we have next to see whether he had any other remedy under the Estates Land Act. In view of the ruling of this High Court in *Ramanathan Chetti v. Arunachalam Chettiar* (1) a purchaser of a land from a raiyat, though his transfer was not recognized by the landholder, could still file a suit under S. 55 of the Act for the

grant of a patta in such terms as the raiyat would be entitled to receive. If such a suit had been filed by the plaintiff in a Revenue Court even before fasli 1333—and he had ample opportunity for filing such a suit since the date of his purchase—defendant 1 would not have been able to take proceedings for the recovery of the cist on the basis of an extent of 277 acres odd for fasli 1333. There was also another remedy open to the plaintiff even before fasli 1333. Under S. 146 of the Act he should have applied for the transfer of the patta to his name. One course allowed for it is a joint application by the transferor and the transferee communicating to the landholder the fact of the transfer.

It is urged that such a course was not available to the plaintiff, because of the enmity between him and the transferor. It is possible that the transferor would not join the plaintiff in giving such a notice. But there is another course provided for in the same section and that is a proceeding in a civil Court for an order of that Court establishing the alleged transfer. There was nothing to prevent the plaintiff from instituting such a proceeding. If he obtained such an order of the civil Court, a copy of that order might be produced before the landholder who would be bound to recognize the transfer on the basis of that order. There is no excuse for the omission on the part of the plaintiff to have recourse to that proceeding. In the face of these facts the principle of the decision reported in *Irulappan Servai v. Veerappan* (2) has to be applied to the present case. As regards the policy of the Estates Land Act, the learned Judges have observed that the policy is to compel any person who has acquired an interest in raiyati land to follow the procedure laid down in S. 146 if he wishes to be treated as a raiyat and to have all disputes as to procedure in rent sales inquired into by the Revenue Court. The consequence of the omission to do so would be a bar to asking for a similar relief in a civil Court by means of a suit and as was held in that case, even as a defendant he would be debarred from impeaching the validity of a rent sale which he could have otherwise disputed in a revenue proceeding. In this view, I have to hold that the present suit is not maintainable in a

1. *A I R 1921 Mad 557=60 I C 316=44 Mad 43.*

2. *A I R 1921 Mad 637=69 I C 918;*

civil Court, but I may observe that it is still open to the plaintiff to take the necessary proceeding as laid down in S. 146, Estates Land Act, or to institute a suit under S. 55. By so doing, he may exonerate the holding from liability to pay cist on the basis of a larger extent than 182 acres and 50 cents. But he is without any remedy in respect of the arrear of cist claimed to be due for fasli 1333. The plaintiff should only blame himself for these consequences on account of his omission to take appropriate proceedings under the Estates Land Act in due time.

In the result this second appeal is allowed and the plaintiff's suit is dismissed with costs in this appeal. The parties will bear their respective costs in the Courts below. I may note that the appellant could even now stick to his undertaking given in the first Court and receive the cist properly payable on an extent of 182 acres and 50 cents on the plaintiff tendering that amount to him.

P.R.S./K.S.

Appeal allowed.

*** A. I. R. 1933 Madras 386**

VENKATASUBBA RAO AND CUR-
GENVEN, JJ.

Akshayalingam Pillai—Petitioner.

v.

Avayambala Ammal and others — Respondents.

Civil Revn. Petn. No. 1112 of 1929, Decided on 4th November 1932, from order of Sub-Judge, Mayavaram, D/- 6th November 1928.

(a) **Specific Relief Act (1877)—Interpretation of sections in Act — English principles can be applied unless there is express divergence.**

The Specific Relief Act is based on the rules and practice of the English law in relation to the doctrine of specific performance; the sections of this Act, both as to substantive law and practice, should be interpreted in the light of the principles recognized by the English Courts. If there is an express divergence, then the Act will be strictly adhered to whatever be the English law: *A I R 1928 P C 208, Rel on.* [P 387 C 2]

* (b) **Specific Relief Act (1877), S. 35 (c) —Decree for specific performance operates in favour of both parties— Held on facts defendant is not entitled to specific performance.**

A decree for specific performance operates in favour of both parties: *A I R 1932 Cal 579; 12 Bom 174 and A I R 1933 Bom 26, Ref.*

[P 387 C 2]

Defendant who had agreed to sell certain property to plaintiff, sold a portion of it to some

other who purchased with notice of the contract between the plaintiff and defendant. Plaintiff got a decree for a specific performance conditional on his paying certain amount with interest. He did not do so as the amount to be paid was rather high. The defendant finding the amount fixed to be advantageous to him sued the plaintiff for specific performance by asking him to pay the amount and that he was willing to transfer the property.

Held: that he was not entitled to the relief as he had perpetrated wrong and could not take advantage of it by trying to deprive the transferees of their title and that he was entitled only to have the contract rescinded under S. 35 (c).

[P 390 C 1]

* (c) **Specific Relief Act (1877), S. 35 (c) —S. 35 (c) applies both to vendor and purchaser irrespective of fact whether he is plaintiff or defendant.**

Section 35 applies to both the plaintiff vendor as well as the defendant vendor and is not confined to the latter case only. And right of rescission recognized in S. 35 (c), Specific Relief Act, is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser it being immaterial whether he appears in the action as plaintiff or defendant: *A I R 1923 Bom 211; 128 I C 875; A I R 1927 Bom 239 and A I R 1923 Mad 284, Ref.*

[P 389 C 1]

C. A. Seshagiri Sastri—for Petitioner.

K. S. Desikan, R. Semasundaram Ayyar, K. S. Venkataramani, V. V. Chowdhury and G. S. Venkatarama Ayyar—for Respondents.

Venkatasubba Rao, J.— An important question has been raised as to the right of a defendant after judgment in a suit for specific performance. The facts which gave rise to the application made in the lower Court, so far as they are relevant to the present purpose, may be briefly stated. The plaintiff-purchaser obtained in O. S. 70 of 1923 (that was the suit in which the application was made) a decree for specific performance of the contract referred to in the pledgings, to sell immovable property. Defendant 1 was the vendor under the contract, and defendants 7, 8 and 13 are alienees of different portions of the property from defendant 1 with notice of the contract. On 31st March 1926 the following decree was made by the Subordinate Judge's Court of Mayavaram:

"(1) That the plaintiff do deposit in Court within six months from this date Rs. 5,500 with interest at 11 annas per cent per mensem from 17th December 1913 to date of deposit; (2) that on deposit defendant 1 on his behalf and on behalf of his sons, defendants 2 to 6 and defendants 7, 8 and 13, do execute and register a conveyance in respect of their respective properties in the plaint (less the items adjudged as lost to the plaintiff by reason of the finding on issue 16); that the deed of conveyance shall be joint or

several according as the plaintiff desires and that all costs in connexion with the execution and registration of conveyance shall be borne by the plaintiff; (3) that the plaintiff do get possession of the properties with mesne profits to be determined in execution as from the date of deposit of the money, defendants 1, 7, 8 and 13 being severally liable for mesne profits according to the extent of property held by each; (4) that defendants 7, 8 and 13 do have a charge on the money in deposit according to their respective stake on the properties as per their sale deeds obtained by them or their predecessor, their remedies being left to be enforced in future proceedings and (5) that the plaintiff do pay defendant 1 Rs. 304-8-0 on account of his costs of the suit and the plaintiff and the other defendants do bear their own costs of the suit as noted below."

It will be noticed that this decree is in some respects somewhat curious. By the time the decree was made, nearly 13 years had elapsed from the date of the contract, and the plaintiff is directed by the decree to bring into Court the purchase money with interest from 17th December 1913, the date of the contract. While the plaintiff was thus made liable for interest for over 13 years, there was no corresponding liability imposed on the defendants, who remained in possession of the property, for mesne profits, as under the decree they were made liable only from the date of the deposit. Another curious feature is that the amount payable to the defendant alienees was left to be determined in future proceedings. It was felt, it is stated, that this judgment bore harshly on the plaintiff, but as he had died even before it was pronounced, his legal representatives were unable to file an appeal. The amount which under the decree the plaintiff was directed to pay was found to be in excess of the value of the property, and no attempt was therefore made by his representatives to carry the decree into effect. Defendant 1, finding it to his advantage to enforce this decree, presented a petition to the lower Court in the following terms:

"That this Honourable Court be further pleased to pass a final order in conformity with the preliminary decree already passed in the suit, so as to enable him to reap the fruits of the preliminary decree."

By this petition defendant 1 stated that he was willing to carry out his part of the contract, and applied that the plaintiff's representatives should be directed to bring the purchase-money into Court. Defendants 7, 8 and 13, it must be noted, did not join defendant 1 in making this application. The stand taken by the

latter in the lower Court was, that the plaintiff was bound to pay in return for the land in his possession which he was prepared to convey, the proper proportion of the price. But the contention in that form has been abandoned in this Court, defendant 1's case now being, that on behalf of the dissenting defendants the conveyance should be executed by the Court and that the plaintiff should be called on to bring in the full price. The learned Subordinate Judge, holding that the only remedy open to the applicant is to have the contract rescinded under S. 35 (c), Specific Relief Act, made the following order:

"It seems to me therefore that the only final order which can be passed on this application is that the plaintiff contract, dated 17th, December 1913, evidenced by Ex. D be rescinded and determined. I accordingly pass the said order."

It is against this order that the revision petition has been directed. A question of general importance has been argued whether, when a decree for specific performance is made, it operates in favour of both parties, so that the defendant also can have it carried into effect. It is argued on the one hand that the defendant to the action does not enjoy the same privilege as the plaintiff, that as regards the relief he can obtain in the suit itself, S. 35 (c), Specific Relief Act, prescribes a remedy and that he cannot obtain any other or further relief in the action than what is provided by that section. It is contended on the other hand that the decree in the suit enures for the benefit of both and each of the parties can after judgment claim specific performance. The question is, which of these two views is correct? The Specific Relief Act, it has been pointed out, is based on the rules and practice of the English law in relation to the doctrine of specific performance: *Ardeshir Mama v. Flora Sassoon* (1). Their Lordships of the Judicial Committee have interpreted the sections of this Act, both as to substantive law and practice, in the light of the principles recognized by the English Courts. If there is an express divergence, then the Act will be a strictly adhered to, whatever be the English law (same case, p. 623 of 52 *Bom.*). It seems to be well settled under the English practice that a decree for specific performance operates in favour

of both parties. The usual form of a decree is to declare that the agreement ought to be specifically enforced without stating that it shall be so enforced at the instance of the plaintiff only. The form given in Seton on Decrees runs thus :

"Declare that the agreement in the pleadings mentioned, ought to be specifically performed and carried into execution and order and adjudge the same accordingly : Edn. 7, Vol. 3, pp. 2136 and 2137."

In India also this view was taken in some cases : *Karim Mahomed Jamal v. Rajooma* (2) and *Karima Bibi v. Abde Raheman* (3). In a recent case the point was discussed at great length by Rankin, C. J., who, after an elaborate examination of the authorities, came to the same conclusion: *Heramba Chandra v. Jyotish-chandra Singha* (4). In England a suit for specific performance is not deemed to come to an end by the passing of the decree. In Ch. 4 of Fry's standard work on specific performance he discusses the various reliefs that may be obtained after judgment. The right to these reliefs is not possessed by the plaintiff alone. The learned author says :

"It may and not unfrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part, as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced: S. 1170, Edn. 6."

And then again :

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself S. 1171."

Then he goes on to describe at some length the various kinds of relief that are open to a vendor and those open to a purchaser. The nature of the relief depends upon whether the applicant is the vendor or the purchaser, not upon whether he is the plaintiff or the defend-

ant. The chapter deals with varieties of reliefs, and some of them may probably not apply to India, the law and practice here being in some respects different ; but there is no reason why the principle, which has been accepted by the English Courts, should be departed from in this country. The Specific Relief Act is defective in this respect, and we should turn for guidance to the English practice on the subject. Let us take the case where the defendant happens to be the purchaser. The plaintiff, who has obtained judgment, makes default. What then is the defendant's position ? He is prepared to pay the purchase price and otherwise observe the decree, but on the hypothesis that it does not enure for his benefit, he cannot compel the plaintiff to execute the conveyance. There is no provision in the Specific Relief Act, which such a defendant can invoke. The decisions say that the plaintiff may obtain in certain circumstances an extension of the time originally granted. When then can the defendant feel that he is absolved from the contract ? How long is he to keep ready in his hands the purchase-money ? It cannot be that the intention of the law is that a defendant-purchaser should be subject to this unmerited hardship. Therefore in the case of a defendant-purchaser at any rate, there being no provision in the Specific Relief Act, we must necessarily turn to the recognized English practice in that respect.

Next, is there anything to show that, where the defendant is the vendor, the remedy provided by the Act is exhaustive ? I may observe first, that S. 35 applies to both the plaintiff vendor as well as the defendant vendor and is not confined to the latter case only. Supposing a vendor as plaintiff obtains a decree for specific performance but finds that the defendant is impecunious and cannot pay the purchase-money, why should it not be open to him to have the contract rescinded under that section ; and secondly the words "in the same case" in the final paragraph refer to the case mentioned in Cl. (c). I agree with the view taken on this point in *Kurpal v. Sham Rao* (5) and by Thiruvengkatachariar, J., in *Mohamedali Shah v. Abdul Khader Saheb* (6) at p. 357. The

2. (1888) 12 Bom 174.

3. A I R 1923 Bom 26=67 I C 667=46 Bom 990.

4. A I R 1932 Cal 579=139 I C 230=59 Cal 501.

5. A I R 1923 Bom 211=47 Bom 589.

6. (1927) 128 I C 875.

opening paragraph of the section refers to the "following cases" then three cases follow, case (c) being one of them. The words "in the same case" in the final clause of case (c) must therefore refer to that particular case. And further, why should it be assumed that a departure from the English law is intended and the relief is restricted to the contingency mentioned in the penultimate clause, namely, where the purchaser is in possession?

A contrary opinion has been expressed by Collett in his Specific Relief Act: see Edn. 5, p. 282, and there is a dictum of Kemp, J., to the same effect in *Chathurbuj v. Kalyani*: A. I. R. 1927 Bom. 239; but I must express my respectful dissent from this view. S. 35 thus in my opinion applies to both the plaintiff-vendor and the defendant-vendor, and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. But is that any reason for holding that the other remedies open to them under the English law are denied to them under the Act? We cannot overlook that the word used in the final clause of S. 35 is "may" and not "shall." It therefore seems to me that a defendant, whether he be purchaser or vendor, must after judgment be in a position to require specific performance from the opposite party in the same action. If the principle on which the rule of mutuality is founded be accepted, the remedies open to the plaintiff after judgment must be equally available to the defendant and the varied nature of the remedies is set forth, as already noticed, by Fry in his work. Thus, the right of rescission recognized in S. 35 (c), Specific Relief Act, is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser it being immaterial whether he appears in the action as plaintiff or defendant. That the principle of reciprocity is not limited to the enforcing of the decree by requiring specific performance, is the effect of the observations of Sir Walter Schwabe, C. J., in *Abdul Shakur v. Abdul Rahiman* (7) already cited. The learned Chief Justice gives a rough summary of the remedies enumerated by Fry as they obtain in the English system

and assumes that they are equally available to either party in this country.

This in my opinion is the necessary result of the acceptance of the dual principle recognized in the English law: first that the passing of the decree does not terminate the suit but that various reliefs may be obtained after judgment in the action itself (according to Sir Walter Schwabe, C. J., the decree is in the nature of a "preliminary decree"), and secondly, that the decree enures not only for the benefit of the plaintiff but also of the defendant. Mr. Seshagiri Sastri suggested (though on the facts of this case it was not necessary for him to take up this position) that in regard to limit of time, applications by a defendant to enforce the decree would be governed by the provisions of the Limitation Act. It is sufficient to point out that this does not seem to be the true principle on which relief is granted to either party, but this subject I need not pursue further.

I have so far assumed that the decree that is passed has followed the proper form, i.e., that it directs the contract to be specifically enforced, the words being wide enough to apply to the plaintiff as well as the defendant. If, as in the present case the decree has not followed that form, it is a matter of detail, whether the Court before granting relief to the defendant would insist upon the decree being in the first instance amended. In any case it would be advisable for the Courts to follow the English form in framing specific performance decrees any further by way of caution to insert, as suggested by Sir Walter Schwabe, some such words as "further consideration reserved" at the end of the decree. In the result, the contention of Mr. Seshagiri Shastri that a defendant can enforce specific performance is in my opinion well founded. But the question still remains, can defendant 1 in the circumstances of this case obtain such a relief? The plaintiff is neither in law nor under the decree bound to take a conveyance of defendant's share alone. Can the latter then compel defendants 7, 8 and 13 against their consent to join in the conveyance? They were not, it must be noted, parties to the contract, but the Court giving effect to a rule of equity, held that they were bound at the instance of the plaintiff. Defen-

dant in violation of his contract with him alienated parts of the property to these defendants. As against the plaintiff no doubt, they may have no equities, but surely defendant 1 cannot be allowed to perpetrate a double wrong. His conduct towards the plaintiff was wrongful, and he now invokes the aid of the Court to undermine the position of the alienees to whom he professed to pass a good title. The lower Court, by way of affording a relief to him, rescinded the contract under S. 35, and in my opinion he is not entitled to any higher or further relief. I may mention that almost at the close of the case it was intimated to us that defendant 13 had died subsequent to the appeal and his legal representatives had not been brought on the record. This, in the view I have taken, is immaterial. In the result the civil revision is dismissed with costs.

Curgenven, J.—I agree that this civil revision petition should be dismissed, but I would like briefly to put my reasons for that view in my own words. Accepting the general proposition that a decree for specific performance may be enforced by the defendant where the plaintiff has not chosen to give effect to it, and even regarding the decree in the present case, in spite of its actual form, as amenable to such treatment, I have not been persuaded that, in such circumstances as the present, the Court would be bound to comply with defendant 1's (petitioner's) request. The agreement to sell was in 1913, and nearly six years later, in 1919 defendant 1 parted with certain portions of the property to defendants 7, 8 and 13. They were aware of the agreement, but it seems to have been represented to them that the plaintiff had no intention of carrying it out. Now, since defendant 1 cannot enforce the decree so far only as his own property is concerned, enforcement must entail deprivation, at his instance, of the property which these defendants acquired from him. However the equities may stand between these persons and the plaintiff, it appears to me repugnant to all principles of equity that defendant 1 should now enforce the decree against their interests and without their consent, thereby depriving them of the title which he had himself conveyed to

them. Had he himself sued the plaintiff for specific performance after making these alienations, I do not think that any Court would have given him a decree; and I am loth to believe that, now that the plaintiff has a decree, defendant 1 may get indirectly what he could not get directly and the Court has no discretion to refuse to give it operation at his instance. Such enforcement may not technically amount to execution, but it appears to me that, where only one of several defendants applies there must necessarily be a power in the Court such as, in execution, is supplied by O. 21, R. 15, Civil P. C., to safeguard the interests of the remainder. Were this not so, it would have been open to this petitioner to dispose of all but a few cents of the property and yet compel the unwilling holders of the remainder, not to speak of the equally unwilling plaintiff, to become parties to a sale. I do not think that, even had we in this case strictly to administer the law, the doctrine of the reciprocal enforceability of decrees for specific performance would need to be applied in so unqualified a manner. A fortiori it follows that this petition for revision must be dismissed.

P.R.S./K.S.

Revision dismissed.

A. I. R. 1933 Madras 390

JACKSON AND WALSH, JJ.

(*Pichu Patter's son*) *Sivaramakrishna Patter and others*—Appellants.

v.

Mannathil Krishnan Nair and others—Respondents.

Letters Patent Appeal No. 46 of 1927, Decided on 5th October 1932, against decree of Devadoss, J, reported in *A I R 1927 Mad 73*.

(a) Civil P. C. (1900), S. 100—**Finding of fact from which custom is inferred cannot be interfered with by High Court in second appeal.**

The existence of a custom or usage having the force of law is a mixed question of fact and law, S. 100, Civil P. C., precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred: 41 *Mad* 374, *Foll.*[P 391 C 1]

(b) **Easements Act (1882), S. 18 — Customary right to do ceremonies under tree belonging to another is valid and can be proved.**

A customary right by the residents of a village to do certain ceremonies under a tree belonging to another is not unreasonable and can be proved. It is not necessary for such a custom

to be valid that all the villagers should exercise the right at the same time; nor does the fact that people other than the villagers also take part in the ceremony disentitles the villagers to get a declaration regarding their right.

[P 392 C 2]

T. R. Ramachandra Ayyar and *V. Subramania Ayyar* and *S. Varadachariar* for *K. Kuttikrishna Menon*—for Appellants.

P. A. Krishna Kutta Nair—for Respondents.

Walsh, J.—The plaintiffs sued for a permanent injunction restraining defendant 1 from interfering with their customary right as villagers of Parali to graze cattle on a paramba belonging to defendant 3's sthanam, to walk across it, to perform certain ceremonies at the foot of an arasa or pipal tree on it, to perform pradakshanam round the tree and to use the tank for bathing purposes. Defendant 1 who obtained a melcharth in 1911 obstructed the plaintiffs from exercising these alleged customary rights. The Court of first instance dismissed the suit; the Court of first appeal allowed it and granted an injunction against defendant 1. In second appeal the suit was dismissed and against this decree the present Letters Patent appeal is preferred. Before us the right to grazing has been given up by the appellants; so the only matters in question are the right of way across the paramba, the right to bathe in the tank and the right to perform certain ceremonies round the pipal tree. The first ground of appeal is that the learned Judge has interfered with findings of fact of the lower appellate Court. In *Kumarappa Reddi v. Manavala Goundan* (1) it was laid down that the existence of a custom or

"usage having the force of law is a mixed question of fact and law. S. 100, Civil P. C., precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred."

The learned Judge in this case says:

"The evidence on behalf of the plaintiffs is that the inhabitants of Parali generally bathe in a river close by and that when the water of the river is muddy some of the people use the tank for bathing purposes and funeral ceremonies are sometimes performed under the pipal tree. Is this evidence sufficient to make out the customary right in favour of the plaintiffs? The acts of the villagers of Parali seem to be of too fugitive a character to establish a customary

right in their favour. The facts on record are not sufficient to establish a valid custom.

It will be convenient here to take separately the right of bathing in the tank (which involves the use of the foot-path) and the rights claimed with regard to the ceremonies at the pipal tree. In regard to the first it cannot be said that the learned Judge has misstated or altered any finding of fact on which the custom is to be inferred so that this particular objection does not seem made out. But he has certainly failed to notice or deal with a most important fact which largely forms the basis of the first appellate Court's decision, namely, the two flights of steps to the tank and the paving. The case of defendant 1 was that the tank was used solely for irrigation purposes, in which case flights of steps of this sort and paving would certainly have been very improbable. The learned Sub-Judge finds as regards the steps:

"There is a flight of steps towards the whole of the eastern side of it" (the tank) divided into two compartments (most probably for the use of men and women simultaneously). It is in evidence that these steps are provided with granite slabs here and there (probably for the use of washing clothes for bathers)."

He then asks

"Why was the tank so paved with two compartments and with so many conveniences? It must have been for the use of people of both sexes and bathing purposes.

Further on he says:

"The flight of steps must have been put up for the use of the villagers whoever it be that put it up. It is probable therefore that the pavement was put up by the villagers or at least for their convenient use by defendant 1's predecessor in interest. Whether it was put up by the prior kanomdars or by the villagers there can be no doubt that the villagers of both sexes were using it for bathing purposes."

And later on:

"I have no doubt upon the evidence as pointed out that the tank A-2 and the flight of steps throughout the eastern portions of it were being used by the plaintiffs' villagers doubtlessly."

We have not got the benefit of any remarks by the learned Judge as to how he reconciles these flights of steps and the pavement with a fugitive use of the tank for bathing. It appeals to us that they would never have constructed merely for the convenience of a few people who only occasionally bathed in the tank when they found the river too muddy. On these facts we would find that the use of the tank for bathing was not fugitive. The question of the ceremonies round the pipal tree is a little more

difficult. The learned Judge says that only a few people went round the tree and only a few people performed funeral ceremonies under the tree and that it is not suggested that all the inhabitants of the village were in the habit of going round the tree. He quotes *Superintendent Engineer v. Ramakrishniah* (2). That case is not very authoritative because both the learned Judges agreed that the suit had to be dismissed for want of notice to the Government. With regard to the right of worshipping the idol raised in that case, of the two Judges, Sadasiva Ayyar, J. expressed no final opinion. Spencer, J., expressed an adverse opinion. *Taluk Board, Dindigul v. Venkatramiah* (3), quoted by the learned Judge in connection with the right to bathe in the tank does not seem quite parallel. The land in that case was a village site which the villagers claimed to use for thrashing floor, storing manure and other agricultural purposes and which they therefore sought to restrain the Government from assigning as house-site. In that case Odgers, J., remarks:

"The waste land in question was obviously used for any and all purposes or for several purposes at one or different times. Each user was fugitive or intermittent so much so that as shown by the plaint itself, it is extremely difficult to say what the customary user sought to be established was. Indiscriminate miscellaneous user of village waste land cannot in my opinion establish the fact that such user had become a customary law of the place in respect of the persons and things which it concerned. The user here is much too indefinite to do anything of the kind."

On the other side *Mangree Mian v. Behari Lal* (4) is quoted. This is a decision of the Patna High Court, in which the facts are very similar to those in the present case. It was held there that: "a suit by the residents of a village for a declaration that they have acquired the customary right of going over a particular plot of land belonging to the defendants for the purpose of worshipping a pipal tree and the idol of Sree Ganesh embedded in the tree and a tulsi chabutra, all situated on that plot of land and for a further declaration that the defendants have no right to obstruct the plaintiffs or other Hindu residents of the village in any way whatsoever from coming over the said land and worshipping the said pipal tree the idol of Sree Ganeshji and the tulsi chabutra, or to destroy, damage or desecrate the said objects of worship and also for a permanent injunction is maintainable and, the custom pleaded is not unreasonable or invalid."

This is clear authority that such a custom can be established and no decision to the contrary has been quoted. While in this country it is no doubt specially necessary to stop such practices at the start and before they have become a custom if the owner objects to them, we find that in the present case the custom has been established. It does not seem a sufficient objection that all the villagers do not exercise it at the same time and perhaps some of them never. So far as funerals are concerned, it is naturally only the relatives of the particular deceased who would perform the ceremony. Although it does not affect the strictly legal aspect it is clear that the real objection raised by defendant 1 in the present case is to the right of way across the paramba, and if this has to be allowed for the purpose of bathing in the tank the ceremonies round the pipal tree will not materially add to his discomfort.

It was argued for the respondents before us that the body who claimed to exercise the right was not definite because it is in evidence that other people coming to the village also exercised it. It may be noticed that the ground of appeal before the learned Judge in second appeal on this matter was not that the body was indefinite because it included persons of other villages, but that:

"such an indefinite and uncertain body of persons as the inhabitants of a village cannot have a customary right to make a particular use of a particular thing in respect of property which does not belong to them."

It has not been attempted to argue before us here that the inhabitants of a particular village are not a sufficiently definite body of individuals for this purpose. When they claim as such a body it is immaterial whether persons, with or without right, exercise a similar custom. The villagers only ask to have their own right declared. The main ground relied on in support of the learned Judge's decree is that whatever the villagers might do cannot bind the jenmi since the persons who have been in possession of the property have only been limited owners under him and have been villagers themselves. In this connexion it is to be noted that no case of permissive user was ever set up nor was there any issue on the point so that the analogy of permissive user to a person to take water

2. A I R 1920 Mad 723=58 I C 885.

3. A I R 1924 Mad 197=75 I C 33=46 Mad 866.

4. A I R 1921 Pat 90=61 I C 132.

from a tap in a private compound, which the learned Judge applies to the act of the villagers bathing in the tank, does not seem to be in point.

With regard to the jenmi in this case Mr. Ramachandra Ayyar for the appellants states that the learned Judge has misrepresented him in saying that he met this objection by saying that one of the anandravans was aware of the user and therefore the Sthanam must be taken to have been cognizant of what was going on. The person alluded to is P. W. 9. At the time of the institution of the suit he was karnavan, not an anandravan, and he has now succeeded defendant 3 as Sthani. Defendant 3, the Sthani at the time the suit was instituted, denied the plaintiff's claims and put in a written statement accordingly. He died and was succeeded by defendant 24 and the latter gave evidence in his capacity as Sthani as P. W. 9. He fully supported the plaintiffs' claims. He stated that he has been witnessing the custom claimed for 72 years. In the second appeal he had in turn been succeeded by respondent 46 in that appeal who no doubt supported the appellants' side in that appeal.

We agree that when P. W. 9 as representing the Sthanam gave evidence supporting the plaintiffs' case he must be held to have impliedly revoked the written statement of defendant 3, his predecessor. At any rate that written statement is of no avail in the face of his evidence. That answers the objection that the custom established against the limited owners will not bind the Sthanam. The Court of first appeal found as a fact that "the uses were made openly to the knowledge of the jenmi as well as the kanomdar." The injunction seems to have been granted against defendant 1 only because he was the person principally objecting. In the result this Letters Patent Appeal is allowed with costs. The decree of the first appellate Court will be restored with the exception that the words "grazing cattle" in Cl. (a) will be omitted. As all the defendants or their representatives in interest are before us the decree will also be altered by including them with defendant 1 in Cl. (a) of the decree. Cl. (b) will stand. The appellants will recover costs of this appeal, but as they failed in their claim to grazing in the second

appeal, and have given it up here, each side will pay its own costs in the lower Courts.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 393

CURGENVEN, J.

Narappa Naicken—Appellant.

v.

Rangasami Naicken and another—Respondents.

Appeal No. 132 of 1928, Decided on 23rd November 1932, against order of Dist. Judge, Coimbatore, D/- 6th March 1928.

Civil P. C. (1908), S. 13—Ex parte decree of foreign Court passed without jurisdiction.—Decree transferred to British India for execution—Application in foreign Court to set aside decree—Decree is nullity and continues to be inexecutable in British India—Execution.

An ex parte decree was passed by a foreign Court and it was transferred to British India for execution. The judgment-debtor applied to the foreign Court to set aside the decree, but it was dismissed and the execution was sought to be continued in British India on the ground that even though the decree was passed without jurisdiction, by the judgment-debtor's applying to set aside the decree, there was a submission to jurisdiction and that the decree was valid.

Held: that the decree was a nullity as the submission was not only made subsequent to the decree, but that it was also not voluntary and that it continued to be inexecutable in British India: *A. I. R. 1927 Lah 200; Guiard v. De Clermont and Donner*, (1914) 3 K. B. D. 145; *A. I. R. 1931 All. 689; 22 Cal. 222; 39 Mad. 24 and Voinet v. Barrett*, (1885) 55 L. J. Q. B. 39, *Ref.* [P 394 C 2; P 395 C 1, 2]

T. M. Krishnaswami Ayyar and K. Balasubramania Ayyar—for Appellant.

K. Bhashyam Ayyangar and V. C. Veeraraghavan—for Respondents.

Judgment.—The appellant holds a money decree passed ex parte against the respondent by the Court of the District Munsif of Quilon. It was transferred to the Court of the District Munsif of Tirupur for execution and the judgment-debtor was arrested. An application by him for his release on security for the purpose of getting the decree set aside was granted and he thereupon applied to the Quilon Court to set aside the ex parte decree. In that application the Quilon Court ordered an interim stay, but eventually dismissed it for default and intimated to the Tirupur Court that it might proceed with the execution. Thereupon the judgment-debtor filed an application to set aside the order of arrest and dismiss the execution petition

on the grounds that the foreign Court had no jurisdiction to pass the decree against him and that he had not submitted to it. The District Munsif dismissed the application on the ground that although the decree, being passed without jurisdiction, was a nullity, yet the judgment-debtor by applying to have it set aside has made a voluntary submission to the Court. The learned District Judge has differed from the District Munsif on this latter point, holding that in the circumstances of the case the judgment-debtor must be held to have acted under compulsion.

The first point that arises for consideration in my view is whether a decree passed without jurisdiction can be validated by submission, not in the suit itself and before the decree was passed, but after the decree had come into existence. It is contended that if the decree at the time when it was passed was a nullity, no subsequent action on the part of the judgment-debtor can have validated it. This point has been considered by the learned District Judge, who has followed a ruling in *Hari Singh v. Muhamad Said* (1). That too was a case where, after the decree had been passed ex parte, the defendants applied to have it set aside. The passage in the judgment relating to this point is to be found at p. 92. The learned Judges recognize that proceedings to set aside an ex parte decree cannot be said to be proceedings in the suit, the argument having been addressed to them that the submission to jurisdiction must be in the suit, but they think that when the defendants applied to have the ex parte decree set aside they must be held to have been ready to accept the decisions of the Courts of that foreign territory, provided always that they were not opposed to natural justice, etc. They themselves think that this is a curious result, but that it seems to follow from the decisions upon the point. The only decision actually cited is *Guiard v. De Clermont and Donner* (2), and I have not been able to discover that it affords any authority for this view.

The case related to an action brought in the Tribunal of Commerce of the Seine, in France. The defendants, who

were in England, declined to appear or to take any part in the proceedings and in the ordinary course judgment by default was passed by that Court. The plaintiff upon this obtained what was equivalent to an attachment order of money at the credit of the defendants in a French Bank, whereupon the defendants applied to the Tribunal of Commerce to have the default judgment set aside, and the Court actually did set it aside. The plaintiffs however appealed and obtained judgment in their favour. That appeal judgment was what was sued upon in England, and, as Lawrence, J., points out on p. 155, it is clear that it was a judgment to which the defendants were parties and in which they took the chance of obtaining a decision in their favour. This case does not seem therefore to afford support to the proposition that a judgment passed without jurisdiction can by subsequent submission to the Court become executable in British India. The learned Judges who decided *Sheo Tahal Ram v. Binack Shukul*, A. I. R. 1931 All. 689, seem to have been inclined to take the same view. They extract from Dicey's Conflict of Laws rules regarding jurisdiction in actions in personam. So far as it relates to this topic the rule is as follows:

"Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i. e., has precluded himself from objecting thereto: (a) by appearing as plaintiff in the action, or (b) by voluntarily appearing as defendant in such action without protest; or (c) by having expressly or implicitly contracted to submit to the jurisdiction of such Court."

As Sulaiman, Ag. C. J., remarks, it would seem that the submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission the judgment is a nullity. In the present case the alleged submission took place not only after the judgment was pronounced, but after the execution petition had been filed and to some extent acted upon. If the decree was, at the time when it was passed, an absolute nullity, I do not think it can seriously be contended that it can have been subsequently and retrospectively clothed with jurisdiction by any such action as the judgment-debtor took in this case. Mr. T. M. Krishnaswami Ayyar has attempted to argue that it was not an

1. A I R 1927 Lah 200=102 I C 523=8 Lah 54.

2. (1914) 3 K B 145=83 L J K B 1407=30

T L R 511=111 L T 293.

absolute nullity in the sense that it nowhere had any validity; for it was a good enough decree within the Travancore State. I do not think that circumstance makes any difference to the view which should be taken of it in British India. I may quote Lord Selborne who, delivering the judgment of the Privy Council in *Gurdyal Singh v. Raja of Haridkot* (3), said:

"In a personal action a decree pronounced in absentem by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

I would accordingly hold that the decree in this case continues to be a nullity and therefore inexecutable in British India. On the further point, whether, if the judgment-debtor's action amounted to a submission, that submission was voluntary, I am inclined to agree with the conclusion of the learned District Judge. I do not find much of assistance in the case-law upon this point. It has been held that submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal: see *Veeraraghava Ayyar v. Muga Sait* (4), which follows the English case of *Voinet v. Barrett* (5). It does not necessarily follow perhaps that where in pursuance of such a decree execution is taken in British India and some constraint imposed upon the judgment-debtor there the submission cannot be voluntary. But if to a "voluntary act" is attached the ordinary meaning of an act done of a man's own free will and without constraint, it is difficult to bring the respondent's action in resorting to the Quilon Court into this category. It may be true that he could have taken the alternative course of pleading that the decree was without jurisdiction, but if, as we must suppose, he was ignorant that this course was open to him, such ignorance does not, in my view, make his recourse to the Quilon Court any the more voluntary. He must have supposed that the only alternative to undergoing a

term of imprisonment was to challenge the decree as he did, and since he acted under pressure of this prospect I cannot hold that his appearance before the Quilon Court was in the nature of voluntary submission. I accordingly agree with the lower appellate Court and dismiss this second appeal with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 395

CORNISH, J.

Palani Chetty — Defendant — Petitioner.

v.

A. R. S. V. Sevugan Chetty — Plaintiff — Respondent.

Civil Revn. Petn. No. 1433 of 1929, Decided on 2nd December 1932, from decree of Temporary Sub-Judge, Devakottai, D/- 25th March 1929.

Civil P. C. (1908), O. 7, R. 6—Plea of exemption from limitation — New grounds of exemption cannot be allowed to be proved without amendment of pleadings.

Order 7, R. 6, is a rule of pleading. It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case. If a party is advised that his pleadings are defective the remedy is amendment by leave of the Court. Where a plaintiff pleads exemption from limitation on a certain ground, he cannot be allowed to prove such exemption from limitation by other grounds not taken in the pleadings. He can do so only after amendment of the pleadings: *Case law reviewed.*

[P 396 C 2]

Judgment. — Defendant is the petitioner. He was sued on a promissory note. The plaintiff's suit was filed after the expiration of the prescribed period of limitation. He accordingly, in pursuance of O. 7, R. 6, Civil P. C., stated in his plaint the ground on which he claimed exemption from the law of limitation. The ground was that there had been a part payment towards principal and interest on 15th June 1925, by the defendant "as per Vaddichittai filed herewith." Some months later it apparently occurred to the plaintiff or his advisers that the ground alleged in the plaint could not be relied on, and an application was made to amend the plaint by averring payments on later dates by the defendant towards interest. The application was opposed by the defendant as out of time, and the application to amend was withdrawn. As a matter of fact, the payment pleaded was found to have been made towards principal, and as the fact of payment did not appear in

3. (1895) 22 Cal 222=21 I A 171=6 Sar 503 (PC).

4. (1916) 39 Mad 24=26 I C 287.

5. (1885) 55 L J Q B 39=34 W R 161.

the handwriting of the defendant as required by S. 20, Lim. Act, it did not avail to give a fresh starting point for limitation. But the Subordinate Judge, following certain cases, which will be referred to presently, allowed the plaintiff to prove the later payments towards interest, notwithstanding that they had not been pleaded in the plaint as a ground of exemption from the law of limitation, and decreed the plaintiff's suit.

In *Jogeshwar Roy v. Raj Narain Mittar* (1) a Bench of three Judges held that the plaintiff who pleaded acknowledgment of a particular debt as an exemption from the Limitation Act, was debarred by S. 50, Civil P. C., (corresponding to O. 7, R. 6) from proving another acknowledgment at a later date. But the Court indicated that the plaintiff might get over the difficulty by obtaining leave to amend his plaint. The decision was criticized by Beaman, J., in *Yakub Ebrahim v. Rahimatbai* (2). In that case the plaintiff alleged in his plaint that the defendant being an executor of his deceased creditor, there could be no bar of limitation. At the trial plaintiff sought to establish that the defendant was an express trustee within S. 10, Lim. Act. The learned Judge said:

"It seems to me that when a plaintiff does satisfy the requirements of S. 50, Civil P. C., by stating what is in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground should he be later advised that the latter is the true ground."

This opinion was approved in *Nistarini Debi v. Chandi Dasi Debi* (3). But the Court proceeded to show that the proper course would be for the plaintiff to apply for leave to amend the plaint. Referring to O. 7, R. 6 the judgment says:

"The discretion of the Court in the matter of granting or refusing an application for amendment of the plaint cannot be restricted by an inflexible rule of law. It must be decided on the circumstances of each individual case whether such application should be granted or not."

In other words O. 7, R. 6 did not stand in the way of an amendment of the plaint. In *Hingu Miah v. Haranba Chandra* (4) the judgment, as in the prior case, was delivered by Mookerjee, J. It cites *Yakub Ibrahim v. Rahimatbai*

(2), and *Nistarini Debi v. Chandi Das Debi* (3) as authority for the proposition that if the plaint shows the ground of exemption, O. 7, R. 6 is satisfied and the plaintiff ought not to be precluded from taking another and an inconsistent ground. This ruling was adopted in *Parmeshri Das v. Fakiria* (5) by the Lahore High Court, though the point actually decided was that a plaintiff who has not pleaded a special ground of exemption might nevertheless take advantage of an admission made by the defendant in his written statement.

The learned Subordinate Judge in the present case has, quite reasonably, understood the two cases last cited as laying down that if a plaintiff pleads a ground of exemption, which may be a bad ground but sufficient for the purpose of saving his plaint from rejection under O. 7, R. 11, he is free to urge any other ground at the trial without the necessity of amending his plaint. I do not agree with this view of O. 7, R. 6. It is not the view taken of it in *Jogeshwar Roy v. Raj Narain Mittar* (1) or by this High Court in *Jagannadha Row v. Seshayya* (6) and *Marudai Muthirian v. Chinna-kannu Muthirian* (7). O. 7, R. 6 is a rule of pleading. It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case. If a party is advised that his pleadings are defective the remedy is amendment by leave of the Court. I can see no reason why a different consideration should apply to a plaintiff who wishes to throw over the ground of exemption pleaded and to put forward some other ground of exemption which he has not pleaded. In my opinion, the plaintiff ought to have applied for leave to amend his plaint, and should not have been allowed to give evidence of the other ground of exemption without such leave having been given. No application for leave to amend was made at the trial, and as already stated, the previous application was withdrawn by the plaintiff. The suit ought therefore to have been dismissed as barred by limitation. This petition is allowed and the decree of the Sub-Judge will be set aside, with costs here and in the Court below.

P.R.S./K.S. *Petitioner allowed.*

1. (1904) 31 Cal 195=8 C W N 168.

2. (1908) 10 Bom L R 346.

3. (1910) 8 I C 788.

4. (1910) 8 I C 81.

5. A I R 1922 Lah 280=60 I C 772=2 Lah 13.

6. (1907) 17 M L J 281.

7. A I R 1919 Mad 332=52 I C 243.

* A. I. R. 1933 Madras 397

CURGENVEN AND SUNDARAM
CHETTY, JJ.*Raju Thambiran*—Plaintiff—Appellant.

v.

Arunagiri Thambiran and others—
Defendants—Respondents.Appeal No. 344 of 1926, Decided on
3rd January 1933, from decree of Sub-
Judge, Chingleput, in Pauper O. S. No. 27
of 1924.*** Hindu Law—Sudra—Inheritance—Illegitimate son is coparcener with legitimate sons after death of putative father and entitled to sue for partition.**An illegitimate son of a Sudra becomes a coparcener with the legitimate sons on the death of his putative father and there being no collaterals involved, is entitled to sue for partition irrespective of the fact whether the property left by the father is ancestral or self-acquired :
Case law reviewed. [P 397 C 2; P 398 C 1]*K. Rajah Ayyar*—for Appellant.*C. Veeraraghava Ayyar*—for Respondents.*Curgenv, J.*—The learned Subordinate Judge has decided this case against the plaintiff upon a preliminary point and it is unfortunate that the argument upon this point proceeded ex parte, because the consequence was that a clear current of decisions contrary to the position taken up by the lower Court was not brought to its notice. The suit was brought by the illegitimate son of a Sudra against the legitimate sons and other descendants for partition of the family property, and the preliminary question which arose was whether in the circumstances of the case, there being no collaterals involved, such a suit would lie. The lower Court has referred only to two cases and there is an essential distinction between those cases and the present case, namely, that they both related to families in which collaterals existed. *Gopalasami Chetti v. Arunachallam Chetti* (1) accordingly is no authority for the proposition which the preliminary issue raises in this case, nor is *Natarajan v. Muthiah*, A. I. R. 1926 Mad. 261 which followed that case and which was taken to the Privy Council as *Vellaiyappa Chetty v. Natarajan* (2). But if the learned Subordinate Judge had observed that *Ranoji v. Kandoji* (3)

1. (1904) 27 Mad 32.

2. A I R 1931 P C 294=134 I C 1084=58
I A 402=55 Mad 1 (P C).

3. (1885) 8 Mad 557.

was cited in *Gopalasami Chetti v. Arunachallam Chetti* (1) and had carefully perused that earlier case he would have discovered certain propositions which would have made him hesitate to decide the matter as he did. In that case, to which the learned Judge Muthuswami Iyer, J., was a party, the fact is recognised that an illegitimate son does not become a coparcener by birth. But a consideration of the texts shows that where the father

“has died ‘vibhakta’ or separated, there can be no question that the right of the illegitimate son extends not only to his father’s acquisitions, but to ancestral property which may have come to the father’s hands (page 561).”

On the next following page it is expressly stated that the claim of the illegitimate son to a half of the son’s share, which claim he could make if there were no collaterals, cannot be sustained against the undivided brothers of the father, and on p. 563 an attempt is made to show why this should be so, namely :

“that the property of a father separated from his brothers may well be subject to discharge an obligation to which it would not have been subject in the hands of unseparated brothers.”

The lower Court has adopted the view that it would only be the father’s self-acquired property which would be liable to a claim of this description, but the whole course of authority not only of this Court but in Bombay and in Calcutta is contrary to that position. To take the earliest Bombay case, which was a Full Bench case *Sadu v. Baiza* (4), it was held that on the death of the father an illegitimate son and a legitimate son form a coparcenary between them and take the estate jointly as such with rights of survivorship, although the illegitimate son would only take a half of what he would have been entitled to if legitimate. This case was followed recently in *Sakharam v. Shamrao*, A. I. R. 1932 Bom. 234, a case which is especially instructive here because there the father had already given his self-acquired property to the illegitimate son and after the father’s death the illegitimate son sued the legitimate son for a share in the family property. Accordingly that was a case which dealt specifically with the right to a share in the family property. In *Jogendr Bhupati v. Nitya-*

4. (1879) 4 Bom 37 (FB).

nand Man Singh (5), a Privy Council case, the same theoretical principles are recognised, following the text of the *Mitakshara*, that an illegitimate son has no right by birth but receives what he does according to his father's pleasure; but that after the death of the father he becomes a coparcener and that the legitimate brothers have to give him his due share. In this Court the case of a family with no collaterals has been directly dealt with in *Thangam Pillai v. Suppa Pillai* (6), and there again we find it laid down that the text states that when the father is alive, the illegitimate son takes his share by his (the father's) choice, but directs that after the father's death his legitimate sons should give him moiety of a son's share, and again :

"It was nowhere held that he was entitled to the share allotted to him only by the choice of his legitimate brother, and that he could not recover that share by insisting on partition."

In *Karuppannan Chetti v. Bulokam Chetti* (7), it is expressly stated that the text which forms the authority upon this point does not refer alone to the self-acquired property of the father. There are a number of other cases in which the law has been stated in similar terms. We need only refer to *Ramalinga Muppan v. Pavadai Goundan* (8) and *Annayyan v. Chinnan* (9), and we do not think that any views contrary to this consistent body of opinion can be extracted from the Privy Council judgment in *Vellaiyappa Chetty v. Natarajan* (2). In fact it embodies a survey of the law laid down by the Judges of this and the other Courts in India and clearly agrees with the conclusions so arrived at. We must accordingly allow this appeal, set aside the decree of the lower Court, answer the issue (No. 1-e) in favour of the plaintiff and remand the suit for disposal upon the remaining issues. The contesting respondents (defendants 1 to 3) will pay the appellant's costs in this appeal. Costs in the Court below will abide the result.

P.R.S./K.S.

Appeal allowed.

5. (1891) 18 Cal 151=17 I A 128=5 Sar 596 (P.C.).

6. (1889) 12 Mad 401.

7. (1900) 23 Mad 16.

8. (1902) 25 Mad 519.

9. (1910) 33 Mad 366=5 I C 84.

*** A. I. R. 1933 Madras 398**

MADHAVAN NAIR AND JACKSON, JJ.

P. K. Krishnamurthy Chettiar—Appellant.

v.

K. S. A. S. Sathappa Chettiar and others—Respondents.

Appeal No. 182 of 1926, Decided on 1st December 1932, against decree of Sub-Judge, Kumbakonam, in O. S. No. 25 of 1924.

*** Transfer of Property Act (1882), S. 92—Subrogation—Mortgagee paying off prior mortgage is entitled to subrogation whether he knows of existence of subsequent mortgage, or not.**

Where a mortgagee pays off a prior mortgage, the presumption is that he intends to keep that mortgage against all subsequent mortgages. This presumption is a general one and is not restricted by the question whether the man who makes the payment knows of the existence of the subsequent mortgage or not and such payment cannot be considered to be a payment made on behalf of the mortgagor : 10 Cal 1035 (P.C.); 8 Mad 246; A I R 1928 Mad 703 and A I R 1920 Mad 941, *Rel. on.* [P 399 C 1]

K. Rajah Ayyar and V. Ramasami Ayyar—for Appellant.

K. Bashyam Ayyangar—for Respondents.

Madhavan Nair, J.—Defendant 3 is the appellant. The question for decision in this appeal is whether he is entitled to the right of subrogation to the extent of Rs. 1,181-12-7 the balance of consideration on the first mortgage which he has paid off. The facts are these: The suit property was subject to four mortgages. The 1st mortgage is dated 20th November 1918. Defendant 3, has paid off the balance of the mortgage debt, namely, Rs. 1,181-12-7. The 2nd mortgage is dated 22nd April 1921 and the mortgagee under it is the present plaintiff. The 3rd mortgage with which we are not concerned is dated 30th November 1921, and the 4th mortgage dated 18th January 1922 is in favour of defendant 3, the appellant. Under this mortgage he had to pay from out of the consideration the balance of the 1st mortgage. He paid it on 19th January 1922. At that time he did not know of the existence of the plaintiff's mortgage and when he came to know of it he prosecuted defendant 1 for "cheating." In the circumstances the appellant claims that he is entitled to the right of subrogation as against the plaintiff to the extent of the mortgage debt which he has paid off. The

lower Court disallowed the contention. The question has been dealt with in para. 11 of its judgment. The learned Subordinate Judge says:

"I do not think that an encumbrancer who in pursuance of the agreement between the mortgagor and the mortgagee pays a portion of the mortgage money towards a prior mortgage is entitled to priority or subrogation of the prior mortgage rights."

Apparently the learned Judge treated defendant 3 as an agent of the mortgagor in paying off the balance of the mortgage debt and therefore he thought that the payment was on behalf of the mortgagor and not on behalf of himself. This ground of his decision is not tenable at all. In fact Mr. Bhashyam Ayyangar for the respondents did not base his argument on this principle. His argument is this: That at the time when the payment was made defendant 3 did not know of the existence of the plaintiff's mortgage and therefore it cannot be presumed that he intended to keep the 1st mortgage as a shield against the 2nd mortgage of the plaintiff. It appears to us that the question is a very simple one and has been decided once for all by the Privy Council in *Gokuldas Gopaldas v. Rambaksh* (1). In that case, their Lordships pointed out that a man having a right to act in either of the two ways, that is, either to extinguish or keep alive a mortgage, shall be presumed to have acted according to his interest. In this case the presumption should be that when the appellant paid off the prior mortgage he intended to keep that mortgage against all subsequent mortgages. But Mr. Bhashyam Ayyangar contends that the presumption should be held not to arise because he did not know at that time that the 2nd mortgage existed. But the knowledge of the existence of the 2nd mortgage is not a material consideration in pleading "the presumption" as has been held in *Gangadhara v. Sivarama* (2). In that case the learned Judges referred to the case in *Gokuldas Gopaldas v. Rambaksh* (1) and treated the presumption as a general one the operation of which is not restricted by the question whether the man who makes the payment knew of the existence of the subsequent mortgage or not. The same conclusion was arrived at in *Andi*

Thevan v. Nagayasami Chettisar (3). In *Chidambaram Nadan v. M. Nagendrayya* (4), it was held that a payment made by the subsequent mortgagee in discharge of a prior mortgage debt cannot be considered to be a payment made on behalf of the mortgagor. These three decisions dispose of the ground on which the lower Court's judgment is based, and also the contention urged before us by Mr. Bhashyam Ayyangar. We therefore set aside the decree of the lower Court and declare that the appellant is entitled to get priority over the plaintiff's mortgage to the extent of the balance of the consideration which he has paid off with reference to the 1st mortgage, that is, the sum of Rs. 1,181-12-7 together with interest. The case will be remanded to the lower Court for passing a final decree giving the appellant priority in the manner indicated above. The appellant is entitled to costs here and in the Court below with respect to the amount on which he has succeeded. The Court-fee will be refunded.

P.R.S./R.K.

Case remanded.

3. A I R 1928 Mad 703=111 I C 266.

4. A I R 1920 Mad 941=58 I C 813.

A. I. R. 1933 Madras 399

WALSH, J.

Govinda Padayachi—Appellant.

v.

Velu Murugayya Chettiar and another—Respondents.

Appeal No. 168 of 1930, Decided on 17th January 1933. against order of Dist. Judge, Negapatam, D/- 5th March 1930.

(a) Civil P C. (1908), Ss. 100 and 151 — Order of Court in execution proceedings under S. 151 — Appeal and second appeal lies.

If a Court is approached in execution under S. 151 and passes an order there is an appeal and a second appeal: A I R 1924 Mad 778. Rel. on. [P 400 C 2]

(b) Civil P. C. (1908), S. 151—Sale held in contravention of express order of Court — Court can set aside such sale under S. 151.

Where an execution sale is held in contravention of the express direction of the Court, the Court has inherent jurisdiction to set aside the sale without any application by the judgment-debtor under O. 21, R. 90: A I R 1924 All 446; 15 IC 53; 3 C L J 29 and A I R 1922 Lah 238, Dist; A I R 1921 Lah 344 and A I R 1923 Mad 635, Rel on. [P 401 C 1]

C. A. Seshagiri Sastri—for Appellant.

S. Rajaraman—for Respondents.

Judgment.—In this case the auction-purchaser is the appellant. He got a

1. (1884) 10 Cal 1035=11 I A 126 (P C).

2. (1885) 8 Mad 246.

decree which on the date of sale amounted to Rs. 2,127 odd. The judgment-debtor was an undivided member of a joint Hindu family entitled to an undivided one-fifth share in the family property. At the request of the appellant the property which was the total property of the family was divided into two lots for sale.

The Court had given standing instructions that in Court sales no bid was to be finally accepted before the Court had sanctioned it. The District Munsif had also informed the Dy. Nazir, who conducted the sale that in this sale he should not sell more than would realize the decree amount. The first lot was valued at about Rs. 940. It had a usufructuary mortgage on it for Rs. 400. It was put up for sale first and the decree-holder purchased it for Rs. 950. Then the second lot was put up and he purchased this for Rs. 2,275. When the Dy. Nazir brought the papers to the Court in the evening for confirmation he told the District Munsif that the bids had fetched more than the commissioner's valuation; but he did not inform him that the bid for the second property was enough to cover the decree amount. The District Munsif not realizing this confirmed both bids. The decree-holder paid the balance of about Rs. 1,000 due into Court on the same day and on the next day the District Munsif discovered his error. The judgment-debtor Ramasami Chetti had died by the time of the sale and his legal representatives were his two sons, of whom one was said not to be in British India.

On a notice by Court the other son appeared and said he was willing that the sales of both the lots should be set aside and at least that that of lot No. 1 should be set aside. The District Munsif asked the appellant to put in a counter petition which he did stating that the sale of both lots should be confirmed. The District Munsif under S. 151 set aside the sale of lot No. 1 and confirmed that of lot No. 2. Appellant filed an appeal to the District Judge who confirmed the order.

Against this he has put an appeal and a Civil Revision Petition to this Court. As there is a Civil Revision Petition it is immaterial whether an appeal lies but Jackson, J., held in *Akshia*

Pillai v. Govindarajulu Chetti (1) that if a Court is approached in execution under S. 151 and passes an order of this kind there is an appeal and a second appeal, and in this very case he directed the Civil Revision Petition to be put up with the appeal.

The sole ground taken by the appellant is that as there was no application by the judgment-debtor under O. 21, R. 90, Civil P. C., to set aside the sale for the irregularity the Court had no power to do so under S. 151. He relies on the general principles stated in *Panchanam Singha Roy v. Dwarka Nath Roy* (2), *Gopal Chandra Mukerji v. Notobarkundu* (3), *Abdul Karim v. Allahabad Bank Ltd.* (4) and *Joshi Shib Prakash v. Jinhuria* (5), that S. 151 is only applicable where there is no remedy prescribed by the Code. *Panchanam Singha Roy v. Dwarka Nath Roy* (2) does not help appellant at all. In *Gopal Chandra Mukerji v. Notobarkundu* (3), the order under S. 151 was upheld; in *Joshi Shib Prakash v. Jinhuria* (5) the party wilfully neglected to avail himself of the remedy open under the Code. I think the authorities are clear that the Court can, where its orders have not been carried out, and it has been misled, correct its own error.

The only cases quoted for the appellant which seem to me to bear at all on this matter are *Moulvie Abdul Hye v. Macrae* (6), and that case seems to be really against him. There a Subordinate Judge had in execution ordered the sale of several factories in different lots. The District Judge then removed the execution proceedings to his own Court and ordered that the factories should all be sold as one lot. It was held that the District Judge had no power to call up the execution proceedings to its own Court or to pass the order he did, that the judgment-debtor had suffered material injury in consequence, and the learned Judges set aside the sale under S. 256 which corresponded to O. 21, R. 90. The decision was in 1875 long before S. 151 had been introduced in the Code of 1908, though the existence of

1. A I R 1924 Mad 778=84 I C 975.

2. (1906) 3 C L J 29.

3. (1912) 15 I C 53.

4. (1917) 44 Cal 529=41 I C 598 (F B).

5. A I R 1924 All 446 = 78 I C 416 = 46 All 144.

6. (1875) 23 W R 1.

such a power in the Court had been recognized. The other case, *Satia Nand v. Jhangli Ram*, A.I.R. 1932 Lahore 238, quoted for the appellant is not parallel. In that case a judgment-debtor who made an application under O. 21, R. 89, to set aside a sale did not deposit the 5 per cent required, and the Court under S. 151 made an order setting aside the sale. It was held that it had no power to do so. There was no question there of the power of the Court to rectify its own mistake. On the other hand there are several cases which are clearly in respondents' favour. In *Mul Raj v. Bura Mal* (7) it was held that

"when the Court is empowered to make an order, it has inherent jurisdiction to see that the order is carried into effect. When therefore an execution sale admittedly contravened the express direction of the Court then the Court can suo motu set aside the sale under S. 151."

That case exactly applies here. Then there is *Raghavachariar v. Murugesu Mudali* (8), quoted by both the Courts below. It was sought to distinguish this case by saying that there the concealment was a fraudulent one by the purchaser; but I do not think that this is sufficient to make inapplicable the principle laid down by Schwabe, C. J., there about

"nondisclosure to Court of relevant facts unknown to the Court and which there was a duty to bring before the Court"

justifying an order by Court under S. 151. While it is not suggested that there was anything intentional in the action of the Dy. Nazir in failing to appraise the Court that the bid for lot No. 2 was sufficient to cover the decree amount, it was clearly his duty to have done so in the face of the express instructions issued, and the Court was misled by his failure to do so. With regard to the argument of hardship raised that if lot No. 1 does not fall to the share of the deceased judgment-debtor at a family division the appellant will be at a disadvantage, it was pointed out by the lower appellate Court that the separation of the property into two lots was at appellant's own request and so he cannot complain of any results which may flow from it. In my opinion the order of the Courts below was correct. The second appeal fails and is dismissed with costs (one set).

P R.S./R.K. Appeal dismissed.

7. A I R 1931 Lah 344=12 Lah 602.

8. A I R 1923 Mad 635=46 Mad 539.

1933 M/51 & 52

* A. I. R. 1933 Madras 401

PANDALAI AND CURGENVEN, JJ.

R. A. Venkatathirisami Naidu and others—Petitioners.

v.

R. V. Kasthuriranga Appaswami Naidu—Opposite Party.

Civil Misc. Petn. No. 4323 of 1932, Decided on 5th January 1933, for leave to appeal to His Majesty in Council.

* Civil P. C. (1908), S. 110—Plaintiff is not entitled to include interest accruing subsequent to suit in determining amount or value of subject-matter — Difference between plaintiff's and defendant's appeal pointed out.

A plaintiff is not entitled to include interest accruing subsequent to the institution of the suit in determining the value of subject-matter in dispute as he cannot insist upon the award of post-plaint interest as something to which he possesses a legal right. The granting of the interest itself and the rate is left to the discretion of the Court. Where a defendant must appeal against the whole decree passed against him, a plaintiff can do no more than appeal against the dismissal of his claim as that claim stood on the date of the suit: 8 M I A 166 (P C); *Bank of New South Wales v. Owston*, (1879) 4 A C 270; 10 M L J 144 and 17 Bom 41, Ref; A I R 1920 All 202, Dist. [P 401 C 2; P 402 C 1, 2; P 403 C 1]

S. Ramaswami Aiyer—for Petitioners.

K. S. Sankara Ayyar — for Opposite Party.

Curgenven, J.—This is an application under S. 110, Civil P. C., for permission to appeal to His Majesty in Council. The suit was brought on behalf of minor plaintiffs against the defendant, as executor under their father's will, for an account of his management of the estate. The valuation of the relief claimed was over Rs. 10,000, so that the case fulfils the first condition prescribed by the section, that:

"the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards."

We are asked to hold that the second condition is also satisfied, that:

"the amount or value of the subject-matter in dispute on appeal to His Majesty in Council," is the same sum or upwards. The decision of this point depends upon whether the plaintiffs, who are the petitioners, are entitled to include in their reckoning interest accruing subsequent to suit. The Court of first instance gave a decree which, after correction of an error, amounted to Rs. 3,859-14-10. This sum was the subject-matter of the defendant's appeal to this Court, and the plaintiffs presented a memorandum of objections claiming, in addition to it, a

sum disallowed by the trial Court which, after deducting a certain amount given up stood at Rs. 2,118-0-8. The result of this Court's decree was that the whole of the plaintiffs' claim was disallowed, and they were found liable to pay the defendant Rs. 173-7-11. The plaintiffs now desire to appeal to the Privy Council in respect of the three sums above specified, totalling Rs. 6,151-7-5, and to the amounts of the two former they claim to add a sum of Rs. 5,072-10-10, being interest from 31st January 1918, when payment, it is said, was due from the defendant, up to 19th April 1932, the date of this Court's decree. If this course is permitted, the value of the appeal will be well above Rs. 10,000, viz., Rs. 11,224-2-3. If interest accruing subsequent to the institution of the suit is to be excluded, the value will be below the appealable minimum.

The learned advocate for the petitioners puts his case in this way: if the plaintiffs had fully succeeded both in the appeal and in the memorandum of objections before this Court, they would have obtained a decree which, with interest at 6 per cent up to the date of that decree, would have exceeded Rupees 10,000; and from this decree the defendant could have appealed to the Privy Council. It must follow that the plaintiffs, who have been denied the whole of this sum, have equally a right of appeal, since it would be inequitable and anomalous to withhold from the one a right which would, in the converse case, have been conceded to the other.

It is no doubt true that the value of a defendant's appeal is the amount of the decree of this Court, and that where interest up to its date is included the appellant is entitled to a certificate if the whole sum thus composed reaches the minimum figure of ten thousand rupees. That was decided by the Privy Council in *Gooropersad Khoond v. Juggutchunder* (1), a case followed by their Lordships in *Bank of New South Wales v. Owston* (2). But it does not necessarily follow that the converse proposition, as it is sought to apply it to a plaintiff's appeal, is true. The only case to which our attention has been drawn

as directly deciding this point against a plaintiff is *Ram Kumar v. Muhammad Yakub* (3). Apparently the decision in *Gooropersad Khoond v. Juggutchunder* (1) was not cited before that Bench, but only the *New South Wales* case (2) which the learned Judges distinguished on the ground that whereas the law of New South Wales gives a decree-holder a statutory right to interest, in this country the grant of it is discretionary to the Court. Such a ground for distinction would not, of course, apply to the case in *Gooropersad Khoond v. Juggutchunder* (1), which proceeded upon no more than the fact that the decree comprised interest, and not upon any question of the decree-holder's right to claim it. We think that the real difference upon which the Allahabad Bench might have based its judgment is that, as here, they had in question a plaintiff's and not a defendant's appeal.

A defendant must appeal against the whole decree standing against him. A plaintiff can do no more than appeal against the dismissal of his claim, as that claim stood at the date of his suit. The distinction is observed in assessing appeals of either kind to court-fees; a plaintiff who appeals against the dismissal of his suit, as has been held in *Srinivasa Rao v. Ramaswami Chetti* (4) and *Vithal Hari v. Govind Vasudeo* (5) not having to include in his valuation interest accruing subsequent to suit, whereas a defendant must appeal against the whole decree, including any such subsequent interest. The real ground for this difference is that whereas a defendant has to get rid of any sum, whether principal or interest, decreed against him, a plaintiff cannot insist upon the award of post-plaint interest, as something to which he possesses a legal right. Its grant is under, S. 34, Civil P. C., discretionary to the Court, which may, if it thinks fit:

"order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree."

It is observed that not only is the question whether or not to award interest, but also the question at what rate to award it, left to the Court's dis-

1. (1859-61) 8 M I A 106=3 W R 14=1 Suth 399=1 Sar 742 (P C).

2. (1879) 4 A C 270=48 L J P C 25=40 L T 500.

3. A I R 1920 All 202=42 All 445=55 I C 976.

4. (1900) 10 M L J 144.

5. (1893) 17 Bom 41.

cretion. It has, it is true, become in practice the rule to adopt the rate of 6 per cent per annum, but nowhere is that rate prescribed, and there is nothing in law to prevent any Court from awarding some other rate. In 1860, as we see from *Gorooprasad's* case (1) the Court rate was 12 per cent; in the *New South Wales* case (2) it was 6 per cent. The most then that a plaintiff-appellant can urge in support of his claim to include post-plaint interest at 8 per cent in his valuation is that he is proceeding upon the assumption that a practice which considerations of convenience tend to make uniform would be observed in his case in the event of his success.

And it must follow that, since there is no rule of law enabling him to enforce the award of interest, it cannot, in any strict legal sense, be deemed to be part of his claim against the defendant, or, to employ the language of S. 110, Civil P. C., part of "the subject-matter in dispute on appeal to His Majesty in Council." If the plaintiff's suit is dismissed by this Court on appeal, the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allowed the claim in whole or in part or dismissed it altogether. For these reasons we conclude that no appeal such as the plaintiff proposes to prefer will lie, and it is unnecessary to decide the further question raised, whether or not that part of this Court's decree which affirms the decree of the trial Court should be disregarded. We dismiss the petition with costs.

P.R.S./K.S. *Petition dismissed.*

A. I. R. 1933 Madras 403

WALSH, J.

Sarkaru Munisami Achari and others
—Defendants 2 to 6—Appellants.

v.

Chikka Veerappa Setti — Plaintiff—Respondent.

Appeal No. 114 of 1929, Decided on 13th December 1932, from order of Sub-Judge, Chittoor, D/- 8th October 1928.

Limitation Act. (1908), Art. 182 (5)—Application by decree-holder for transfer—Satisfaction by judgment-debtor pleaded—Counter-petition by decree-holder — Batta and

affidavit filed in support—Vakalatnama filed in appeal—These held were not steps-in-aid.

A decree-holder put in an execution application on 20th August 1923 under O. 21, R. 16, for the transfer of his decree. After various adjournments the Court noted on 5th December 1923 "I want to examine the decree-holder. He should appear with all his account books of 1920 and onwards. Defendants also should bring their accounts. Batta in three days." The decree-holder on the same day put in an affidavit, in which he said he had not kept his day books and ledger with him and stated "as prayed for in the petition, orders are necessary for taking out execution." Transfer was ordered on 7th December 1923. The present execution petition was filed on 22nd November 1926. It having been contended as barred by limitation the decree-holder relied on three steps: the first was the batta application put in on 27th November 1923, the second was a vakalat put in in the appeal preferred by the judgment-debtors against the transmission of the decree and the third was the affidavit already mentioned, as being the steps-in-aid of execution.

Held: that the affidavit could not be a step-in-aid. [P 404 C 1]

Held further: that if the counter itself, the most important document without which none of the subsequent proceedings in execution could take place is not a step in execution, none of the subsequent steps in removing the obstruction can be steps-in-aid and hence filing batta for witnesses could not be a step-in-aid. [P 405 C 2]

Held also: that the filing of the vakalat by the respondent in the appeal stood on the same level as the appeal was only a continuation of the previous proceeding and the vakalat was filed to oppose it: *Case-law discussed.* [P 405 C 2]

B. Somayya—for Appellants.

A. C. Sampath Ayyangar and T. R. Srinivasa Ayyar—for Respondent.

Judgment.—The decree-holder in O.S. No. 434 of 1919 on the file of the District Munsif of Madanapalle put in an execution application on 20th August 1923 under O. 21, R. 16, Civil P. C., for the transfer of the decree to the District Munsif's Court of Chittoor for execution. Defendants 3 and 6 contested the application saying that the decree was fully satisfied. What took place on the execution application is as follows: An issue was framed on 6th October 1923: "Is the decree fully satisfied. If not what is due?" After various adjournments the Court noted on 5th December 1923:

"I want to examine the decree-holder. He should appear with all his account books of 1920 and onwards. Defendants also should bring their accounts. Batta in three days."

The decree-holder on 5th December 1923 put in an affidavit, Ex. C, in which he said he had not kept his day books and ledger with him and stated "as prayed for in the petition, orders are

necessary for taking out execution." Transfer was ordered on 7th December 1923. The present execution petition was filed on 22nd November 1926. The executing Court found it barred by limitation. The lower appellate Court found it not barred. Hence this appeal. The learned District Munsif did not discuss the steps which were alleged to save limitation but the lower appellate Court has fully discussed them. Three steps were relied on before it; the first was the batta application Ex. B put in on 27th November 1923, the second was a vakalat put in in the appeal proffered by the judgment-debtors against the transmission of the decree and the third was the affidavit already mentioned, Ex. C. The first two matters the learned Subordinate Judge did not find to be steps-in aid; and the third he found was such. I shall therefore first deal with the third ground on which the appeal was allowed although in point of fact in arguing the case before me the respondent relies rather on the first ground. I fail to see how Ex. C can be a step-in aid. The plaintiff had been ordered to produce his accounts and was unable or unwilling to do so. All that he had to tell the Court was that he was not producing his accounts. The prayer to the Court to proceed with the execution of his petition was entirely unnecessary since the Court was bound to dispose of it. There are two cases of this Court bearing on the question. One is *Rangachariar v. Subramania Chetty* (1), a case very similar to the present case which follows *Masilamani Mudaliar v. Sethuswami Aiyar* (2), and dissents from *Abdul Kader Rowther v. Krishnan Malamal Nair* (3).

It was sought to distinguish this case on the ground that an order for transmission had already been passed in that case. But even in that case apparently though the order for transmission had been passed what the petitioner asked the Court to do was actually to send the records to the other Court. In the case in *Masilamani Mudaliar v. Sethuswami Aiyar* (2), an assignee of a decree filed a petition for execution on 13th

July 1911, and an order of attachment was made on the day of hearing, 12th August 1911; the petition itself was dismissed on 26th August 1911 as he failed to pay batta. A fresh application was filed on 10th August 1914. It was held that though in the above circumstances the Court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution, such application was not a step-in-aid of execution. It was only on the supposition of such an application for execution being made on 12th August 1911 that limitation could have been saved at all. It is clear that the application was made before the orders were passed. Further, *Krishna Patter v. Seetharama Patter* (4) and *Ramaswami v. Veeranna* (5) concur with this view. Other Courts no doubt have held a different view: vide for instance *Ram Lal v. Udit Narain Singh* (6).

The learned advocate for the respondent has sought to uphold the appellate Court's decision on the ground that the batta memo was a step in execution. In *Kuppuswami Chettiar v. Rajagopala Aiyar* (7), it was laid down that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step in execution. In the other case, *Krishna Patter v. Seetharama Patter* (4), it was held that it was immaterial whether an execution application was or was not pending at the time. As noted in that case the decisions in Calcutta appear to be conflicting. There are cases of Allahabad directly contrary to the view taken by Madras: vide *Muhammad Siddiq Khan v. Misiri Lal*, A. I. R. 1922 All. 432 and *Abdul Kuaddus v. Ahmed Hussain*, A. I. R. 1923 All. 415. Lahore takes a different view: *Umar Din v. Ghulam Mahommed*, A. I. R. 1927 Lah. 653. But it is argued that the authority in *Kuppuswami Chettiar v. Rajagopala Aiyar* (7) and *Krishna Patter v. Seetharama Patter* (4), has been shaken by *Vapur Rowther v. Sivakataksham Pillat* (8).

4. A I R 1926 Mad 1178=98 I C 156=50 Mad 49.

5. A I R 1928 Mad 143=106 I C 648.

6. A I R 1927 Oudh 134=100 I C 308=2 Luck 419.

7. A I R 1922 Mad 79=45 Mad 466.

8. A I R 1930 Mad 588=123 I C 577=53 Mad 390.

1. A I R 1920 Mad 86=58 I C 536.

2. (1918) 41 Mad 251=41 I C 701.

3. A I R 1914 Mad 384=23 I C 533=38 Mad 695.

I do not find anything in that case which shakes the previous ones. The question there was whether an application for leave to bid and to set off the price against the decree amount is a step-in-aid of execution. The learned Judges held that it was. Venkatasubba Rao, J., refers to *Daleel Singh v. Umras Singh* (9) on the point as to whether a mere application to bid would be a step in execution. This point is not covered by any Madras decision and the learned Judge admits that it does not really arise but that he is disposed to agree with the Allahabad decision. It was argued that the learned Judge dissented from the position taken up in *Krishna Pattar v. Seetharama Pattar* (4), that the step must be one which the Court is asked to take. The learned Judge says on this point:

"In one sense this is perfectly true. The learned counsel contends that the step which the Court is asked to take must be something like attaching or selling property. I am not prepared to place this restricted view upon the words."

The learned Judge does not say that the Court has not to be asked to take some step. In any case the observation is obiter. The other learned Judge Madhavan Nair, J., refuses to express any opinion as to whether a mere application for leave to bid in auction is a step in execution. I find nothing in the case which shakes the authority in *Kuppuswami Chettiar v. Rajagopala Aiyar* (7) and *Krishna Pattar v. Seetharama Pattar* (4). I think it is unnecessary to quote the decisions of other Courts on this vexed matter in regard to which Venkatasubba Rao, J., has remarked that there is an extreme conflict of view in the decided cases which fail to disclose even a principle of a general or uniform application. He says:

"The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion and a good deal of the time of the Court is wasted."

He suggests that the

"Legislature may well with the aid of the decided cases catalogue the applications which, in its opinion, ought to serve as steps-in-aid of execution."

I will therefore merely note some Madras cases. *Raman Chetty v. Ramaswami Pillay*, A. I. R. 1928 Mad. 563, was a case of batta memo for arrest. *Vijiaraghavalu Naidu v. Srinivasalu Naidu* (10), was an application for sale

proclamation. *Govindaswami Pillai v. Govinda Padayachi* (11), was a batta memo to attach properties. It was sought to be argued that while the counter application to remove the obstruction caused by the judgment-debtors who stated that the decree was satisfied may not be a step in execution, to file batta for witnesses in the inquiry necessitated by this plea would be step-in-aid of execution. I entirely agree with the reasoning of the learned Subordinate Judge, that if the counter itself, the most important document without which none of the subsequent proceedings in execution could take place is not a step in execution, none of the subsequent steps in removing the obstruction can be steps-in-aid.

The last matter relied on as a step in execution, namely, the vakalat filed by the respondent in the appeal appears to me to stand on the same level as the appeal was only a continuation of the previous proceedings and the vakalat is filed to oppose it. Only one reported case on the matter was quoted: *Brij Nath Sahai Singh v. Hari Charan Ray* (12). It was there held that the defending of an appeal preferred by the judgment-debtor in execution proceedings is not a step-in-aid of execution within the meaning of Art. 182, Lim. Act. That decision is therefore against the respondent and it is the more noticeable as coming from the Patna High Court which in other matters takes a more favourable view than Madras with regard to the steps for the removal of obstruction being steps-in-aid. It has been suggested to me that I should refer the matter to a Bench but sitting as a single Judge I can find no conflict of authority in Madras on the first and third points dealt with by the lower appellate Court. As stated by Ayling, J., in *Kuppuswami Chettiar v. Rajagopala Aiyar* (7):

"In a matter like limitation certainty is the first desideratum: it matters comparatively little whether a decree-holder is allowed three years or ten to execute his decree so long as he knows for certain when the time allowed will come to an end."

The Bench decisions of this Court having been uniform with regard to two of the grounds raised I see no reason to make a reference. With regard to the other ground, "the affidavit filed in ap-

9. (1900) 22 All 399=(1900) A W N 129.

10. (1905) 28 Mad 399.

11. A I R 1925 Mad 880=89 I C 894.

12. (1918) 48 I C 187.

peal," it seems that, following the principle laid down by the Madras High Court the decision must also be against the respondent and as I pointed out the Patna High Court which takes the view favourable to the executing decree-holder is here against him. The appeal must therefore be allowed with costs and the execution petition dismissed.

P.R.S./V.S.

Appeal allowed.

A. I. R. 1933 Madras 406

WALSH, J.

A. Ramaswami Chettiar—Appellant.

v.

Chinnappa Chetty—Respondent.

Appeal No. 24 of 1929, Decided on 25th January 1933, from order of Dist. Judge, Coimbatore, D/- 9th April 1928.

Civil P. C. (1908), O. 5, R. 19—Unless there is declaration by Court as to due service of notice, constructive res judicata as to service does not arise—Res judicata.

In order that the rule of constructive res judicata can be availed of on basis of service, such service must be declared by the Court to be due service under O. 5, R. 19: *Case law reviewed.* [P 406 C 1, 2]

B. Sitarama Rao —for Appellant.

T. M. Krishnawami Ayyar—for Respondent.

Judgment.—In this case the only matter which has been argued before me in second appeal is that even though the application for arrest on 26th November 1923 might have been out of time, the fact that the Court ordered notice on it renders the matter that it was in time res judicata. This notice is the only one attempted to be served on the respondent, defendant 1 in the case. The return that was made on it is:

"defendant 1 is absent. It is learnt that he went to Salem and other places. The notice was fixed on the outer door."

It was not stated that this information was given to process-server at the house of defendant 1 nor who gave him the information. With regard to this, in the B diary there is a note against 9th January 1924 "N. S. A. arrest by 29th January 1924." I understand that "N. S. A." stands for "notice served; absent." There was no declaration by the Court under O. 5, R. 19, Civil P. C., that notice was duly served. That this is not a due service for the purpose of creating constructive res judicata, has been held in several cases. In *Subramania Pillai v. Subramania Ayyar* (1)

1. (1898) 21 Mad 419.

the Court set aside a decree passed after such service: see also *Abraham Pillai v. Donald Smith* (2), and *Baldeodas Lohia v. Subkarandas Goenka* (3). In *Sundararajulu Naidu v. Narayanswami Naidu*, A. I. R. 1927 Mad 813, Srinivasa Ayyangar, J., in a case very much like the present held that where on the basis of service the rule of constructive res judicata was sought to be availed of, such service must have been declared to be sufficient. This decision was followed by Bardswell, J., and myself in A. A. O. 235 of 1929 and we distinguished in that case the one which has been quoted now for the appellant, namely, *Mahomed Meera Rowther v. Kadir Meera Rowther* (4). In that case there was a petition to set aside a sale for want of proper service of an attachment notice. *Nusur Mahomed v. Kazbai* (5), referred to in that case and *In re Sri Krishna Doss* (6) a case of refusal of notice do not deal with the question of constructive res judicata in execution applications.

In *Farangu v. Hari Kishan*, A I R 1929 Lah. 334 the Court held that the acceptance of the service of such summons by the Court which issued it without any declaration was not conclusive on the matter of the service. *Gynammal v. Abdul Hussain Sahib* (7), also allows a party to allege that the notice was not duly served on him when such service was sought to be used against him for the purpose of constructive res judicata. It was remarked in *Subramania Ayyar v. Rajeswara Dorai Sethupathi* (8) that the principle of constructive res judicata should be very cautiously applied to execution proceedings, especially where there is any indication that improper services were being attempted and then the execution dropped in order that such notice may afterwards be argued as res judicata on the question of limitation. Both the lower Courts have found as a matter of fact in this case that there was no proper service and that therefore defendant 1 had no opportunity of raising the plea of limitation. In the

2. (1906) 29 Mad 324.

3. A I R 1925 Cal 627=88 I C 508=52 Cal 179.

4. A I R 1914 Mad 153=22 I C 302.

5. (1886) 10 Bom 202.

6. (1909) 8 I C 474.

7. A I R 1931 Mad 813=134 I C 1202=55 Mad 223.

8. (1917) 40 Mad 1016=38 I C 627.

result the second appeal fails and is dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 407

PANDALAI, J.

Chittoori Chinnammi—Appellant.

v.

Immanni Venkayamma and others—Respondents.

Appeal No. 59 of 1931 and Second Appeal No. 434 of 1932, Decided on 2nd November 1932, against order and decree of Dist. Judge, East Godavari, in A. S. No. 205 of 1926.

(a) **Civil P. C. (1908), O. 41, R. 27—Fresh evidence—When Judge can allow in appeal pointed out.**

Fresh evidence in an appeal can only be taken if the Judge on an examination of the record discovers some lacuna which makes it necessary for him in the exercise of his duty to decide the case to get some more evidence. It is not a right of the parties; it can be exercised only by the Judge and that exercise is hedged in by the requirement that "grounds" must be stated. Hence he is not justified in introducing a new ground of fact by way of objection to the registration of a document which has not been taken by the parties and which so far as one of the parties is concerned takes him entirely by surprise at a time when it is absolutely impossible to meet it. [P 408 C 2]

(b) **Registration Act (1908), S. 32—Presentation of document for registration by minor claiming under it is valid.**

Presentation by a minor claiming under a document in his favour for the purpose of registration before a Sub-Registrar is perfectly valid : *A I R 1929 P C 24, Ref.* [P 409 C 1]

(c) **Registration Act (1908), Ss. 73 (1) and 32—Difference between Ss. 73 (1) and 32 pointed out.**

The language used in Ss. 73 (1) and 32 is not exactly the same and the principles which apply to the first presentation of a document under S. 32 do not apply to the presentation of an application under S. 73 (1). All that is similar is that the class of persons who are empowered to make the application under S. 73 (1) are included in those who may present a document under S. 32. But they are not identical. Secondly there is no question of presentation at all under S. 73. All that S. 73 requires is making an application and if the Registrar is satisfied that the person making the application is entitled to do so, the application can be made in any way that is satisfactory to him. It may be made in person or even by post. [P 409 C 2]

(d) **Registration Act (1908), Ss. 73 and 33—Presentation by husband as agent of wife under powers-of-attorney is valid—Powers-of-Attorney Act (7 of 1882), S. 5.**

An application made by a husband on behalf of his wife as agent under a power-of-attorney from her is valid even though the power-of-attorney is executed during her minority as such power-of attorney is perfectly valid under S. 5, Powers-of-Attorney Act. [P 409 C 2; P 410 C 1]

(e) **Registration Act (1908), S. 73—Husband of Hindu minor wife is representative of wife and competent to make application—Hindu law.**

Under Hindu law a husband is a lawful guardian of his minor wife and as such he comes within the description of representative of the wife and is competent to make the application to the Registrar. [P 410 C 1]

K. Lakshmayya—for Appellant.

M. Appalachari and K. Ramamurthy—for Respondents.

Judgment.—Both these appeals are from the same order and raise the same question, namely, the validity of the registration of a document, Ex. 1, dated 17th March 1931, purporting to be a relinquishment by the plaintiff and defendant 1, the two elder sisters, in favour of defendant 2, the youngest sister, of a mortgage right taken in the names of all the three. The question arose in a partition suit brought by the plaintiff against her two sisters of their father's property. It is not relevant to this appeal to mention the other disputes in that suit. It is sufficient to say that the appeal to the lower appellate Court was brought by the plaintiff concerning two points, the first relating to the question whether she was entitled to the benefit of a legacy given to her under her father's will which the defendants said had been adeemed by a subsequent gift. This was decided by both the lower Courts against the plaintiff. The other point in dispute in appeal was about Ex. 1. The Court of first instance held that the plaintiff and defendant 1 who had executed the relinquishment were bound by it and that the objections raised by the plaintiff on the ground : (1) that it was brought about by fraud and misrepresentation and (2) that its registration was invalid because the presentation of the document before the Sub-Registrar and of the appeal before the Registrar were invalid according to the Registration Act, are not well-founded.

In appeal the learned District Judge upheld the first Court's finding as to fraud and misrepresentation affecting Ex. 1, but differed from the first Court in its opinion about the validity of its registration. He held first, though not without hesitation, that the presentation of the document by defendant 2 (the present appellant) before the Sub-Registrar might be valid although she

was a minor at the time, but secondly that the presentation of the appeal from the order refusing registration to the Registrar was invalid because it was made three days after defendant 2 had attained majority and that the appeal was filed by her husband purporting to act as guardian when in fact his authority as guardian had ceased. On this ground the learned Judge held the registration of Ex. 1 invalid and therefore the document itself inoperative and sent the case down to enable the plaintiff to get her proper share of the mortgage right which still belonged to her. In these appeals the only question which has been argued is the last mentioned one relating to the validity of the registration of Ex. 1.

On this point it is clear that the facts on which the lower appellate Court held the registration invalid were quite different from those on which the first Court held it valid. In the first Court and so far as appears from the records after the plaintiff had filed her memorandum of appeal the validity of the registration was attacked on the basis that the appellant (defendant 2) was throughout a minor and the case made was that a minor was incompetent to present a document for registration in her favour to the Sub-Registrar and as a minor has no power to appoint an attorney the husband acting as a holder of such power was incompetent to present the appeal. From the judgment in appeal however it is clear that the learned Judge adopted quite a distinct ground. He held that defendant 2 had attained majority on 31st August 1903, but as the appeal to the Registrar was filed on 3rd September 1921, she was on the latter date a major. Therefore he concluded that though if she had been a minor her husband as guardian might have validly presented the appeal, yet as she had ceased to be a minor, the guardianship also ceased with it and his authority to act on behalf of his wife; and as for the power of attorney he held that his minor wife had no authority to execute a power during her minority. Both grounds of representation thus having disappeared he held that the appeal was filed by an incompetent person. The learned Judge has fallen into more than one error in thus dealing with the point. The finding that the appellant (defen-

dant 2) had attained majority three days before the appeal was filed was a point not raised by any of the parties. It was not raised in the first Court and so far as appears it was not raised in the lower appellate Court. I have examined the grounds of appeal to the lower Court and do not find any such ground taken in it.

The only ground taken in the appeal is that defendant 2's husband filed the appeal not as guardian, in which case it would be saved on the footing that his wife was a minor, but as her agent. (Ground No. 13). To sustain this ground apparently the appellant in the lower Court (the plaintiff) was allowed to produce a new document, Ex. P which showed that defendant 2's husband had filed the appeal as agent. Now this document which was obviously filed to sustain Ground No. 13 in the memorandum of appeal was used by the learned Judge for an entirely different purpose. Having upon Ex. D series found that the date of birth of defendant 2 was 31st August 1903 and that the date of the appeal was 3rd September he put two and two together and concluded that defendant 2 had attained majority three days before the appeal. The whole of the rest of the learned Judge's judgment is built upon this. In my opinion the learned Judge was not justified in introducing a new ground of fact by way of objection to the registration of Ex. 1 which had not been taken by the parties and which so far as defendant 2 was concerned must have taken her entirely by surprise at a time when it was absolutely impossible to meet it. But quite apart from that the whole of this argument is derived from the document Ex. P which the learned Judge had no jurisdiction to admit. It is now settled beyond possibility of controversy that fresh evidence in an appeal can only be taken if the Judge on an examination of the record discovers some lacuna which makes it necessary for him in the exercise of his duty to decide the case to get some more evidence. It is not a right of the parties; it can be exercised only by the Judge and that exercise is hedged in by the requirement that "grounds" must be stated. None of these precautions seems to have been adopted before Ex. P was admitted in this appeal. I have therefore come to the conclu-

sion after hearing the respondents' learned advocate upon the point that Ex. P must be struck out of the record and if that goes, the whole of the foundation upon which the structure of the learned Judge's judgment is built disappears. Though these appeals ought to be decided upon the footing that defendant 2 was a minor on both dates, namely, the date of presentation of the document before the Sub-Registrar and of the appeal before the Registrar, it will appear from what follows that it would not affect the result even if she had attained majority before the date of this appeal. It is admitted that defendant 2 herself, then a minor, presented the document before the Sub-Registrar and the plaintiff her elder sister appeared and denied execution. The Sub-Registrar thereupon refused registration. There can be no question in view of the authorities that presentation by a minor claiming under a document in her favour for the purpose of registration, before a Sub-Registrar is perfectly valid. In *Venkatappayya v. Venkata Ranga Row* (1) power to adopt a minor aged 14 was in question. The document was presented for registration by his natural father, and the question was whether that was valid presentation. In the course of the argument, two of the learned Lords of the Privy Council made observations which leave the matter no longer in doubt. At p. 222, Lord Phillimore during the argument of Mr. Dunne put it to him that in the case then under appeal the adopted boy could present (the document) and at p. 224, Lord Atkin said the same thing in these words :

"If they had then objected, the adopted son could have been produced to present the document and the defect could have been cured at once."

There is a direct decision of a single Judge in the late Chief Court of Rangoon reported in *Chetty Firm v. Ma On Shw* (2). There is no decision to the contrary and therefore so far as the presentation to the Sub-Registrar was concerned, Ex. I was validly presented. Then as regards the appeal the learned Judge was in error in thinking that the language used in S. 73 (1) and S. 32 is exactly the same and that the principles which apply to the first presentation of

a document under S. 32 must also apply to the presentation of an application under S. 73 (1). The language of the two sections is not the same. All that is similar is that the class of persons who are empowered to make the application under S. 73 (1) are included in those who may present a document under S. 32. But they are not identical. Secondly there is no question of presentation at all under S. 73. All that S. 73 requires is making an application and as far as I can see there is no reason why, if the Registrar is satisfied that the person making the application is entitled to do so, the application should not be made in any way which is satisfactory to him. It may no doubt be presented in person but I do not see why it should not be sent by post. However, that is not the material point. It is admitted that the application under S. 73 was made by defendant 2's husband on her behalf and styling himself as agent, under a power-of-attorney. As to this the learned Judge seems to have thought that the application was incompetent because the power-of-attorney by defendant 2 during her minority was itself inoperative. By S. 5, Powers-of-Attorney Act (7 of 1882) a married woman, whether a minor or not, shall, by virtue of this Act, have power, as if she were unmarried and of full age, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do.

The words of this section are perfectly general and I have not been shown that there is anything which limits the generality of those words. It is no doubt the case that by S. 183, Contract Act, any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. But as the words of S. 5, Powers-of-Attorney Act, show, by virtue of that Act minor married women are empowered to appoint attorneys on their behalf to execute such documents and do such acts as they are competent to execute or do. In this case the presentation of an application by way of appeal to the Registrar was undoubtedly an act which defendant 2 might have herself done and therefore by the section above referred to, her attorney lawfully appointed was capable of doing that act on her be-

1. A I R 1929 P C 24=114 I C 17=56 I A 21=52 Mad 175 (P C).

2. (1916) 33 I C 33.

half whether she was a minor or a major at the time of doing it. It is not disputed that the power of attorney falls within S. 33, Registration Act. The presentation of the application to the Registrar was thus perfectly valid whether defendant 2 was a minor or had attained majority on the date of the appeal. If she was still a minor the same result is arrived at in another manner. Defendant 2's husband whether empowered under the power-of-attorney or not was himself the husband and according to Hindu law the lawful guardian of his minor wife. As such he comes within the description of representative of the claimant who was himself competent to make the application. On these grounds the application to the Registrar was valid.

The result is that the opinion of the learned District Judge as to the registration of Ex. 1 cannot be upheld. It is admitted that the consequence of that is that the plaintiff's appeal to the lower appellate Court will stand dismissed. The appellant (defendant 2) must have her costs from the plaintiff in C. M. A. 59/31. There will be no order as to costs in the second appeal.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 410

PANDALAI, J.

Sree Mahant Prayag Dossjee Varu—
Defendant—Petitioner.

v.

Raja Venkata Perumal — Plaintiff —
Opposite Party.

Civil Revn. Petn. No. 1618 of 1931,
Decided on 24th August 1932.

(a) Civil P. C. (1908), O. 6, R. 17—**Amendment of plaint for stating relief originally intended, accurately and clearly can be allowed.**

An amendment of a plaint for stating the relief accurately and explicitly can be allowed and the Court is not guilty of illegality or irregularity in allowing such an amendment.

[P 411 C 1]

(b) Civil P. C. (1908), O. 6, R. 17 and S. 34—**Amendment allowed on payment of costs — Acceptance of costs allowed — Effect stated.**

In particular case it must be ascertained whether the costs or other benefit accepted by a party is in fact and substance a part of the entire order of which after accepting the part favourable to him, a party puts it beyond his power to attack the rest. It is not necessary that the orders to which the doctrine is applied should themselves be the result of an agreement. It is sufficient if by their nature or intention

the Court regarded them as an entire whole, giving a benefit in one respect to one party and in another to his opponent, in other words such that the benefit to one would not have been granted but for the corresponding benefit granted to the other.

[P 411 C 2]

(c) Civil P. C. (1908), S. 2 (15) — **Order passed on payment of costs — Advocate has authority to accept and legal consequences flow from such act even if advocate has accepted without realizing consequences — Legal Practitioner.**

An advocate in the ordinary course of his employment has undoubted authority to receive costs paid by the other side, but the fact that the advocate does not realize the consequences of his acceptance of the money, cannot prevent the legal consequences which Courts draw from such an act.

[P 411 C 2]

V. V. Srinivasa Ayyangar and *T. K. Srinivasa Thathachari*—for Petitioner.

A. Ramachandra Ayyar—for Opposite Party.

Judgment.—The learned Subordinate Judge has in an elaborate order setting out the pleadings and the nature of the amendment sought and numerous decisions cited to him allowed the amendment of the plaint but made it conditional on the plaintiff paying Rs. 25 as costs to the defendant which the defendant's advocate received. This Civil Revision Petition is against the order for amendment, on the merits, i. e., on the question whether the learned Judge has exercised his jurisdiction illegally or with material irregularity. I cannot find that he has been guilty of any illegality or irregularity. I am not sure that it can be asserted that he used his discretion wrongly.

Both parties are temples litigating through their respective trustees. The dispute relates to the boundary between two neighbouring villages belonging to the two temples respectively. In 1925-26 there were survey proceedings as a result of which the boundary between the villages was demarcated in the particular way as shown by the survey plan and this decision was notified in the local official gazette. The suit as originally brought was to question the correctness of a particular portion of the line where the villages touch as to which there had been during the survey what is called a land complaint which the survey officer decided against the plaintiff temple. The amendment sought was to bring in question other portions of the boundary line which were demarcated but with respect to which as far as now appears there were no land complaints

and consequently no specific decision except the final decision constituted by the completion of the survey and notified under S. 12 of the Act of 1923. According to the Survey and Boundaries Act of 1923 differing in this respect from the former Act of 1897, notices have to be given under S. 9 even in cases where there is no dispute about a boundary to those who are likely to be affected by the decision. Whether such notices were given in respect of the portions of the boundary now called in question by the amendment does not appear. But if the plaintiff's allegations about his ownership and possession of the disputed lands are true—and they must for the present purpose be assumed to be true—it is plain that he would in the absence of notice have a good ground for not knowing that anything had been decided against him and hence a bona fide ground for asking for the necessary amendment when it became known. The ground on which the learned Judge has granted the amendment is that the plaintiff's suit was bona fide brought to set right on behalf of the temple all the errors made during the survey as to the boundary between the two villages and that the relief was claimed only as to two plots because it was then thought that that was all that was decided against the temple. The learned Judge having taken that view I am not in a position to say that he acted illegally in doing so and if so he was justified in allowing the amendment.

It was again pressed as it was pressed before the lower Court that the amendment deprives the defendant of the benefit of the plea of limitation. That is so, only if a new suit had to be brought in respect of the other portions of the boundary as if it were a new matter. But in the view taken by the Judge the plaintiff is only asking that the relief originally intended should be accurately and explicitly demanded. In this view the objection raised by the respondent that this petition is incompetent as the petitioner's advocate in the lower Court has already received the costs so ordered to the defendant (petitioner) and must be held to have adopted the order does not call for elaborated discussion: see *Venkatarayudu v. C. Ramakrishnayya* (1). The petitioner's learned advocate has

1. A I R 1930 Mad 268=123 I C 337.

placed before me the English and Indian Cases referred to in that decision and rightly pointed out that in every particular case it must be ascertained whether the costs or other benefit accepted by a party is in fact and substance a part of the entire order of which after accepting the part favourable to him, a party puts it beyond his power to attack the rest. To this I agree. But I am not prepared to go so far as to say that the orders to which the doctrine is applied should themselves be the result of an agreement. It is sufficient if by their nature or intention the Court regarded them as an entire whole, giving a benefit in one respect to one party and in another to his opponent, in other words, such that the benefit to one would not have been granted but for the corresponding benefit granted to the other. In this case which was, as shown by the order of the lower Court, one of great doubt to the learned Judge, he after discussing the pros and cons at great length finally allowed the amendment but made payment of costs a condition of granting it. I am of opinion that the Judge would not have granted the costs unless he allowed the amendment and therefore the order comes within the rule. It was then urged that the advocate Mr. C. Doraiswamy Ayyangar who received the costs had not been shown to have authority to bind the defendant by a compromise and so his receipt does not bind the defendant. The question is really not one of any compromise or special agreement. But the advocate in the ordinary course of his employment has undoubted authority to receive costs paid by the other side. The fact, if it is a fact, that the advocate did not realize the consequences of his acceptance of the money, cannot prevent the legal consequences which Courts draw from such an act. The petition fails and is dismissed with costs.

P.R.S./K.S. *Petition dismissed.*

A. I. R. 1933 Madras 411

MADHAVAN NAIR AND JACKSON, JJ.
(*Mannaluri*) *Yegnanarayanamurthi*
and *another*—Appellants.

v.

Mannaluri Balakrishnayya—Respdt.
Civil Appeal No. 246 of 1928 and Civil
Misc. Petn. No. 995 of 1932, Decided on
15th December 1932.

(a) Civil P. C. (1908), O. 22, R. 10—Mortgagee of deceased plaintiff's share is entitled to continue appeal.

A suit by a plaintiff was dismissed and an appeal was filed against the decree by his widow, the plaintiff having died in the meanwhile. The widow died pending appeal and the mortgagee of the rights of the plaintiff in the suit filed an application to be allowed to continue the appeal.

Held: that the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by O. 22, R. 10, has devolved on him and he may therefore be allowed to continue this appeal: *A. I. R. 1922 P. C. 304* and *A. I. R. 1926 Mad. 244, Dist.; Mad. C. M. A. No. 69 and 70 of 1929, Diss. from.* [P 413 C 2]

(b) Civil P. C. (1908), S. 35—Person continuing appeal under O. 22, R. 10—Dismissal of appeal—Such person is liable for full costs of respondents and not costs incurred from date of his application under O. 22, R. 10.

Where a person is allowed to continue an appeal on an application by him under O. 22, R. 10, and the application is dismissed with costs, he is liable for the full costs of the respondents and not merely costs incurred from the date of his application under O. 22, R. 10. [P 413 C 2]

Ch. Raghava Rao—for Appellants.

The Advocate General, K. Umamaheswaran, V. Govindarajachari, V. Pattabhirama Sastri, V. Krishna Mohan and K. Kameswara Rao—for Respondents.

Madharan Nair, J.—In considering whether, while dismissing the appeal, the appellant should be made to pay the costs of the successful respondents, we have to decide the question whether the appellant is competent to prosecute this appeal. The present appellant is a mortgagee of the rights of the plaintiff in the suit. The suit having been dismissed, the plaintiff's widow filed an appeal to this Court against the decree, the plaintiff having died in the meanwhile. His widow is now dead, and the mortgagee has filed an application to this Court to be allowed to continue the appeal. Under O. 22, R. 10 (1):

"in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

In *Manindra Chandra Nandi v. Ram Lal Bhagat* (1), it was held by the Privy Council that

"where a decree for possession and mesne profits has been obtained, there is no power under O. 22, R. 10, or S. 47, Civil P. C., to join as a defendant to the suit a tenant to whom during the pendency of the suit the defendant has let the property so as to compel the tenant to account for profits which he has received from the land."

On the reasoning of their Lordships

1. *A I R 1922 P C 304=68 I C 973=49 I A 220=1 Pat 581 (PC).*

contained in this decision it is argued that the mortgagee of the plaintiff's interest in this case should not be allowed to continue this appeal. The decision in *Manindra Chandra Nandi v. Ram Lal* (1), was passed in appeal from the judgment of the High Court of Patna reported in *Ram Kumar Lal v. Mukund Sahai* (2). Their Lordships reversed the decision of the High Court. The facts of the case were briefly these: The respondents before the Privy Council instituted as plaintiffs a suit against one Raja Mukund Sahi to recover possession of six villages and a jungle which they claimed. The Court of first instance dismissed the suit. Just one year after the dismissal the Raja gave a lease for a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the appellant before the Privy Council. On appeal by the unsuccessful plaintiffs the High Court reversed the decision of the first Court and made a decree in favour of the plaintiff and remitted the case to the lower Court to take an account of the mesne profits to which the appellants were entitled for three years prior to the institution of the suit and for the period thereafter till the delivery of possession. In inquiring into the mesne profits the Amin not only ascertained the rents which the Raja had received from the appellant before the Privy Council and the other tenants, but also proceeded to inquire what were the profits which the various lessees might be taken to have made from the mica which they had extracted during the terms of their leases pending the somewhat protracted litigation.

It is clear, as pointed out by the Privy Council, that in ascertaining such mesne profits the successful plaintiffs would not be entitled to the actual rents which the trespassing defendant had received, nor could the lessees be rendered liable for damages in that suit to which they were not parties in respect of the mica that they had removed. On the receipt of the Amin's report the plaintiffs (that is, the respondents before the Privy Council) relying on the statements with regard to the profits obtained from the mines made an application that the several lessees from the Raja should be made parties to the proceedings. The appellant before the Privy Council raised

2. (1917) 1 Pat L J 596=38 I C 237.

various objections and said that since he knew of the plaintiffs' claim to the property he had surrendered his leases and that he should not be made a party. The Subordinate Judge accepting his contentions dismissed the plaintiffs' application. The High Court in appeal from his order held, basing their order on the language of O. 22, R. 10, Civil P. C., that

"the appellants are entitled to have the persons in question added as parties to the proceedings, and compel them to account for any profits which they may have received from the land."

Their Lordships of the Privy Council set aside this order, and in doing so they considered the scope of O. 22, R. 10, Civil P. C. Its scope is thus described;

"The order contemplates cases of devolution of interest from original party to the suit, whether plaintiff or defendant, upon some one else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of R. 10 for all other cases. But, they are all cases of devolution."

Then after referring to S. 372 and noting that the words "in addition to" in the earlier Code have disappeared in the present Code their Lordships state this:

"But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs."

And then they point out that serious injustice should be done if any other view was taken. The reasoning contained in the last extract we have quoted from the judgment affords the real basis of their Lordships' decision. O. 22, R. 10, relates to cases of devolution, and, as the liability of the appellant in that case was the liability of a trespasser which cannot be said to have devolved upon him from the defendant Raja, their Lordships held that he cannot be made liable in that suit and therefore refused to make him a party, the provisions of O. 22, R. 10 in such a case being absolutely inapplicable. This is the reasoning of their Lordships and it is not affected, if we may say so with great respect by the change in the language of the present Rule. We may also point out that there is nothing in their Lordships' observations to justify the view that the devolution of interest contem-

plated in R. 10 is a devolution of the entire interest. The terms of the Rule which speaks of a devolution of any interest do not support such a view. For the above reasons it appears to us that the reasoning of their Lordships in the Patna case cannot be relied upon for the view that the mortgagee of the plaintiff's interests in the suit should not be substituted in the place of the mortgagor and be allowed to continue the suit on his death. For the same reasons we regret we are unable to accept as correct the contrary view enunciated by Krishnan Pandalai, J., in C. M. A. No. 69 and 70/29, etc. The decision in *Srinivasa Aiyangar v. Pratapa Simha* (3) has no application to the case before us, as in that case a mortgagee was sought to be brought on record after the termination of the suit.

In the present case the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by O. 22, R. 10, has devolved on him and he may therefore be allowed to continue this appeal. We would therefore allow his petition. He being thus declared competent to conduct the appeal, it must follow, the appeal having been dismissed, that he should pay the costs of the respondents. It is argued by Mr. Raghava Rao on his behalf that the costs should be limited to the costs incurred by the respondents since the date of his application. We see no reason to limit the order in this manner. The appeal is dismissed with costs: one set. The petitioner in C. M. P. No. 995/32 will get his costs of the application.

P.R.S./K.S. *Order accordingly.*

3. A I R 1926 Mad 244=91 I C 820.

* A. I. R. 1933 Madras 413

BURN, J.

K. S. Subramania Ayyar—Petitioner.
v.

Swamikannu Chetty—Opposite Party.

Criminal Revn. Case No. 747 of 1932 and Criminal Revn. Petn. No. 697 of 1932, Decided on 30th January 1933, from order of Sess. Judge, South Arcot, D/- 26th July 1932.

*(a) Criminal P. C. (1898), S. 195—Same act constituting offence under Ss. 193 and 471, I. P. C.—Prosecution under S. 471 alone without complaint of District Munsif before

whom document is used does not lie—Penal Code (1860), Ss. 193 and 471.

A promissory note would have become barred by limitation on 5th December 1930. A, the endorsee of the promissory note, arranged with B, a vakil's clerk, for the filing of suit on the pro-note. B failed to file it within the period of limitation, but had it filed some time afterwards. Then the pro-note bore an endorsement of the payment of Rs. 2, on 15th March 1929. A accused B of having somehow forged the endorsement in order to cover up his own offence and prosecuted him under S. 471, I. P. C., without the previous sanction under S. 195 (1) (c), Criminal P. C., contending that B being not a party to the suit, no previous sanction was necessary:

Held: that the facts alleged constituted an offence under S. 193, I. P. C., and therefore the complaint was barred by S. 195, Criminal P. C.: *A. I. R. 1932 Mad. 253 and A. I. R. 1929 Mad. 23, Rel. on.* [P 415 C 2]

(b) Criminal P. C. (1898), Ss. 209 (2) and 436 — Magistrate discharging accused on ground that he has no jurisdiction to entertain complaint is not order of discharge and Sessions Judge is not competent to deal with it under S. 436.

A Magistrate discharged the accused under S. 209 (2) on the ground that he had no jurisdiction to entertain the complaint. The Sessions Judge in revision dealt with it under S. 436, Criminal P. C., and ordered further inquiry.

Held: that the order of the Magistrate was wrong in that if he had no jurisdiction to entertain the complaint he could certainly have no jurisdiction to discharge the accused under S. 209 (2), Criminal P. C.

Held further: that the Magistrate's order amounted only to an order that he declined to proceed with the case for want of jurisdiction even though the word "discharged" was used, that his order was not an order of discharge and that it could not be revised by the Sessions Judge under S. 436. [P 416 C 1]

(c) Criminal P. C. (1898), S. 209 (2)—Order of discharge must be based on ground that charge is groundless.

An order of discharge under S. 209 (2) must be based on a consideration that the charge is groundless. Such an order cannot be passed on the ground that the Magistrate has no jurisdiction to entertain the complaint. [P 416 C 1]

K. S. Jayarama Ayyar and G. Gopalswami—for Petitioner.

Public Prosecutor and T. E. Ramabhadrachariar—for Opposite Party.

Order.—The petitioner was accused of an offence under S. 471, I. P. C., in a complaint presented by the respondent to the Subdivisional Magistrate, Chidambaram. The complaint was taken on file for offences under Ss. 465 and 471, I. P. C., and transferred to the 2nd Class Magistrate of Vridhachalam for preliminary inquiry under Ch. 18, Criminal P. C. The Sub Magistrate recorded a sworn statement from the complainant and issued processes to the ac-

cused and witnesses, but before the inquiry could begin he was succeeded by another Magistrate, who heard preliminary arguments and held that the complaint was barred by S. 195, Criminal P. C., because there was no complaint by the District Munsif of Vridhachalam. The Magistrate then passed an order purporting to discharge the accused (the petitioner) under S. 209 (2), Criminal P. C. In revision the learned Sessions Judge of South Arcot acting under S. 436, Criminal P. C., set aside the order of discharge and directed the Sub-Magistrate to restore the complaint to file and dispose of it according to law. The accused has prayed that the order of the learned Sessions Judge may be quashed as being contrary to law and without jurisdiction.

The facts, as alleged in the respondent's complaint are quite simple. Ramana Naidu of Melapapanampatti in Vridhachalam Taluk executed on 5th December 1927, a promissory note for Rs. 150, in favour of Kuppuswami Chetty of Melpadi. On 15th October 1930, Kuppuswami Chetty endorsed the promissory note in favour of the respondent. Until 15th October 1930, no endorsement of payment on account of principal or interest had been made on the promissory note and therefore the respondent's claim under it would become barred by limitation on 5th December 1930. On 19th November 1930, the respondent issued a notice to the promisor to which he received no reply. On 2nd December 1930 the respondent arranged with the petitioner, who is, or was then, a vakil's clerk for the filing of a suit on the promissory note in the Court of the District Munsif, Vridhachalam. He sent to the petitioner the promissory note, a vakalat form duly signed, and a blank sheet duly signed on which the plaint might be copied out; he sent also at the same time Rs. 24, for the fees and necessary expenses. The petitioner failed to see that the suit was filed within the period of limitation, but had it filed some time afterwards, and then the promissory note bore an endorsement of the payment of Rs. 2, on 15th March 1929. The respondent accused the petitioner of having somehow forged the endorsement in order to cover up his own offence, and stated that by filing the promissory note in the Court the peti-

tioner had committed an offence under S. 471, I. P. C. The suit was dismissed by the District Munsif on the ground that the claim was barred by limitation. (This appears from the order of the learned District Judge; the records of the suit have not been discussed before me.)

The Sub-Magistrate took the view that the offence alleged in the complaint was clearly one of intentionally fabricating false evidence for the purpose of being used in a judicial proceeding (S. 193, I. P. C.) and that therefore a prosecution was barred by S. 195 (1) (b), Criminal P. C., for want of a complaint by the District Munsif in whose Court the false document had been used. There can be no doubt that the person who wrote the false endorsement did so with the intention of causing it to appear that a payment of Rs. 2 had been made on 15th March 1929. That would be an important item of evidence in the suit, because if such a payment had been made, the bar of limitation would be removed. The respondent's contention, which appears to have found favour with the learned Sessions Judge is that the petitioner forged the endorsement not in order to make false evidence for the suit, but in order to cover up his own failure to file the suit in time. This contention is very obviously due to a confusion of motive with intention. No doubt the motive of the petitioner was to save himself from blame for delay in having the suit filed. But the intention of the act of forgery and the intention of the act of filing the forged document, have to be gathered from the acts themselves. The intention with which the forged endorsement was made was to cause it to appear that a payment of Rs. 2 had been made on 15th March 1929. The intention with which the forged document was filed in Court is equally clear; it was to make it appear to the District Munsif who was to try the suit that the claim was not barred by limitation. If the District Munsif believed that, and gave a decree for the plaintiff, the mistake of the respondent would be concealed and he would escape responsibility for the fees which had been entrusted to him. That however, though it may have been the ulterior object which the petitioner desired to gain, was not the intention with which

he acted when he filed the promissory note in the Court.

The offence of fabricating false evidence for use in a judicial proceeding (S. 193, I. P. C.), is specified in S. 195 (1) (b), Criminal P. C., and therefore no Court could take cognizance of that offence in this case without the complaint of the District Munsif, Chidambaram. The offence of using as genuine a forged document (S. 471, I. P. C.), is specified in S. 195 (1) (c), Criminal P. C., and the petitioner not being a party or a witness to the suit, no complaint of the District Munsif is necessary before he could be prosecuted for that offence. The respondent has attempted to prosecute the petitioner for the offence under S. 471, I. P. C., although the facts alleged would constitute an offence under S. 193, I. P. C. This is precisely what is forbidden by the decisions in the cases of *Ravanappa Reddi In re* (1) and *Perianna Muthirian v. Vengu Ayyar* (2).

This is sufficient to show that the order of the learned Sessions Judge must be set aside and I do not think it is necessary to discuss the other decisions cited by the learned Sessions Judge. On the merits of this case it is in my opinion clearly one in which no prosecution should be entertained except upon the complaint of the District Munsif, Vridhachalam. I have no doubt whatever that the plaint in the suit upon the pro-note contained an averment of the payment of Rs. 2 on 15th March 1929. That averment was signed by the plaintiff (the respondent in this petition) and the learned District Munsif would want from him a full and satisfactory explanation thereof, before deciding at his instance to file a complaint against the present petitioner. The respondent, it is clear from his complaint, has foreseen this difficulty; hence the allegation in the complaint that he signed and delivered to the petitioner a blank sheet on which the plaint could be drafted. Under O. 6, R. 15, Civil P. C., the respondent was bound to append a verification to his plaint, and, if he had applied to the District Munsif to prosecute the petitioner, he would have found that it was not so easy to escape from the implications of

1. A I R 1932 Mad 253 = 1932 Cr C 182=136 I C 779=33 Cr L J 261=55 Mad 343.
2. A I R 1929 Mad 21=114 I C 360=30 Cr L J 322.

his verification by a mere assertion that he had signed on a blank sheet. This would have had an important bearing on the question whether the District Municipal would consider it expedient in the interests of justice to prosecute the petitioner. He might even have considered it necessary to prosecute the respondent also.

There is another technical point to which Mr. K. S. Jayarama Iyer for the petitioner has called my attention though it has not been fully argued, since it was not mentioned in the petition. The learned Sub-Magistrate has stated in his order that he discharged the petitioner under S. 209 (2), Criminal P. C. He had decided that he had no jurisdiction to entertain the complaint, but strangely enough it did not occur to him that if he had no jurisdiction to entertain the complaint he could certainly have no jurisdiction to discharge the accused under S. 209 (2), Criminal P. C. Moreover an order of discharge under S. 209 (2), Criminal P. C., must be based on a consideration that the charge is groundless. There is nothing in this case upon which the Magistrate could have arrived at such a decision; nor in fact has he arrived at such a decision. The Magistrate's order that he declined to proceed with the case for want of jurisdiction was not an order that could be revised by the learned Sessions Judge. Though the Magistrate used the word "discharge" his order was not in law an order of discharge at all, and the mere mention in it of S. 209 (2), Criminal P. C., could not give the learned Sessions Judge jurisdiction to deal with it under S. 436, Criminal P. C. Nor was it an order dismissing a complaint under S. 203, Criminal P. C., for, such an order can only be passed by a Magistrate having jurisdiction to take cognizance of the complaint. The order of the learned Sessions Judge directing further inquiry into the complaint against the petitioner is accordingly set aside.

P.R.S./K.S.

*Order set aside.***A. I. R. 1933 Madras 416**

BURN, J.

(Sanitary Inspector) Municipal Council, Dindigul—Petitioner—Complainant.
v.

Rajamani Ayyar—Accused—Respondent.

Criminal Revn. Case No. 935 of 1932 and Criminal Revn. Petn. No. 859 of 1932, Decided on 3rd February 1933, to revise judgment and decree of Bench Magistrates, Dindigul, D/- 31st August 1932, and in S. T. No. 486 of 1932.

Madras District Municipal Act (5 of 1920), S. 306, Bye-law No. 1 — Bye-law No. 1 does not authorize Municipal Chairman to issue any notice of any kind nor make failure to obey notice punishable.

Bye-law No. 1 is badly drafted and it does not prohibit anyone from doing anything. It does not authorize the Municipal Chairman to issue to anyone any notice of any kind nor does it say that failure to obey a notice is punishable. Hence a person who uses for hotels, etc., any premises not constructed as mentioned in Bye-law No. 1 will not be liable to penalty.

[P 416 C 2]

K. Rajah Ayyar and S. Narasinga Rao—for Petitioner.

K. S. Jayarama Ayyar and T. P. Gopalakrishna Ayyar—for Respondent.

Public Prosecutor—for the Crown.

Order.—The petition must fail. Bye-law No. 1 is badly drafted. It does not prohibit anyone from doing anything. It enjoins that

"premises used for hotels, lodging houses, boarding houses, choultries, rest houses, restaurants, eating houses, cafes, refreshment rooms, or coffee houses or to which the public are admitted for the consumption of any food or drink shall be constructed of masonry or of such other durable materials, as may be approved by the Chairman and no part thereof shall be constructed of inflammable materials;"

but it fails to say that anyone who uses for hotels, etc., any premises not so constructed will be liable to any penalty. Moreover, the bye-law certainly does not authorize the Municipal Chairman to issue to anyone any notices of any kind, nor does it say that failure to obey a notice is punishable. The acquittal was correct and this petition is dismissed.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 417

BEASLEY, C. J. AND BARDSWELL, J.
Appaji Reddiar—Appellant.

v.

Thailammal—Respondent.

Letters Patent Appeal No. 4 of 1930,
 Decided on 24th January 1933, from
 order of Jackson, J., D/- 28th No-
 vember 1929.

**Letters Patent (Madras), Cl. 15 — Order
 ordering respondent in appeal to be brought
 on record as legal representative of deceased
 appellant is not appealable.**

An order ordering the respondent in an appeal
 to be brought on the record as the legal repre-
 sentative of the deceased original appellant is
 not an appealable order as such an order is not
 a judgment within the meaning of Cl. 15, Letters
 Patent: 35 *Mad.* 1, *Appl.* 31 *I. C.* 38 and *A. I. R.*
 1922 *Cal.* 335, *Dist.* [P 417 C 1]

S. N. Srinivasa Ayyar—for Appellant.

T. R. Srinivasan—for Respondent.

Beasley, C. J.—This is a Letters Patent
 Appeal from an order of Jackson, J. The
 question raised here is whether that
 order which was one ordering the res-
 pondent in this appeal to be brought on
 the record as the legal representative of
 the deceased original appellant is an ap-
 pealable order or not. In my view, it
 is not. Applying the test applied by Sir
 Arnold White, C. J., in *Tuljaram Row v.*
Alagappa Chettiar (1), this is certainly
 not an appealable order. That test has
 so often been referred to and I do not
 propose to re-state it here. I may how-
 ever summarise my reasons for saying
 that this is an order which is not ap-
 pealable. An order to be appealable
 must of course be a judgment within
 the meaning of Cl. 15, Letters Patent. In
 my view, this is not a judgment which
 finally settles the rights of parties but
 has the effect of allowing litigation
 which is proceeding to further proceed
 to a final adjudication. The facts of the
 case here are that the deceased original
 appellant filed this appeal and whilst it
 was pending died. Then an application
 was made to bring on record the res-
 pondent as her legal representative. The
 question as to whether or not the res-
 pondent was the legal representative of
 the deceased original appellant depended
 upon the genuineness or otherwise of a
 will. That was a matter which came
 before our learned brother. He first of
 all considered whether the will was a
 genuine one or not and having found
 that it was genuine he brought upon the

record the respondent, the person who
 by the will was established to be the
 legal representative of the deceased ori-
 ginal appellant.

What was the effect of the order?
 Upon the death of the original appellant
 the appeal would have abated if within
 the period allowed for doing so no legal
 representative of the deceased appellant
 had been brought on the record. The
 result would have been that if no ap-
 plication had been made the appeal
 would have abated and the judgment of
 the lower Court would have stood in
 favour of the appellant here. The effect
 of the order made by our learned bro-
 ther is that the final adjudication upon
 this matter is not stopped by the death
 of the deceased original appellant. On
 the contrary the order makes it possible
 for an adjudication upon the matter
 under the appeal. I am clearly of the
 opinion that the cases quoted on behalf
 of the respondent here, namely, *Kyroon*
Bee v. Administrator General of Madras
(2) and *Sarat Chandra Sarkar v. Maihar*
Stone & Lime Co., Ltd. (3), are of no ap-
 plication here at all. Those cases dealt
 with the position of suits which had
 already abated and the question was
 whether an order setting aside the abate-
 ment was an order which was appeal-
 able or not. The reason for deciding that
 the order was appealable was because by
 reason of the abatement of the appeal
 the respondent had acquired a valuable
 right and that the order setting aside
 the abatement had the effect of depriv-
 ing the respondent of that valuable
 right. Hence it was held that there
 should be an appeal from such an order.
 That is not this case at all. For the
 reasons I have given, in my view, the
 preliminary objection taken by Mr. K.
 Bhashyam is a sound one and I must
 hold that there is no appeal from such
 an order as in this case. This Letters
 Patent Appeal must therefore be dismis-
 sed with costs.

Bardswell, J.—I agree.

P. R. S./K. S.

Appeal dismissed.

2. (1915) 31 *I C* 38.

3. *A I R* 1922 *Cal* 335=49 *Cal* 62=67 *I C* 917.

*** A. I. R. 1933 Madras 418**
Full Bench

JACKSON, SUNDARAM CHETTY AND
 MOCKETT, JJ.

(*Vadlamannati*) *Bala Tripura Sundaramma*—Plaintiff—Appellant.

v.

Abdul Khader—Defendant—Respondent.

Appeals Nos. 51 and 52 of 1929, Decided on 14th September 1932 against order of Dist. Judge, Kistna, D/- 14th August 1928.

* (a) Limitation Act (1908), S. 15 and Art. 182—Final decree in mortgage suit and execution application for sale of mortgaged properties—Dismissal of petition for non-payment of batta—Declaratory suit by another that mortgaged property belonged to mosque and that mortgage was invalid and unenforceable decreed—Mortgagee decree-holder's appeal from such decree allowed—Subsequent execution application for sale of mortgaged properties beyond three years from date of dismissal of prior application does not come under S. 15 nor is it revival of old application and is barred by limitation.

An application for sale of mortgaged property in execution of the final decree was dismissed for non-payment of batta by the applicant. On the previous day to the passing of this order, a suit filed by another in which the mortgagee-decree-holder was impleaded, was decreed declaring that the mortgaged property belonged to mosque and that the mortgage was invalid and unenforceable. The mortgagee-decree-holder appealed from that decree and his appeal was allowed and the declaratory suit was dismissed. Subsequently three years beyond the date of the dismissal of the former execution application, the mortgagee-decree-holder applied for sale of the mortgaged properties and contended that the application was not barred as it came under S. 15 and as it was to revive the old application.

Held: that the case did not come under S. 15 as the prior petition was dismissed for non-payment of batta and not on account of the decree in the declaratory suit, and that the second application was a fresh one and not to revive or to continue the old one as that application was dismissed finally and properly and could not be revived and as such was barred by time under Art. 182. *Case law discussed.*

[P 421 C 1; P 422 C 1]

(b) Limitation Act (1908)—Construction—Exemption not covered by sections in Act cannot be imported by Court.

Per *Jackson, J.*—Exemption not covered by the sections of the Indian Limitation Act should not be imported by Courts to relieve a party from the bar of limitation: *A I R 1920 Mad 1 (PC)* and *43 Cal 660, Ref.* [P 420 C 2]

(c) Civil P. C. (1908), O. 9 and O. 17 and S. 151—Court has inherent power to dismiss execution application for default—Decree—Execution.

Per *Sundaram Chetty, J.*—Though O. 9 and O. 17, Civil P. C. do not apply to execution proceedings, still the Court has doubtless, inherent

power to dismiss an application for execution when the applicant makes default in the payment of batta which is necessary to put the Court in a position to proceed with the application. [P 422 C 1]

* (d) Decree — Execution — Application finally and properly dismissed cannot be revived—Test for applicability of principle of revival indicated.

An application for execution which has been finally and properly dismissed cannot be revived: *21 Mad 257* and *A I R 1926 Mad 693, Rel. on.*

[P 422 C 1]

But where an execution petition can be deemed to have been not finally disposed of and can be treated as 'still pending in the eye of law, the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application is dismissed finally, but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turns out to be untenable, the latter execution application would be deemed to be one for a revival of the former one: *21 Mad 261*; *28 Mad 50 (F B)*; *31 Mad 71*; *A I R 1924 Mad 210* and *24 Bom 345, Ref.* [P 422 C 2]

The test to be applied for the principle of revival is that the interruption to the execution proceedings is due to an intermediate order which was afterwards set aside or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault or laches of the applicant: *17 Cal 268* and *23 Cal 397, Rel. on.*

[P 423 C 1, 2]

* (e) Limitation Act (1908), S. 15—Injunction or order staying execution must be express and application cannot be stayed by implication.

Per *Mockett, J.*—Equitable considerations cannot be introduced into the very clear provisions of S. 15. The injunction or order must be express in its terms and an application cannot be stayed by implication: *A I R 1932 P C 165, Rel. on.* [P 424 C 1]

N. Sivaramakrishna Iyer—for Appellant.

Ch. Raghava Rao—for Respondent.

Jackson, J.—In E. P. No. 12 of 1928 the appellant, the mortgagee decree-holder in O. S. No. 29 of 1918 of Masulipatam, applied to sell the mortgage security. He cited a previous application dated 2nd October 1922, and claimed to be in time because:

"the plaintiff was restrained by an injunction from executing the mortgage decree, and the injunction was dissolved only on 16th August 1927."

The Court accordingly ordered sale on 5th April 1928 but stayed it upon the respondent judgment-debtor's objection that the execution application was time barred, and finally by its order dated 14th August 1928 dismissed the application as barred by limitation. Hence the appeals. We do not find that the

Court had debarred itself from going into the question of limitation by ordering sale. If it had been misled by the appellant into thinking that there was no question of limitation it did right to go into the matter before the execution was concluded. This disposes of C. M. A. 52. The appellant no longer maintains that there was an injunction as originally stated. But she argues that there was a decree, which in its effect was tantamount to an injunction, and which therefore attracted the provision of S. 15, Lim. Act. The exact words of that section applicable to this case are:

"In computing the period of limitation prescribed for any application for the execution of a decree, the execution of which has been stayed by injunction or order the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

Eight months after the appellant obtained her decree certain worshippers impleading both the mortgagor and the mortgagee got it declared that the security of the mortgage was a religious endowment and not the property of the mortgagor in the decree in O.S. No. 14 of 1920 on the file of the Sub-Judge, Masulipatam, and it is this decree which the appellant asks us to treat as an order staying the execution of her prior decree, until it was set aside on appeal by the High Court on 16th August 1927. The learned District Judge has found that the petitioner was not restrained or prevented from executing her decree, and if she had applied for execution the Court could not have refused to execute.

In our opinion this is correct. Suppose in a similar case the mortgagor was possessed of much property besides the mortgaged property. The decree-holder could put in his application for execution, sell the property with the blot on the title for what it was worth, or have it recorded that the property was legally extinct: see *Chand Mall Babu v. Ban Behari Bose* (1) and, then apply for a personal decree; and to say that in these circumstances execution has been stayed is to wrest the expression entirely away from its ordinary meaning. To maintain her argument the appellant must read "stayed" as "inconvenienced," and it remains to see whether the case law supports that interpretation. There appears to be no Madras case directly in

point. The two Bombay rulings in *Somshikhar Swami Guru v. Shivappa Mallappa* (2) and *Ram Bharosay v. Sohan Lal* (3) run on all fours with the present case and negative the appellant's view. In regard to the institution of suits, not the execution of decrees, it is held in *Satyanarayana Brahmam v. Seethayya* (4) that no equitable grounds for the suspension of a cause of action can be added to the provisions of the Limitation Act and a decree cancelling a promissory note as fraudulent is no stay of a suit upon the note. This judgment does not seem to have been brought to the notice of the Bench in *Lakshminarayana v. Lakshmipathi* (5) and there the ruling is to the exact contrary—that the decision in the collateral suit was in substance one which prevented the filing of a suit upon the note. Two cases are cited by that Bench in support of its view. *Pandey Satdeo Narayan v. Radhey Kuar* (6) and *Satish Mohini Debya v. Pabna Bank, Ltd.* (7). In the Patna case the decree-holder was ordered to furnish security for half a lakh before executing his decree, and that order is interpreted as one staying the execution; there is no question of collateral decrees. In *Satish Mohini Debya v. Pabna Bank, Ltd.* (7) it is also found that there is an order amounting to a stay:

"Execution was clearly stayed by the order of 27th May—the Judge struck off the execution case for the present."

Again, there is no question of a collateral decree, so *Lakshminarayana v. Lakshmipathi* (5) seems to stand alone, and of the two contradictory judgments we prefer *Satyanarayana Brahmam v. Seethayya* (4) as correctly stating the law. In *Muthu Korakkai Chetty v. Madar Ammal* (8) the question was referred to a Full Bench whether the cause of action for delivery to which Art. 180, Lim. Act, applies is suspended during the pendency of proceedings for setting aside the sale, and this question attracted a general discussion of limitation covering a wide range. On p. 203, Sadasiva Ayyar, J.,

2. A I R 1924 Bom 39=76 I C 557.

3. A I R 1924 All 707=82 I C 1.

4. A I R 1927 Mad 97=100 I C 776=50 Mad 417.

5. A I R 1927 Mad 997=105 I C 304.

6. A I R 1920 Pat 354 = 53 I C 9 = 5 Pat L J 39.

7. (1918) 47 I C 907.

8. A I R 1920 Mad 1=54 I C 66 = 43 Mad 185 (FB).

1. A I R 1924 Cal 209 = 74 I C 1021 = 50 Cal 718.

found that the sale was not finally approved till the proceedings to set it aside for fraud had terminated, a case very much on all fours with *Bajinath Sahai v. Ramgut Singh* (9), when a revenue sale was held to be finally confirmed after various proceedings. He then enunciates a principle underlying this ruling

"that whenever proceedings are being conducted between the parties bona fide in order to have their mutual rights finally settled, the cause of action for an application, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when these proceedings finally settle such rights."

It can hardly be said that *Bajinath Sahai v. Ramgut Singh* (9) and the other case cited *Mt. Rance Syrno Moyee v. Shooshee Mokhe Burmonia* (10), lay down any such general proposition. These cases decide as a matter of fact that in certain circumstances a cause of action arose upon a certain date, and it would be very dangerous to proceed as though their underlying principle contained a general proposition of statutory force. The next case which is cited, *Nrityamoni Dossai v. Lakhan Chandra Sen* (11), requires to be read with care. As stated in the opening sentence it is a general concurrence with the judgment under appeal, reported in *Lakhan Chunder Sen v. Madhusudan Sen* (12), a case in which *Mt. Rance Syrno Moyee v. Shooshee Mokhe Burmania* (10) and *Prannath Roy v. Rockea Begum* (13) have been followed. In the latter case it is found on p. 357 that it would be an inconsistent course in the Courts to hold that the pendency of a litigation furnished no "good and sufficient cause" for the appellant's not proceeding with his own claim. The words in inverted commas are a quotation from an exception to certain Bengal Regulations referred to on p. 253 of this same Vol. 7:

"But certain exceptions are introduced into these regulations, amongst others, that the limitation of 12 years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within that period."

It cannot be said that the series of cases ranging from *Mt. Rance Syrno*

Moyee v. Shooshee Mokhe Burmonia (10) to *Nrityamoni Dossai v. Lakhan Chandra Sen* (11) have superimposed upon the Limitation Act some provision which finds no place among its sections. On p. 209 of 43 Mad., of *Muthu Korakkai Chetty v. Madar Ammal* (8) Sadasiva Ayyar, J., restates the principle in these terms

"a person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings for the settlement of the same rights."

But that seems rather to beg the question. If the application is one which must be made in order to save the bar of limitation it is neither futile nor unnecessary. As observed by Seshagiri Ayyar, J., in the same case on p. 211, the Judicial Committee have held that exemptions not covered by the sections of the Limitation Act should not be imported by Courts to relieve a party from the bar of limitation, and this principle is not overlooked in the six Privy Council cases which he cites including *Nrityamoni Dossai v. Lakhan Chandra* (11). The Officiating Chief Justice speaks to the same effect on page 200:

"It is hardly to be inferred from such observations that the Privy Council intended to lay down any rule other than those mentioned in various sections of the Limitation Act."

In *Satyanarayana Brahman v. Seethayya* (4) it is also held that whatever view be taken of *Nrityamoni Dossai v. Lakhan Chandra* (11) no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. *Ammathayi Ammal v. Sivarama Pillai* (14) is to the same effect. A recent Privy Council case, *Nagendra Nath Dey v. Suresh Chandra Dey* (15), lays down that though in theory some rule in regard to collateral litigation may be intelligible, when however there is no such rule in the Act, the only practical course is to interpret and follow the Act's provisions. We agree and hold that if the appellant cannot bring herself within the exemptions provided for in the Act, she cannot escape the bar of limitation by pleading in equity an implied order or a collateral litigation which would render her proceedings futile.

9. (1896) 23 Cal 775=23 I A 45=7 Sar 1 (PC).

10. (1867-69) 12 M I A 244 (PC).

11. (1916) 43 Cal 660=33 I C 452.

12. (1908) 35 Cal 209=12 C W N 326=7 C L J 59.

13. (1857-59) 7 M I A 323=4 W R 37 (PC).

14. A I R 1925 Mad 334=85 I C 272.

15. A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1=63 M L J 329 (P C).

It remains to consider whether the execution petition which was dismissed on 16th January 1923 can be treated as revived by the present execution petition so that no question of limitation need arise. There is no doubt that the execution petition was dismissed because batta was not paid, and it is difficult to see how a petition dismissed for that reason can possibly be revived. I have had the advantage of reading the judgment of my learned brother which is about to be delivered on this point, and entirely agree with his conclusion, and the statement of the case law upon which it is founded. The appeals therefore must be dismissed with costs.

Sundaram Chetty, J.— The appellant in these appeals filed O. S. No. 29 of 1913 in the District Court, Masulipatam, on a mortgage bond and obtained a preliminary decree for sale of the mortgaged properties on 4th November 1919. The final decree in that suit was passed on 27th March 1922. She filed E. P. No. 57 of 1922 on 2nd October 1922, praying for the sale of the mortgaged properties for the realization of the decree amount. That petition was dismissed on 16th January 1923. In 1919 one Mahomed Yusuff and another filed a suit in the District Court of Kistna at Masulipatam which was subsequently transferred to the Court of the Subordinate Judge, Masulipatam, and numbered as O. S. No. 14 of 1920, in which the present appellant and also the mortgagors who executed the mortgage deed on which the decree in O. S. No. 29 of 1918 was passed, were also impleaded as defendants. The plaintiffs therein contended that the mortgaged properties belonged to a mosque which was a public religious endowment and were inalienable and prayed for a declaration that the mortgage deed was invalid and unenforceable. That suit was decreed on 15th January 1923 and the declaration sought for was accordingly given. The present appellant who was impleaded as defendant 2 in that suit preferred an appeal to the High Court against that decision (A. S. No. 349 of 1923). That appeal was allowed and the plaintiffs' suit brought on behalf of the mosque was dismissed on 16th August 1927. Subsequently, the present application for the execution of the decree in O. S. No. 29 of 1918 was filed by the decree-holder on 23rd September 1927.

The contention of the judgment-debtors is that this application for execution is barred by limitation. The learned District Judge upheld this objection and dismissed the execution petition.

The appellant puts forward several grounds in support of the contention that the present execution application should be held to be not barred by limitation. I propose to deal with one of those contentions, and that is that the present E. P. No. 12 of 1928 filed soon after the High Court decision must be deemed to be one for the revival of the former E. P. No. 57 of 1922 which was dismissed on 16th January 1923. In order to apply the principles of law relating to the doctrine of revival, it would be well to ascertain what the exact facts in this case are. In E. P. No. 57 of 1922 the prayer was for the sale of the mortgaged properties. On 17th November 1922 notice of sale to the judgment-debtors was ordered fixing the hearing date as 12th December. On the later date the judgment-debtors were absent and the notices were found to have been affixed. Finding that the service was not sufficient the Court ordered fresh sale notice to be taken out by the decree-holder and fixed the hearing date as 16th January 1923. When the petition was taken up for disposal on that date it was found that no batta was paid for fresh sale notice as ordered by the Court. On the express ground that no batta was put in, the petition was dismissed on that day without costs. Thus ended E. P. No. 57 of 1922. It is true that on 15th January 1923 the judgment in O. S. No. 14 of 1920 was pronounced by the Subordinate Judge, declaring that the mortgage in question was invalid and not binding on the trust. It may be contended with some show of reason that even in the absence of an injunction restraining the sale of the properties in execution of the mortgage decree in O. S. No. 29 of 1918, the declaration of the invalidity of that mortgage would be an obstacle to pursue the execution of the mortgage decree by seeking to sell the mortgaged properties. I am not however dealing with that point. What is stated in ground No. 13 in the memorandum of appeal in C. M. A. No. 51 of 1929 is, that E. P. No. 57 of 1922 was dismissed on 16th January 1923, in consequence of the judgment in

O. S. No. 14 of 1920 dated 15th January 1923.

If this statement is correct, it may very well be contended that the present execution application may be deemed to be one for the revival of the former one which was wrongly dismissed by reason of an obstacle which was subsequently removed and for no fault or neglect of the decree-holder. But as I have set forth above, the dismissal of E. P. No. 57 of 1922, as would appear from the orders thereon, was due to the non-payment of batta for fresh sale notice as ordered by the Court. There is nothing to show that by reason of the adverse decision in O. S. No. 14 of 1920 the executing Court dismissed that petition on the ground that the properties could not be put up for sale. In the absence of any sort of proof in support of the assertion made in ground No. 13 of the appeal memo and in the face of the express order of the Court passed on 16th January 1923, the only possible conclusion in this case is that that petition was dismissed on that date on account of the failure of decree-holder to pay batta for fresh sale notice as ordered by the Court.

Though O. 9 and O. 17, Civil P. C., do not apply to execution proceedings, still the Court has, doubtless, inherent power to dismiss an application for execution when the applicant makes default in the payment of batta which is necessary to put the Court in a position to proceed with the application. That being so, the dismissal of the execution petition on 16th January 1923 on account of the default of the decree-holder due to her own laches was a proper and final disposal of that petition. The principle of law deducible from a long course of decisions seems to be, that an application for execution which has been finally and properly dismissed cannot be revived. This principle has been clearly stated in the decision in *Suryanarayana Pandarathar v. Gurunada Pillai* (16). In that case the application filed in September 1892 was found to have been properly dismissed, as it was filed in contravention of the previous order of the Court. The fresh application for execution which was filed in October 1895 could not be treated as a renewal of the application filed in September 1892 as the latter application

was finally and properly dismissed. The same view has been expressed by Ramesam, J., in the decision reported in *Lamiya v. Mazur Hannisa* (17) in the following passage :

"Not unless there was a suspension without any default on her part can the principle of revival of a former execution petition be utilized in favour of the appellant."

The learned advocate for the appellant referred us to several decisions in support of his contention, but none of those decisions has proceeded on any ground inconsistent with the principle stated above and all those decisions are clearly distinguishable and cannot help the appellant in this case. Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of the law, the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application was dismissed finally, but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one. For all intents and purposes, there is not much difference between revival and continuation of the former application. The same principle however applies in both cases. In the decision in *Sasivarna Tevar v. Arulanandam Pillai* (18), it was held that the District Munsif had no legal authority to dismiss the execution petition simply because execution was stayed by the Sub-Court. The words "struck off" were taken to be not a dismissal. In this view, the execution petition was held to be pending in the eye of the law and therefore the later application was treated as one to continue the pending proceedings. The Full Bench decision in *Suppa Reddiar v. Arudai Ammal* (19) is based on the same principle. In that case, the execution petition dated 15th June 1898 and filed by the assignee-decree-holder was dismissed on the ground that the assignment of the decree was for the judgment-debtor's benefit, and consequently the petitioner was not entitled to execute the decree. But in a suit filed by the assignee-decree-holder, it

17. A I R 1926 Mad 698=95 I C 718.

18. (1898) 21 Mad 261=8 M L J 18.

19. (1905) 28 Mad 50 (F B).

16. (1898) 21 Mad 257.

was declared that the assignment of the decree was not for the benefit of the judgment-debtor. The subsequent execution petition filed by the assignee-decree-holder on 24th November 1902 was therefore treated as one to revive or continue the former execution petition which was wrongly dismissed by the Court.

In the case reported in *Chalavadi Kotiah v. P. Alimelammah* (20), the dismissal of the execution petition, because execution was ordered to be stayed by another Court, was held to be a wrong order. It was also found that the dismissal of the execution petition was without notice to the parties. That being so, the execution petition was treated as one pending in the eye of the law and therefore the latter execution petition was treated as one for the continuance of the pending proceedings. The principle relating to revival as stated in this case was approved in the decision in *Surayya v. Venkataratnam* (21). That decision does not in any way help the appellant's contention, that even if the former execution petition was rightly dismissed, the fact that there was an obstacle to execution by reason of another decision would itself entitle the applicant to have the later execution petition filed beyond three years treated as one in revival of the former application. It seems to me clear that there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed, in order to entitle the applicant to have the later application treated as one in continuation of or to revive the former one.

In *Raghunandau Pershad v. Bhugoo Lall* (22) it was held that the second application could not be deemed to be one for the revival of the first. The test to be applied for the principle of revival is that the interruption to the execution proceedings must have been due to an intermediate order which was afterwards set aside or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption

to the execution should not have been occasioned by any fault or laches of the applicant. This was held to be the test for applying the principle of revival. To the same effect is the decision in *Raghunath Sahay Singh v. Lalji Singh* (23). The view taken in the decision in *Narayan Govind v. Sono Sadashiv* (24) is virtually the same. As the original application of January 1888 was found to have been wrongly dismissed on the ground that a suit for the removal of the obstruction was pending, the later execution application was taken to be one to revive the previous one which had been suspended pending litigation. Much reliance was placed on behalf of the appellant on the Privy Council decision in *Qamar-ud-din Ahmed v. Jawahir Lal* (25). In that case, on the execution application filed in August 1888 execution was allowed to proceed by an order dated 18th December. On 29th November 1889, it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December it was ordered that the record be not sent to the Collector's Court as the decree-holder had not made the deposit on account of the transfer. Against the order of 18th December 1888 allowing execution to proceed, an appeal was preferred to the High Court which reversed that order and in a further appeal to the Privy Council the order allowing execution was restored on 12th December 1894.

Then an application for execution was made on 23rd November 1897, which was held to be one to revive a pending execution petition suspended by no act or default of the decree-holder. Their Lordships have clearly held that the order dated 23rd December 1889 was in no sense a final order. It was also held that the interruption to or suspension of execution was not due to any act or default of the decree-holder. In such circumstances the decree-holder was found to be entitled to come again to the Court and ask for the revival or continuance of the former petition.

None of the decisions referred to above can be utilized to justify

20. (1908) 31 Mad 71=18 M L J 46.

21. A I R 1924 Mad 210=79 I C 779=47 Mad 176.

22. (1890) 17 Cal 268.

23. (1896) 23 Cal 397.

24. (1900) 24 Bom 345=1 Bom L R 846.

25. (1905) 27 All 334=32 I A 102=8 Sar 810 (P C).

the appellant's contention pressed for acceptance in this particular case. The present case according to the facts established is not one in which the bar of limitation could be got over by invoking the principles governing revival. As was held in *Suranarayana v. Gurunada* (16), the former E. P. No. 57 of 1922 having been finally and properly dismissed, it could not be revived by the present E. P. No. 12 of 1928. This being a fresh application for execution, it must be deemed to be barred by limitation under Art. 182, Lim. Act, as it was filed more than three years from the date of the final order passed on the former application, namely, 16th January 1923. As regards the other points involved in these appeals, I am in entire agreement with the conclusions arrived at by my learned brother in his judgment. I accordingly agree that these appeals should be dismissed with costs.

Mockett, J.—I have had the advantage of reading the judgments of my learned brothers and I am in complete agreement with the views that they have expressed on both the points raised in this appeal. I would only add this: S. 15, Lim. Act, is explicit in its terms. In order to call its provisions in aid it must be shown that a suit or application for the execution of a decree has been stayed by an injunction or order. The authorities bearing on the question have been fully discussed at the Bar during the arguments in this appeal. After considering them I do not think that there is any real basis for the view that equitable considerations can be introduced into the very clear provisions of the section. The injunction or order must be express in its terms and I find no room for the suggestion that an application can be stayed by implication. The trend of the Privy Council decisions seems to be to this effect; and in the recent case of *Nagrindra Nath Dey v. Suresh Chandra Dey* (15) at 335 (of 63 *M. L. J.*), their Lordships explicitly lay down that "in construing questions of limitation equitable considerations are out of place." I am therefore constrained to join in expressing respectful dissent if any of the Indian cases cited lends colour to the doctrine that although an injunction or order does not in its terms effect a stay nevertheless it can be said to do so "equitably" or

"by implication." I accordingly agree with the order proposed.

P.R.S./K.S. *Appeals dismissed.*

*** A. I. R. 1933 Madras 424**

PANDALAI, J.

Navamani Nadar and another—Plaintiffs—Petitioners.

v.

Vedamanicka Nadar and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 1495 of 1927, Decided on 24th October 1932, from decree of Sub-Judge, Tuticorin.

* Limitation Act (1908), Arts. 111 and 116—Sale of portion of mortgaged property—Vendee undertaking to pay off mortgage-debt—Failure to do so and sale of whole of mortgaged property in execution of mortgage-decree—Suit by vendor for mortgage-debt and interest against first vendee—Art. 116 and not Art. 111 applies and limitation begins to run from date of sale of whole property.

A mortgagor sold a portion of the mortgaged property and as part of the consideration the vendee undertook under the sale-deed to pay off the mortgage-debt. He failed to do so and in execution of the mortgage-decree the whole property including that in the mortgagor's possession was sold. The mortgagor filed a suit against his defaulting vendee for the mortgage-debt which he had undertaken to pay off under the sale-deed and also interest thereon.

Held: the suit was governed not by Art. 111 but by Art. 116 and that limitation ran, not from the date of the sale but from the date when the vendor actually incurred loss, i. e., when the property in his possession was sold in this case.

[P 425 C 1; P 426 C 1]

Held further: that it was not possible for the vendor to sue the purchaser for the whole amount reserved but that he could only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he had either made the payment himself or had suffered some other damage by the purchaser's default: *Case law referred*. [P 427 C 1]

T. L. Venkatarama Ayyar—for Petitioners.

L. S. Veeraraghava Ayyar—for Opposite Parties.

Judgment.—The question in this petition is one of limitation. The suit was dismissed by the learned Subordinate Judge of Tuticorin on the ground that it was barred under Art. 111, Lim. Act, as one for unpaid purchase money personally from the purchaser brought more than three years after the date of the sale. The facts are as follows: The plaintiff's father sold to the defendant on 28th April 1919, for Rs. 500, a portion of the property which had been mortgaged by the vendor to a third party prior to the

sale. The consideration of Rs. 500 was made up as follows :

"Rupees 312 being the amount reserved with you (purchaser) in order that your (purchaser) may redeem the hypothecation executed by me ; Rs. 88 received in cash and Rs. 100 to be paid before the Registrar, total Rs. 500."

The purchaser paid Rs. 188 and took possession of the property. He did not pay the amount of the hypothecation to the third party who therefore brought a suit in 1924 impleading the mortgagor-vendor and purchaser-defendant, and having obtained a decree sold the whole of the mortgaged property in execution on 29th October 1926 including the property which was in the possession of the mortgagor as well as that which was sold to the defendant. This suit was brought on 4th December 1926 for Rs. 738-0-7 made up of Rs. 312 with interest thereon. The lower Court relied upon *Chunilal v. Bai Jethri* (1) in support of its view that Art. 111 governs the case and distinguished the decision in *Seshachala Naicker v. Varadachariar* (2) which pointed out that where a contract to sell is embodied in the deed of sale Art. 111 has no application to the present case. That article governs suits for unpaid purchase money payable to or to the order of the vendor under an agreement to sell and, as the third column shows, is independent of rights arising by the deed of sale because the terminus a quo is the date fixed for completing the sale or the date of acceptance of the title whichever is later.

The present suit is not brought on any agreement to sell ; nor, on the terms of the sale deed, which we may suppose contains the terms of the agreement to sell, is the amount sued for payable to or to the order of the vendor. *Chunilal v. Bai Jethri* (1) related to a parol sale of the year 1890 when the Transfer of Property Act had not been extended to the Bombay Presidency. The sale was for cash to be paid to the vendor, but instead of paying cash the purchaser signed an acknowledgment in the vendor's account book. It was held that the sale was completed and the title accepted more than three years before the suit. In the first place there was no registered sale deed in that case and in the second the whole of the consideration was payable in cash to the vendor. As pointed out

in *Seshachala Naicker v. Varadachariar* (2) where the contract to sell is embodied in a registered deed of sale, the unpaid vendor can rely upon Art. 116 which allows six years from the date of breach. But the difficulty in the present case is that even six years from the date of the sale deed will not save the suit. It is therefore argued that the date of breach in a case where the purchaser undertakes in the sale deed to pay part of the purchase money to the vendor's creditors, secured or unsecured, is not the date of the sale deed but some later date, which is put in some cases as a reasonable time after the sale deed; in others as the date of demand and refusal; and in still others as the time when the vendor is himself compelled to pay the creditors whom the purchaser has defaulted to satisfy. Another line of reasoning which favours the postponement of the date for bringing a suit by the vendor is that where the purchaser agrees in a registered deed of sale to satisfy a mortgage debt or other debt of the vendor with part of the purchase money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by action taken by the creditors on the default of payment by the purchaser and such an agreement to indemnify is broken only when the vendor is compelled to pay the creditors himself or his property is sold.

It is curious that no decision of our own Court directly dealing with this topic was cited. In *Raghunath Chariar v. Sadagopa* (3) it was held that in a transfer (of two decrees), the consideration for which was that the transferee should pay the transferor's creditors, the transferor could sue the transferee for the money, even though the transferor himself had not paid off the creditors, on the transferee's default to do so within a reasonable time, but that the suit can only be for the consideration for the sale which the vendee failed to pay but not for any further damages which the vendor had not actually sustained. This implies that where the vendor has actually sustained further damages, by having to pay the creditors himself or by having his property sold, he is entitled to recover the damage actually sustained. I do not consider this deci-

1. (1898) 22 Bom 846.

2. (1901) 25 Bom 55=11 M L J 318.

3. (1913) 36 Mad 348=12 I C 352.

sion as prohibiting a suit for the damages actually sustained after it has been sustained, if it is reasonable to infer that a contract of indemnity is to be implied in the circumstances.

There are however decisions of other Courts more to the point. In *Raghubar Bai v. Jaij Bai* (4), a case like the present except that the vendor had not in fact himself paid the secured creditor whom the purchaser had undertaken to pay, it was held that it was not necessary for the vendor to have paid the creditor before bringing the suit and that as no time was fixed in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed. This view however was dissented from in *Ram Ratanlal v. Abdul Wahib Khan* (5) where the vendor had been compelled to pay a mortgage debt himself and it was held that limitation in respect of the vendor's suit against the purchaser will not begin to run until he has been compelled to pay. *Makund Lal v. Bhola Bai*, A. I. R. 1931 All. 419 was a case where the vendor's unsecured creditors had to be paid off by the purchaser and it was held that the vendor could recover the unpaid money within six years from the date of the sale deed. *Ammani Bai v. Anant Narayan* (6) was a case in which the vendor's creditors had recovered the money from the vendor on the purchaser's default to pay. The sale was in 1912; the vendor was compelled to pay the same debt in 1921. The vendor's suit against the purchaser was brought in 1924, i. e., within three years of the actual payment but 12 years after the sale deed. It was held that the article applicable was 116 and that time began to run when the plaintiff actually suffered the loss, which was the date when the purchaser's agreement became impossible of performance by reason of the payment by the vendor himself. *Ram Rachhya Singh v. Raghunath Prasad* (7) is a case which adopts the same reasoning. It was held that the terminus a quo was not the date of the execution of the sale deed but the date on which the contract was deemed to have been

broken, namely, the date when either there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied and also that the measure of compensation to be awarded is the amount of the debt with interest.

It occurs to me that it is necessary to distinguish claims of two kinds which may arise in this connexion. A vendor may reserve part of the purchase money with the purchaser entirely for payment of the vendor's debts in the payment of which the purchaser has himself no primary interest. These may be unsecured creditors of the vendor for which the vendor alone is liable or secured creditors of the vendor where the security is other than the property sold. On the other hand such a reservation may be for payment of debts in which the purchaser as owner of the property purchased becomes solely primarily interested. It may be to pay off a previous mortgage covering only the property sold. In this case except by way of the vendor's personal liability for any deficiency that may arise on the mortgage, the purchaser subject to the mortgage becomes the only person interested in the payment. If he does not pay, the previous mortgage debt will be realized from his own property and no one else's. It is difficult to see how in such a case, except where the vendor is proceeded against on his personal liability, he can bring a suit if the purchaser fails to pay off the mortgage on the property which he has bought. But the reserved portion of the price may be, as it is in this case, to pay off a mortgage which covers not only the property bought but also some other property which the vendor is entitled to be freed from the mortgage by the payment undertaken by the purchaser.

In such a case the vendor is entitled to see that by the purchaser's default the mortgaged property left with him is not endangered. In brief, the suits in which a vendor is entitled to bring for the reserved amount against the purchaser before himself paying the amount or suffering some other damage are cases in which he alone is entitled to benefit by the payment. But where, as in this case, the benefit of the payment of the reserved amount accrues partly to the

4. (1912) 34 All 429=14 I C 244.

5. A I R 1927 All 435=101 I C 691=49 All 603.

6. A I R 1931 Bom 365=133 I C 267.

7. A I R 1930 Pat 46=122 I C 244=8 Pat 860.

purchaser himself and only partly to the vendor, that it is not possible for the vendor to sue the purchaser for the whole amount reserved, in such cases he can only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he has either made the payment himself or has suffered some other damage by the purchaser's default. The basis of the suit in such a case is the contract of indemnity which the agreement in the sale deed implies and can be held to be broken only when the plaintiff has actually suffered loss. I am therefore of opinion that the limitation in this case began to run when the plaintiff's property was sold on 29th October 1926 and therefore the suit was not barred.

Another point depending upon this and following from it is the amount which the plaintiff is entitled to recover. As the plaintiff is not entitled to recover the whole of Rs. 312 because a portion of it was also to release the property sold to the defendant from the mortgage he can recover only the loss actually sustained by him. What it is has yet to be ascertained. The decree of the lower Court is therefore set aside and the suit remanded for retrial and disposal according to law. The petitioners must have their costs in this Court from the counter-petitioner.

P.R.S./K.S.

Suit remanded.

A. I. R. 1933 Madras 427

BEASLEY, C. J. AND BARDSWELL, J.

Chelikani Venkatarayanim Garu—Appellants.

v.

Maharaja of Pittapuram — Respondent.

Letters Patent Appeals Nos. 81 to 84 of 1931, Decided on 8th December 1932, against judgment of Madhavan Nair, J., D/- 3rd February 1931.

Madras Estates Land Act (1908), S. 26 (3) — Rent payable under grant is not binding after lifetime of landlord on person entitled for rent unless such rent is lawful.

The tenants of the suit lands prior to the date of the grant to the appellants in 1905 were paying a higher rate of rent under an agreement with the then landlords than what the appellants were paying to the respondent's predecessor. In a suit by the respondent for higher rent.

Held: that the former tenants, though they were not having occupancy rights, were still in possession of raiyati land paying rent and as such

were raiyats within the meaning of S. 26, that as they were paying rent under a contract enforceable at law, the rates were lawful and that appellants were liable to pay according to that rate: 45 I. C. 406, Ref. [P 428 C 1]

P. Satyanarayana Rao—for Appellants.

Advocate-General—for Respondent.

Beasley, C. J.—The question which arises in these Letters Patent appeals is one under S. 26 (3), Madras Estates Land Act, which reads as follows:

“Except as provided by sub-S. (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the raiyat before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood.”

The facts of the case have been very fully set out in the order of Madhavan Nair, J., in Second Appeals Nos. 140 to 144 of 1928, calling for a finding from the District Judge upon the question:

“Whether the rates now paid are lower than the lawful rates paid by these raiyats of the suit holdings and, if lower, what were the rates that were paid before?”

The learned District Judge's finding is that

“the rates now paid are in fact lower than the rates agreed to by these raiyats on the suit holdings.”

The position therefore is that the tenants of the suit lands prior to the date of the grant to the appellants in 1905 by the respondent's predecessor were, under an agreement with the then landholder, paying a higher rate of rent than that paid by the appellants. The respondent claims that under S. 26 (3) the lower rate of rent paid by the appellants under the grant in 1905 is not binding upon him. Whether his claim is well founded must depend upon the construction of that section. The appellants claim that the rate should be that which was being paid by the tenants of neighbouring lands and not that actually payable by the former tenants of this land because the latter tenants were tenants at will having no occupancy rights and were therefore not raiyats within the terms of S. 26: and it is further contended that the words “the raiyat” mean the raiyat under the Estates Land Act to whom occupancy rights had been granted under the Act, namely, the appellant. These two contentions are really bound up in one another.

As regards the latter contention, the words of the subsection clearly refer to the raiyat in possession of the land before the date of the grant who may be an entirely different person to the person to whom the grant was made. But it is argued that such prior tenants were not raiyats at all as the only raiyats in the contemplation of the Act are raiyats to whom occupancy rights have been granted under the Act. If this contention is right, then it means that S. 26 (3) does not provide for the case of a high rate of rent paid by a tenant prior to 1908. This contention, in my view, cannot succeed. S. 6, Madras Estates Land Act, reads as follows:

"Subject to the provisions of this Act every raiyat now in possession or who shall hereafter be admitted by a landholder to possession of raiyati land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding; but nothing contained in this subsection shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act."

This section gives the raiyats then in possession of raiyati land permanent occupancy rights. The former tenants of the suit lands, even though tenants only at will and not having occupancy rights, were in possession of raiyati land paying rent for that land and they were clearly raiyats: and it has not been shown that the rates of rent paid were not lawful. They were paid under a contract enforceable at law and hence were lawful rates. In respect of the suit lands there was no faisal rate fixed for them and there were no faisal rates in competition with contract rates as was the case in *Karuppa Kavundan v. Narayana Chettiar* (1) which is referred to in support of the appellant's case. There was no faisal rate at all here, but only a contract rate. Madhavan, Nair, J., says in his judgment:

"In my opinion the agreement of the predecessors of the appellants to pay the rents agreed to by them not being shown to be bad in law, or prohibited by it, those rates which they agreed to pay must be considered to be lawful rates."

With that opinion I entirely agree. For these reasons these Letters Patent appeals must be dismissed with costs in Letters Patent appeal No. 81 only.

Bardswell, J.—I agree with my Lord.

P.R.S./K.S.

Appeal dismissed.

1. (1918) 45 I C 406.

A. I. R. 1933 Madras 428

BURN, J.

(*Panniyamkandi*) *Kelu Kutti*—Plaintiff—Appellant.

v.

Calicut Municipal Council—Defendant—Respondent.

Second Appeal No. 322 of 1931, Decided on 10th August 1932, against decree of Sub-Judge, Calicut, in A. S. No. 207 of 1930.

Madras District Municipalities Act (1920), S. 142—"Public drains"—Word is not confined to drains maintained by the Municipal Council.

The words "public drains" are not confined to those drains provided and maintained by Municipal Council. They have to be understood in their ordinary sense; and they include a water-course which has been long in existence for draining away storm water. Hence where a person encroaches upon the limit of such water-course, without the permission of the Municipal Council, the chairman is within his rights in removing the obstruction. [P 428 C 2]

K. P. Ramakrishna Ayyar—for Appellant.

K. Kuttikrishna Menon—for Respondent.

Judgment.—The facts have been clearly stated in the judgments of the lower Courts. There are findings by both Courts that the plaintiff-appellant has encroached upon the limits of a water-course. The only question for discussion here is whether the water-course is a public drain. If it is, the plaintiff has no right to obstruct it without the permission of the Municipal Council, and the chairman was within his rights in removing the obstruction: S. 142, Madras District Municipalities Act. There is no definition in the Act of a "public drain." It is contended for the appellant that the only drains which can be called "public drains" are those provided and maintained by the Municipal Council under S. 137. This is fallacious. Every drain provided and maintained by the Municipal Council must of course be a public drain, but it does not follow that a drain cannot be a public drain merely because it has not been provided, and is not maintained, by the Municipal Council. There were public drains in Calicut long before the Municipal Council was created. Since there is no definition of a public drain in the Act, the words must be understood in their ordinary sense. In this case there is evidence upon which both the lower Courts have found that the site in dis-

pute is a water-course along which in times of rain storm water is drained from the lands to the east of it and from a tank, belonging to a temple, to the south of it. As the learned Subordinate Judge says (para. 4 of his judgment) :

"This land or water-course has been in existence for a very long time, serving as a storm water drain."

Nothing more is needed to constitute it a "public drain" in the ordinary sense of the words. The learned advocate for the appellant points out that a "water-course" connected with water supply vests in the Municipal Council under S. 125 (1) of the Act; and argues that since this water-course has nothing to do with water-supply, it does not vest in the Municipal Council and the Municipal Council has no right to meddle with it. Here again there is a fallacy. It is not every water-course that is connected with water-supply; many water-courses have no other function than to serve as drains for surplus water. This is one of such, and it is quite legitimately called a "public drain." This second appeal must therefore be dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

A. I. R 1933 Madras 429

CURGENVEN AND SUNDARAM CHETTY, JJ.

Pedda Venkatapathi — Plaintiff—Appellant.

v.

Ganagunta Balappa and *others*—Defendants—Respondents.

Appeal No. 40 of 1927, Decided on 18th January 1933, against decree of Dist. Judge, Anantapur. in O. S. No. 15 of 1924.

(a) **Tort—Malicious prosecution—Suit for damages—Elements to be satisfied pointed out.**

In a suit for damages for malicious prosecution, besides the fact of the prosecution and of its termination in favour of the plaintiff it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention : *A I R 1926 P C 46, Foll.*

(b) **Evidence Act (1872), S. 43 — Suit for damages for malicious prosecution — Value of judgment in criminal Court—Civil Court should undertake independent inquiry and not take into consideration grounds of acquittal in criminal Court.**

Under S. 43, Evidence Act, the judgment of the criminal Court can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The civil Court can-

not take into consideration the grounds upon which that acquittal was based; it lies upon the civil Court itself to undertake an entirely independent inquiry before satisfying itself of the absence of reasonable and probable cause : *A I R 1929 All 265, Diss. from; 9 Bom L R 1134 and A I R 1928 All 337, Rel on.* [P 430 C 1, 2]

K. S. Jayarama Iyer and *K. Srinivasa Rao*—for Appellant.

T. R. Arunachala Iyer — for Respondents.

Curgenvven, J. — Plaintiff 1 appeals against the dismissal of his suit filed for damages for malicious prosecution against defendant 1, now respondent, and two others. The case arose out of a disturbance which took place on 12th September 1922 at Malyavantham village, Dharmavaram Taluk, Anantapur District. Consequent upon that disturbance defendant 1 filed a complaint. Ex. 5, before the police on 13th September. The purport of that complaint was that the village Madigas were holding a festival on that evening and that in consequence of certain conduct of the complainant's which had caused annoyance to them they came in a body to his house and made trouble there. Plaintiff 1 is himself the son-in-law of defendant 1 and it was alleged, identified himself with the action of the Madigas and while the disturbance was proceeding fired a shot with a revolver which injured one Venkataramappa, examined in the present case as D. W. 3. Accordingly plaintiff 1 was made accused 1 and other persons to the number of 17 were also included. The police took up the case and presented a charge sheet, alleging that acts of rioting and an attempt to murder were committed in the course of the occurrence, and the case was tried by the Deputy Magistrate of Gooty. That officer discharged a number of the accused but framed a charge against plaintiff 1 and one other of the accused. By way of defence the former then set up an alibi which he sought to establish by examining a number of witnesses. The version which these witnesses supported was that on the day of the occurrence plaintiff 1 left the village at about the middle of the day to go to Dharmavaram, visited the taluk office, where he did some business in his capacity as Village Munsif, and then went on to the railway station where he met his brother who came from Anantapur by the mail train and himself proceeded

to Anantapur by the opposite mail train, leaving Dharmavaram at about 2-30 a.m. He had some legal business in Anantapur and accordingly went as early as 5 a. m., to the house of his pleader Mr. Adimurthi Rao. The learned Deputy Magistrate accepted this evidence and acquitted the plaintiff, whereupon this suit for damages was filed.

There has been some discussion in this case as to what lies on the plaintiff to prove and what use can be made of the judgment of the criminal Court. The Privy Council have in *Balbhaddar Singh v. Badri Sah* (1) now made it clear what are the several elements which in a case of this description have to be satisfied. Besides the fact of the prosecution and of its termination in favour of the plaintiff it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention. This pronouncement has been somewhat curiously construed in the judgment of a single Judge of the Allahabad High Court which has been drawn to our attention: *Mohammad Daud Khan v. Jia Lal* (2). The learned Judge would appear to think that some presumption arises from the mere fact that the plaintiff has been acquitted by the criminal Court in cases where there is no scope for surmise and where evidence was given by the defendant of what he actually saw. I think that this case goes a good deal further than the usually accepted position, which is not affected by the Privy Council judgment, that it lies upon the civil Court itself to undertake an entirely independent inquiry before satisfying itself of the absence of reasonable and probable cause. Indeed I am unable to agree that our Evidence Act justifies an examination of the judgment of the criminal Court in order to ascertain the grounds upon which the acquittal proceeded and the views taken by the trying Magistrate of the evidence. Under S. 43, Evidence Act, it appears to me that that judgment can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. I know of no provision of the Act which will justify the civil Court in taking into consideration the

grounds upon which that acquittal was based, and upon this point I am in agreement with *Gulabchand Gopaldas v. Chunilal Jagjirandas* (3) and *Shubrati v. Shamsuddin* (4) in the view that there is no such provision.

The clear and straight issue in the present case, which must be decided before we can find absence of reasonable and probable cause, is whether the respondent was deliberately making a complaint which was in substance false when he alleged that the appellant took part in the disturbance and fired the shot which injured D. W. 3; and the appellant must establish the falsity of this complaint by disproving it before he can be entitled to damages. (His Lordship then discussed the evidence and concluded). On this general ground I am satisfied that it would be quite unsafe to base a decree for damages for malicious prosecution upon the circumstances of a case of this nature and I would accordingly confirm the decree and dismiss the appeal with costs.

Sundaram Chetty, J. — I agree with the judgment of my learned brother and I have nothing more to add.

P.R.S./K.S. *Appeal dismissed.*

3. (1907) 9 Bom L R 1134.

4. A I R 1928 All 837 = 110 I C 413 = 50 All 713.

A. I. R. 1933 Madras 430

VENKATASUBBA RAO AND REILLY, JJ.
Secretary of State—Petitioner.

v.

A. R. Lakhanna—Opposite Party.

Civil Revn. Petn. 482 of 1932, Decided on 7th September 1932, from order of Sub-Judge, Ootacamund, D/- 24th March 1931.

(a) **Court-fees — Ascertainment — Regard must be had to allegation in plaint.**

For the purpose of ascertaining the court-fee payable one must have regard to the allegations in the plaint and it is not the function of the Court to ask itself, whether those allegations are true or probable. [P 431 C 1]

(b) **Court-fees Act (1870), Ss. 7 (iv) (a) and 7 (iv) (c)—Decree against plaintiff on mortgage executed by plaintiff's father—Prayer for declaration that decree is not binding on plaintiff's share of property — S. 7 (iv) (a) applies—Substance of relief claimed and not mere form of 'plaint' should be looked into.**

A decree was passed against plaintiff in a suit on a mortgage executed by plaintiff's father. Plaintiff alleged to this decree obtained against him by the defendant and prayed for a declara-

1. A I R 1926 P C 46=95 I C 329=29 O C 163 =1 Luck 215 (P C).

2. A I R 1929 All 265=116 I C 852.

tion that the decree was not binding on his share of the property.

Held: that the substance of the relief claimed and not the mere form of plaint should be looked into and that though the relief has been so worded as to bring the case within S. 7 (iv) (c), S. 7 (iv) (a) was applicable to the case: *A I R 1932 Mad 605* and *A I R 1929 Mad 668, Rel on.* [P 431 C 2]

(c) Court-fees Act (1870), Sch. 2, Art. 17-A (i)—Prayer for declaration that mortgage is not binding on plaintiff comes under Art. 17-A (i).

A prayer for declaration that certain mortgage is not binding on plaintiff is one for a mere declaration and is governed by Art. 17-A (i), Sch. 2. [P 431 C 2]

Govt. Pleader—for Petitioner.

A. R. Lakshmana for *Subramania Ayyar*—for Opposite Party.

Order. — The learned Government Pleader has raised three points. The first question is the only one dealt with by the lower Court in its judgments and we are satisfied that the decision is correct. For the purpose of ascertaining the court-fee payable one must have regard to the allegations in the plaint and it is not the function of the Court to ask itself whether those allegations are true or probable. The learned Judge points out that the plaintiff has asserted that there has been a division in status and the court-fee has been paid on the basis of that assertion under Art. 17-B, Sch. 2, Court-fees Act. We agree with the view that the proper court-fee has been paid. Point No. 2. In the plaint it is alleged that defendant 6 obtained a decree inter alia against the plaintiff on the basis of a mortgage executed by the plaintiff's father and the plaintiff prays for a declaration that that decree is not binding on his share of the property. It has been held in *Venkatasiva Rao v. Satyanarayanamurty* (1) and *Doraisami v. Thangavelu* (2) that the section that applies in such a case is S. 7 (iv-a) which runs as thus:

"In a suit for cancellation of a decree for money or other properties having a money value or other document securing money or other property having such value according to the value of the subject-matter of the suit and such value shall be deemed to be—if the whole decree or other document is sought to be cancelled—the amount or the value of the property for which the decree was passed or the other document executed, if a part of the decree or other document is sought to be cancelled such part of the amount or value of the property."

The question arose in those cases whe-

(1) *A I R 1932 Mad 605=139 I C 317.*

(2) *A I R 1929 Mad 668=119 I C 38.*

ther the section that is applicable is S. 7 (iv) (c) or S. 7 (iv-a) and it was pointed out that what the Court must look to, is the substance of the relief claimed and not the mere form of the plaint. The plaintiff prays in this case that it may be declared that the decree to which we have referred is not binding on his share. That is to say it is in form a declaratory relief that he prays for, but in truth the plaintiff's request amounts to a prayer that the part of the decree which affects him may be cancelled. Though the relief has been so worded as to bring the case within S. 7 (iv-c) which runs thus:

"to obtain a declaratory decree or order where consequential relief is prayed,"

we must hold on the authority of the cases to which we have adverted, that the section applicable is S. 7 (iv-a). Point No. 3. The plaintiff complains also that a certain mortgage executed by his father's agent in favour of defendant 7 is not binding on him and prays that he may be granted a partition free of that mortgage. The prayer is in effect for a declaration that the mortgage is not binding on the plaintiff's share. We agree with the learned Government Pleader that Art. 17-A (1), Sch. 2 (i. e. the one relating to the obtaining of a declaratory decree where no consequential relief is prayed) applies. The lower Court will take suitable action in regard to the collection of the court-fee in accordance with this judgment.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 431

SUNDARAM CHETTY, J.

T. R. Manikkam Pillai and another—
Plaintiffs—Petitioners.

v.

T. S. Murugesam Pillai and others—
Defendants—Opposite Parties.

Civil Revn. Petn. No. 14 of 1932, Decided on 24th February 1933, from order of Sub-Judge, Kumbakonam, D/- 4th November 1931.

(a) Court-fees Act (1870), Sch. 2, Art. 17-B.—Severance in status—Subsequent suit for division by metes and bounds and for possession of plaintiff's share—Suit falls under Art. 17-B.

A suit for division by metes and bounds and for possession of member's share as against others among all of whom severance in status has already been effected is governed by Art. 17-B, Sch. 2: *A I R 1933 Mad 430, Ref.* [P 432 C 1].

(b) Court-fees—Determination.

The question of court-fee payable has to depend on the allegations in the plaint.

[P 432 C 1]

(c) Court-fees Act (1870), S. 7 (4) (f)—Additional prayer for rendition of accounts in suit for division of property by metes and bounds.

An additional prayer for rendition of accounts in a suit for division of property by metes and bounds comes under S. 7 (4) (f).

[P 432 C 1]

T. M. Krishnaswamy Iyer and *M. A. Nagaswami Iyer*—for Petitioners.

B. Sitarama Rao—for Opposite Parties.

Judgment.—The question of court-fee payable has to depend on the allegations in the plaint, and this is not the stage at which the Court should say whether these allegations are true or not. In the plaint, there is no prayer for a declaration that the partition deed referred to therein should be set aside, nor is any declaration asked for in respect of it. The trend of the plaint seems to be, that though severance in status is effected, there was no actual division by metes and bounds, but on the other hand, the plaintiffs and defendants are in joint possession (vide para. 22 of the plaint). So far as the partition of the immovables is concerned in view of the prior division in status, the suit is for division and separate possession of the plaintiff's share as against other tenants in common. The claim will fall under Art. 17-B, Sch. 2, Court-fees Act: vide, *Secy. of State v. Lakhanna* (1). The fixed fee of Rs. 100 has been paid.

There is an additional prayer for rendition of accounts. This portion of the claim will bring the case under Cl. (f), sub-S. 4, S. 7, Court-fees Act. The plaintiffs should value this relief as a suit for accounts, and pay additional court-fees within a time to be fixed by the lower Court. The order sought to be revised is modified accordingly. The parties will bear their own costs.

P.R.S./K.S.

Order modified.

1. A I R 1933 Mad 430.

A. I. R. 1933 Madras 432

SUNDARAM CHETTY, J.

S. G. Somasundaram Chettiar and *others*—Plaintiffs—Appellants.

v.

(Mahibala) Muthirulappa Pillai and *others*—Defendants—Respondents.

Second Appeal No. 1894 of 1927, Decided on 13th October 1932.

(a) Evidence Act (1872), S. 68, Proviso (as amended by Act 31 of 1926)—Admission by executant as to execution of mortgage — Attesting witnesses need not be called.

The proviso to S. 68 added by Act 31 of 1926, Evidence Act, is retrospective in its operation. Hence when the executant of a mortgage admits execution, it is not necessary to call the attesting witness to prove the bond.

[P 434 C 1]

(b) Registration Act (1908), S. 17 (b), Excep. 2—Letter by mortgagee relinquishing mortgage-amount requires registration.

A letter written by the mortgagee relinquishing the mortgage-amount is not a receipt and does not fall under S. 17 (b), Excep. 2. Hence it is inadmissible in evidence to prove the discharge of the mortgage-debt without registration: 35 All 202 and 44 I C 132, *Rel on*; A I R 1925 Mad 348, *Ref.*

[P 433 C 2]

S. R. Muthuswamy Iyer—for Appellants.

P. Satyanarayana Raju—for Respondents.

Judgment.—The second appeal arises out of a suit brought by the plaintiff (the appellant) for the recovery of a sum of Rs. 430 alleged to be due on the plaintiff-mentioned mortgage deed executed by defendant 1 on 23rd October 1912 in favour of one Sevugan Chetty. The plaintiff is an assignee of the mortgage bond under a deed of assignment executed by Sevugan Chetty's son, Ramathan Chetty, on 15th March 1924. The original mortgage deed is styled as a usufructuary mortgage containing a covenant to pay. The plea of defendant 1 is that Sevugan Chetty remitted the whole of this amount by passing a letter on 26th February 1918, whereby the mortgage debt became extinguished. That letter has been filed as Ex. 1. On the basis of this letter, both the Courts below have dismissed the plaintiff's suit. In this second appeal, the main question argued is whether the document Ex. 1 is admissible in evidence without registration. The terms of that letter are as follows:

"I am very glad to see the notice given to me by vakil Krishnaswamy Ayyar of Sivaganga on your behalf. Let my money go any way. It is enough if you are happy. This has been written to let you know that I do not require the sum of Rs. 430, which I paid on your behalf to Andiappa Chetty."

It is beyond doubt that this sum of Rs. 430 is the amount due under the plaintiff-mentioned mortgage bond to Sevugan Chetty. Ex. 1 is the letter written by Sevugan Chetty (the mortgagee), whereby he expressly relinquishes the amount of Rs. 430, the principal sum due thereunder. The question is whe-

ther this document comes within the purview of S. 17, sub-S. (1), Cl. (b), Registration Act. That clause makes registration compulsory in the case of any non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. On a perusal of Ex. 1, it is clear that it does not in terms purport to extinguish the mortgagee's interest in the mortgaged property. It is argued that it does operate to extinguish such interest. The distinction between the words "purport" and "operate" is clearly explained in the judgment of Srinivasa Ayyangar, J., in the case reported in *Gopalaswami Ayyar v. K. Rangappa* (1). Dealing with Cl. (b) of the aforesaid section and Excep. (2) to that clause which deals with a receipt for payment of money due under a mortgage, when the receipt does not purport to extinguish the mortgage, the learned Judge observes that the omission of the words "or operate" in Excep. (2) has some significance. He states that the obvious conclusion to be drawn from this deliberate difference in the wording is, that receipts granted for money paid may extinguish the debt and may therefore operate to extinguish the security, but if they do not purport in terms to extinguish the security, they need not be registered. This is so with reference to the wording of Excep. (2), Cl. (b), S. 17. But the wording of Cl. (b) itself is wider and the significance of the wider language used in that clause is also stated by the learned Judge in the following passage:

"If the document should be merely an agreement to reduce the amount payable under the mortgage, it is conceivable that it might fall within the terms of Cl. (b), S. 17, because it may, though not purporting to do so, operate to limit or extinguish rights in immovable property."

These observations are very pertinent to the present case. I adopt the opinion of the learned Judge and hold that Ex. 1, though it does not purport to extinguish the mortgage debt, does operate to extinguish the mortgage security. If the mortgagee states in writing that he foregoes the entire amount due in respect of the mortgage deed, the legal effect of such relinquishment is the extinguishment of his interest in the mortgage

security. In other words such relinquishment operates to extinguish his interest in immovable property of a value of more than Rs. 100. The decision in *Gobardhan Sahi v. Jadunath Rai* (2), seems to me to be on all fours with the present case. In that case, the agreement was by the mortgagee to relinquish a portion of the principal and all interest, past and future, due under the mortgage bond. That document does not in terms purport to extinguish the mortgagee's interest in the mortgage security. It has been held that that document was clearly an agreement to forgo in part the mortgagee's rights as against the mortgaged property in consideration of services rendered. I understand this observation to mean that the agreement operated to extinguish the mortgagee's interest in the security, within the meaning of Cl. (b), S. 17, Registration Act. This decision has been referred to with approval in a decision of a Division Bench of this High Court reported in *Lakshmana Setti v. Chenchuramayya* (3). In that case the question was discussed at some length and it was held that an agreement in writing whereby the mortgagee relinquishes a sum of more than Rs. 100 out of the mortgage money is compulsorily registrable and is inadmissible in evidence if not registered. It is true that in that agreement there are the words "we shall return the documents," but the whole reasoning of the learned Judges does not seem to turn upon the introduction of those words in the agreement. The trend of their decision seems to be, that the mere fact of the relinquishment of a sum of more than Rs. 100 out of the mortgage money operates to extinguish the mortgagee's interest in the mortgage security to that extent, and therefore registration is necessary. As the document in question in the present suit is in no sense a receipt, Excep. (2), Cl. (b), S. 17, does not apply and requires no consideration. In view of these authorities, I am of opinion that Ex. 1 is inadmissible in evidence for want of registration. The view of the lower appellate Court is clearly erroneous, for the document, Ex. 1, can in no sense be deemed to be a receipt. I therefore hold that Ex. 1 must be ignored for the purpose of deciding the suit.

1. A I R 1925 Mad 348=85 I C 433.

2. (1913) 35 All 202=19 I C 449.

3. (1918) 44 I C 132.

The objection taken on the score that the suit mortgage bond has not been proved by an attesting witness is futile in view of the proviso to S. 68, Evidence Act, added by way of amendment by Act 31 of 1926. There is no doubt that this proviso is retrospective in its operation: vide *Thayammal v. Muthukumaraswami Chettiar* (4). In the present case the executant of the mortgage bond, namely, defendant 1, has admitted its execution. Defendants 2 and 3 have remained ex parte. There was therefore no necessity to call an attesting witness in proof of the execution of this mortgage bond. In the result the appeal is allowed and the decree of the lower appellate Court is set aside. A mortgage decree is passed in favour of appellants 2 and 3 for a sum of Rs. 430 and costs in all the Courts recoverable from the plaint-mentioned mortgaged properties by sale thereof, if the amount be not paid within three months from this date. The defendants will bear their own costs.

P.R.S./R.K. *Appeal allowed.*

4. A I R 1929 Mad. 881=121 I C 858.

A. I. R. 1933 Madras 434 (1)

BARDSWELL, J.

Muthusami Pillai— Accused — Petitioner.

v.

Government Tahsildar of Ramnad — Complainant—Opposite Party.

Criminal Revn. No. 256 of 1932 and Criminal Revn. Petn. No. 236 of 1932, Decided on 22nd August 1932, from judgment of Sub-dival. Magistrate, Ramnad, D/- 7th December 1931.

(a) Criminal P. C. (1898), Ss. 233 and 235 — Trial of offences under Ss. 170 and 175, I. P. C., together is illegal — Penal Code (1860), Ss. 170 and 175.

A trial of two offences under Ss. 170 and 175 together is illegal and contrary to Ss. 233 and 235, Criminal P. C. [P 434 C 2]

(b) Criminal P. C. (18 8), S. 439—Offence committed found to be technical one — No further inquiry was ordered.

Where it was found that a technical offence was committed by the petitioner under S. 170, I. P. C., and it was also found that the petitioner acted rather through vanity than with any criminal intention the High Court after setting aside the conviction on the ground of misjoinder of offences, did not think it necessary to order further inquiry. [P 434 C 2]

K. V. Srinivasa Ayyar — for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner was convicted in the trial Court of offences punishable under Ss. 170 and 175, I. P. C. On appeal the conviction under S. 175 was set aside on the ground that the complaint as to it was not made as prescribed in S. 195, Criminal P. C., but the conviction under S. 170 was upheld though with a large reduction of sentence.

The point is now taken on revision that the trial of the two offences together was illegal as being contrary to the provisions of Ss. 233 and 235, Criminal P. C. I think that the point is taken correctly. I cannot see how the petitioner's failure to hand over records on his ceasing to hold office on 22nd June 1930 can be regarded as part of the same transaction as his forwarding to the District Munsif, on 22nd July 1930 and 20th November 1930, copy applications in forwarding which he improperly described himself as Headman and Village Munsif, even if he forwarded with the copy applications the records to which they related. He still went on retaining other records till some time later, when they were taken from him. He did not retain the records on the pretext that he was still the Village Munsif. The petition is allowed and the conviction is set aside. No further inquiry is necessary. Even if the petitioner committed an offence under S. 170, I. P. C., it was merely a technical one as the appellate Magistrate has found the petitioner acted rather through vanity than with any criminal intention.

P.R.S./K.S. *Petition allowed.*

A. I. R. 1933 Madras 434 (2)

BURN, J.

M. Savudi Karuppanan Ambalam—Appellant.

v.

Guruswami Pillai and another — Respondents.

Criminal Revn. Nos. 717 and 718 of 1932 and Criminal Revn. Petns. Nos. 670 and 671 of 1932, Decided on 18th January 1933, from judgment of Dist. Magistrate, Madura, in Civil Appeal Nos. 3 and 4 of 1932.

Criminal P. C. (1898), S. 517 — Accused from whom bulls were seized by police acquitted of charge of theft — Bulls should be returned to them — Criminal Court should not decide question of ownership.

When the property is seized from a person who is afterwards acquitted of stealing it the pro-

perty should ordinarily be returned to that person. [P 435 C 1, 2]

When it was found that accused purchased the bulls honestly, held that the question whether they or other people were entitled to them should not be decided by the criminal Court but should be left to the civil Court: *A I R 1931 Mad 17* and *A I R 1927 Cal 532, Rel on.* [P 435 C 1]

F. S. Vaz—for Appellant.

K. V. Sesha Aiyangar — for Respondents.

Order.—These cases are precisely similar. The Sub-Magistrate found that the petitioner (the accused in both cases) was not guilty of the offence of theft or of dishonestly receiving stolen property (S. 379 or S. 411, I. P. C.). He found in fact that the petitioner had purchased both the bulls for fair prices and without any reason to suppose them to be stolen property. Nevertheless he ordered the bulls to be returned to Meenammal and Pandia Muppan whom, after inquiring he considered to be the owners. He was satisfied, he says, that the bull had been stolen though he does not say whence, by whom or when.

The general rule in such cases is that where a person accused of theft is acquitted and claims as his own the property seized from him by the police and alleged to have been stolen it should be restored to him in the absence of special reasons to the contrary: vide *Vaiyapuri Chetty v. Sinnah Chetty* (1). In the present case the learned Sub-Magistrate has not given any reason for departing from this principle. He appears to have thought that the decision of the question of ownership was sufficient to justify an order to return the property to the owner. This is extremely unsound as has been explained by Rankin, C. J., in *Sattar Ali v. Afzal Mahomed* (2). The criminal Courts ought not to be used to short-circuit the civil Courts in this way. When it appears that the petitioner bought the animals honestly, the question whether he or the former owners is, or are, now entitled to them should be left to be decided by the civil Court. It is not a question into which the criminal Court should enter.

Since it is clear that the learned Sub-Magistrate has overlooked the fundamental principle that when property is seized from a person who is afterwards

1. *A I R 1931 Mad 17=1931 Cr C 30 = 129 I C 458=32 Cr L J 355.*

2. *A I R 1927 Cal 532=102 I C 482=28 Cr L J 546=54 Cal 283.*

acquitted of stealing it, the property should ordinarily be returned to that person; he cannot be said to have exercised his discretion in a judicial manner. I therefore set aside his order and direct that the bulls be returned to the petitioner from whom the police took them.
P.R.S./K.S. *Order set aside.*

A. I. R. 1933 Madras 435

BEASLEY, C. J. AND BARDSWELL, J.
Jujishti Panda — Plaintiff — Appellant.

v.

Lakshmana Dola Behara and others—
Defendants—Respondents.

Letters Patent Appeal No. 42 of 1928,
Decided on 19th January 1933, from
judgment of Wallace, J., D/- 19th July
1928.

Civil P. C. (1908), O. 1, R. 10 (2)—Parties
wrongly joined as defendants—Plaintiff
giving up claim as against them or Courts
finding that they have been wrongly joined
—Procedure to be adopted and effect there-
of pointed out.

Where parties have been wrongly joined
and the suit against them is given up by the
plaintiff or upon that ground he exonerates them
or there is a finding come to that they have
been wrongly joined, then the correct procedure
is to strike out their names as having been im-
properly impleaded. On the exoneration or the
striking out of the names of persons on the
ground of misjoinder, they cease to be parties
to the suit. And these defendants must be
treated as persons who had been dismissed from
the suit and not as persons against whom the
suit had been dismissed: *A I R 1930 Mad 817*
(*F B*) and *A I R 1926 Mad 484, Ref.* [P 436 C 1]

G. Lakshmananna—for Appellant.

B. Jagannadha Doss — for Respondents.

Beasley, C. J.—This is a Letters
Patent appeal from a judgment of
Wallace, J. in second appeal. At that
stage for the first time it was contended
that the suit was barred by S. 47, Civil
P. C. It was objected that that plea
ought not to be allowed to be raised at
that stage, but Wallace, J., held that it
was a matter of law affecting the vali-
dity of the suit and that it was a point
of jurisdiction that had to be decided
and he accordingly allowed that plea to
be raised. In the original mortgage suit
defendants 2 to 4 were parties and the
plaintiff's claim against them was on
the footing of their being in possession
of the suit property. They raised the
defence setting up title in themselves
adversely both to the mortgagors and
the mortgagee. Thereupon the plaintiff

exonerated them and gave up the suit against them and having done this he proceeded to enter into a compromise with the mortgagors. All these facts are set out in para. 10 of the learned District Munsif's judgment. The decree in that suit is Ex. E-3 and it states:

"This case coming on for hearing this day in the presence of the plaintiff and of defendant 1 and guardian of defendant 2 in person, defendants 3 and 6, being ex parte, have agreed to compromise the matter of the suit and that they have put into Court a deed of compromise, M. P. No. 984 of 1917, praying that this Court will pass a decree in accordance with the terms thereof, this Court in pursuance of the said deed of compromise defendants 4, 5, and 7 having been dismissed from the suit doth order, etc."

The decree clearly shows that before the compromise was agreed upon, these defendants had been dismissed from the suit. They were dismissed from the suit because the suit could not possibly succeed against them; and in view of the defence raised by them, they were not proper parties to the suit. That being so, the position is exactly the position dealt with by a Full Bench of this Court of which I was a member in *Abdul Sac v. Sundara Mudaliar* (1). It is to be observed that this decision was subsequent to the decision in second appeal by Wallace, J., and had this case been then decided, there is no doubt that his decision would have been the other way. It is quite clear that, where parties have been wrongly joined and the suit against them is given up by the plaintiff or upon that ground he exonerates them, or there is a finding come to that they have been wrongly joined, then the correct procedure is to strike out their names as having been improperly impleaded. On the exoneration or the striking out of the names of persons on the ground of misjoinder, they cease to be parties to the suit. That is quite clear from the judgment of the Full Bench. In this case the learned District Munsif has adopted the correct procedure. He clearly by the decree is shown to have treated these defendants as persons who had been dismissed from the suit and not as persons against whom the suit had been dismissed. From the time of their dismissal they ceased to be parties to the suit because they had been wrongly joined. If that is so, Wallace, J., was wrong in follow-

ing the decision in *Sethu Konar v. Ramasami Konar* (2), a case which has been dealt with and explained in the Full Bench decision. That being so, these defendants were no longer parties to the suit and it follows therefore that this Letters Patent appeal must be allowed with costs throughout and the decree of the District Munsif restored with costs.

Bardswell, J.—I agree

P.R.S./K.S.

Appeal allowed.

2. A I R 1926 Mad 484=94 I C 526=49 Mad 494.

* A. I. R. 1933 Madras 436

WALSH, J.

(*Raja Damara Kumara*) *Chellamma Rao Bahadur* and another—Plaintiffs—Appellants.

v.

Doctor Bhogaraju Pattabji Seetharamayya and another — Defendants—Respondents.

Appeal No. 95 of 1930, Decided on 25th January 1933, from order of Sub-Judge, Chittoor, D/- 16th August 1929.

* (a) Civil P. C. (1908), S. 16 — Suit by vendor to enforce specific performance of contract to purchase land is suit for land—Suit by vendee is covered by proviso to S. 16.

A suit by the vendor to enforce specific performance of a contract to purchase land is a suit for land within the meaning of S. 16. The proviso appears to extend the section to a suit by the vendee. Hence the Court in whose jurisdiction the property is situated has jurisdiction to try the suit even though defendant does not reside within the jurisdiction of the Court: *A I R 1929 Mad 721, Dist.* [P 437 C 1, 2]

* (b) Civil P. C. (1908), S. 16 — Suit by vendee for refund of purchase money which has been made charge on property — Court in which property is situated has jurisdiction.

A suit for refund of purchase money which has been made a charge on the property owing to default to convey the property can be tried by the Court in whose jurisdiction the property is situate as the charge is immovable property: 28 *Mad 227, Rel on.* [P 437 C 2]

P. Venkataramana Rao — for Appellants.

K. Subba Rao—for Respondents.

Judgment.—The plaintiff brought this suit for specific performance to convey in accordance with the terms of a draft, filed with the plaint, executed to her by defendant 1 as trustee of defendant 2 and the members of his family. The property to be conveyed was a mortgage decree in O. S. No. 33 of 1218 on the file of the Court of the Subordinate Judge of Chittoor, which was passed on an assign-

1. A I R 1930 Mad 817=127 I C 805=54 Mad 81 (F B).

ment executed in favour of defendant 2 by one Rani Lakshmikantamma of certain arrears of maintenance due to her. The draft also agreed to transfer a charge on a village called Bharanisankarapuram as an indemnity. There was an alternative prayer that, if specific performance was not decreed, the purchase money, viz. Rs. 32,000, may be refunded and for a charge on the decree debt and on certain properties in that connexion. A preliminary issue as to want of jurisdiction was raised by defendant 2 and it was found in his favour by the learned Subordinate Judge. An appeal has been preferred to this Court and defendant 2 has not appeared to contest it.

It is not disputed with regard to the prayer for specific performance of the contract that the mortgage decree per se is not immovable property. Defendant 2, against whom specific performance is sought, admittedly does not reside within the jurisdiction of the Court though the mortgage-decree property is within its jurisdiction. But it is argued that the relief asked for in respect of enforcing the sale of the mortgage of Bharanisankarapuram renders the suit one for land under S. 16. It has been held in the Full Bench decision in *Velliappa Chettiar v. Govinda Dass* (1) that a suit brought by the vendee to enforce a contract for the sale of land is not a suit for land under Cl. 12 of the Letters Patent and the observations in *Nalam Lakshmikantam v. Krishnaswamy Mudaliar* (2), quoted by the learned Sub-Judge show that all suits mentioned in Cls. (a), (b), (c), (d), (e) and (f) in S. 16, Civil P. C., fall under "suits for land or other immovable property" mentioned in Cl. 12 of the Letters Patent. But it is argued that the proviso to S. 16 which speaks of a "suit to obtain relief respecting immovable property held by or on behalf of the defendant" will cover the present case.

It has been decided in several cases that a suit by the vendor to enforce specific performance of a contract to purchase land is a suit for land within the meaning of S. 16. The proviso appears to me to extend the section to a suit by the vendee for the relief is stated to be one relating to immovable

property held by the defendant as in the present case. The condition laid down in the proviso that the relief can be entirely obtained by his personal obedience is satisfied in this case. The Full Bench decision does not really touch this matter. The prayer for specific performance of sale of this charge, i. e. prayer (a) of the plaint, would therefore I consider give the Court jurisdiction. As regards the alternative prayer (d) for refund of the purchase money the learned Subordinate Judge has met this by saying:

"I am of opinion that there is no prayer in the plaint for sale of any charge which defendant 2 may have independently of the charges created in his favour under the decree in O. S. No. 33 of 1918 for realisation of the amount due to her."

This is because the alternative prayer for refund runs as follows:

"That it be declared that in case the plaintiff is decreed a refund of the said sum of Rs. 32,000 and interest thereon she is entitled to a charge on the said decree debt which is the subject-matter of the suit and the charge in respect thereof on the properties described in the schedule thereunder."

So the learned Subordinate Judge says that the only charge which the plaintiff asks for is the charge on the decree debt. This is correct on the wording, but I feel no doubt the word "thereunder" is simply a slip for "hereunder." In para. 5 of the plaint the plaintiff says, in describing the agreement, that defendant 2 agreed to sell to her not only the decree in O. S. No. 33 of 1918 but the benefit of the charge created over certain items of immovable properties "described in the Sch. A "hereunder" written for a consideration of Rs. 32,000." Sch. A at the end of the plaint is Bhavanisankarapuram village which was not charged under the decree in O. S. No. 33 of 1918 but was a charge conveyed to her as an addition under the sale contract. It is clear the word "thereunder" in para 19 (d) is purely a verbal slip, and as this appeal is not being opposed I have given permission to alter the word "thereunder" to "hereunder" in para 19 (d). With this alternative I think it is clear that the Court has jurisdiction under the alternative relief (d) also, for this charge is immovable property situate within the jurisdiction of the Court; vide *Maturi Subbaya v. Krishnaya* (3) which has not been overruled. I do not agree with the view of the learned Sub-

1. A I R 1929 Mad 721=118 I C 73=52 Mad Mad 809 (F B).

2. (1904) 27 Mad 157.

3. (1905) 28 Mad 227.

Judge that even if we understand that this charge is asked to be made part of the charge for securing the refund of the purchase money the suit will not lie under S. 16. I am of opinion that under the first relief as it stands and under the second as amended the suit will lie in the Sub-Court. The appeal will be allowed but without costs as it is not opposed. Plaintiff will be permitted to withdraw the plaint from the District Court, Kistna, and represent it in Chittoor Sub-Court. Time six weeks.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 438

WALSH, J.

V. G. Nataraja Mudaliar —Appellant.

v.

Official Assignee, Madras—Respondent.

Appeal No. 135 of 1929, Decided on 2nd February 1933, from order of Sub-Judge, Vellore, D/- 8th October 1928.

Limitation Act (1908), Art. 182 (3)—Payment of batta for auction sale of property is step-in-aid of execution.

Payment of batta for an auction sale of property is step-in-aid of execution and is sufficient to save limitation : Case law discussed.

[P 438 C 2]

V. Narayanaswami Ayyar and V. Subramania Ayyar—for Appellant.

N. Sivaramakrishna Ayyar—for Respondent.

Judgment.—The question in this case is whether the execution petition which was filed on 24th June 1927 is barred by limitation. The previous application was on 23rd February 1924. To save limitation the decree-holder relies upon the batta paid on 2nd July 1924 for the auction sale of property. The question is whether the payment of batta is a step-in-aid of execution. Both the Courts have held in favour of the decree-holder ; against that decision this second appeal is filed. The following is an extract of the batta memo :

“ Batta memo filed on behalf of the plaintiff.”

Particulars of the Process.	Against whom.	Residence.	Batta.	Remarks.
Sale warrant.	Immovable property.	District Munsif's Court, Vellore.	Rs. a. p. 1 0 0	...

There appear to have been four cases in this High Court as regards payment of batta saving limitation. The first is the Bench case in *Vijiaraghavalu Naidu v. Srinivasalu Naidu* (1) where it was held that a step-in-aid had been taken. The second is *Arunachalam Chettiar v. Lakshmanan Chettiar* (2) where Wallace, J., held that the payment of process fee for the issue of a warrant of arrest in execution of a decree where the batta memo itself does not apply for the issue of process is not a step-in-aid of execution so as to save limitation. As observed by Jackson, J., in *Raman Chetty v. Ramaswamy Pillai* (3), the third case, the actual paper is not quoted in the judgment, nor was it found in the record. In *Arunachalam Chettiar v. Lakshmanan Chettiar* (2), Wallace, J., relied on *Vijiaraghavalu Naidu v. Srinivasalu Naidu* (1) as indicating the then view of this Court that a mere pay-

ment of batta for process where the batta memo itself does not apply for the issue of process will not be a step-in-aid. In that case, *Vijiaraghavalu Naidu v. Srinivasalu Naidu* (1), a batta memorandum was held to be a step-in-aid and the judgment says that it asked that process may issue and for this purpose the necessary batta was deposited. Jackson, J., says in *Raman Chetty v. Ramaswamy Pillai* (3) that he does not think it can be gathered from that judgment that it was a distinct application for process over and above what was in the form. In *Govindaswamy Pillai v. Govinda Padayachi* (4), Madhavan Nair, J., held that the “process application” for which batta was paid “to attach the properties in the house of the defendants” and which stated “that one rupee might be received for the purpose,” was a step-in-aid. Thus there are one Bench case and three single decisions. Of these *Govindaswamy Pillai v. Govinda Padayachi* (4) where attachment was dis-

1. (1905) 28 Mad 399.

2. A I R 1924 Mad 906=82 I C 497.

3. A I R 1928 Mad 563=110 I C 205.

4. A I R 1925 Mad 880=89 I C 894.

tinently asked for is not of much help. Of the other two decisions by single Judges both consider themselves in agreement with the Bench case *Vijiyaraghavalu Naidu v. Srinivasulu Naidu* (1). But as observed in *Raman Chetty v. Ramaswami Pillai* (3) by Jackson, J., in *Arunachalam Chettiar v. Lakshmanan Chettiar* (2) the actual words in the batta memorandum are not set out. Jackson, J., says that

"it is difficult to apply rulings which contain no citation of the document in question. In fact for that reason alone I should be prepared to ignore the case law and trust to the plain interpretation of the statute."

He continues :

"I had thought of referring the matter to a Bench but on a consideration of the cases I hold that *Vijiaraghavalu Naidu v. Srinivasulu Naidu* (1) is clear authority : cf. *Alagamuthu Pillai v. Devasagaya Fernandez* (5) which is not cited in *Arunachalam Chettiar v. Lakshmanan Chettiar* (2)."

I cannot help thinking that the brackets in the reports are misplaced. Because *Vijiaraghavalu Naidu v. Srinivasulu Naidu* (1) is referred to twice in *Arunachalam Chettiar v. Lakshmanan Chettiar* (2) and in fact in the previous paragraphs Jackson, J., says that the learned Judge in that case considered *Vijiaraghavalu Naidu v. Srinivasulu Naidu* (1). *Alagamuthu Pillai v. Devasagaya Fernandez* (5), which is not cited in *Arunachalam Chettiar v. Lakshmanan Chettiar* (2) is such a clear case as not to be of much help. In the present case the Court passed an order on 31st January 1924 that the properties should be sold on 7th July 1924, and on 2nd July 1924 the process fee was paid for issue of a sale warrant. Under R. 187 of the Civil Rules of Practice the batta for the sale warrant has to be paid a week before and the warrant cannot be prepared till the batta is paid. If the batta is not paid the Execution Petition is liable to be dismissed. It seems to me that the entry "sale warrant" under "Particulars of Process" and "immovable property" under "against whom" is sufficient to indicate that the Court was asked to issue a sale warrant the batta being paid for it. I therefore agree with the view of both the lower Courts that this is a step-in-aid of execution. The second appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

5. (1916) 32 I C 484.

* A. I. R. 1933 Madras 439

PANDALAI, J.

Arumugha Mudaliar—Petitioner.

v.

Venkatachala Pillai and others—Opposite Parties.

Civil Revn. Petn. No. 1904 of 1931, Decided on 18th October 1932, from order of Sub-Judge, Cuddalore, in C.M.A. No. 2 of 1931.

(a) Court-fees — Substance of suit determines court-fees.

In spite of unnecessary prayers the substance of a suit should be looked at to determine the court-fee payable : 35 Cal 202, *Foll.*

[P 440 C 1]

* (b) Court-fees Act (1870), S. 7 (5) — Attachment of property in execution of decree — Claim to property on basis of sale in favour of claimant dismissed — Suit within one year to avoid attachment — Value for purposes of jurisdiction is not market value of land but value under S. 7, Cl. 5—Madras Civil Courts Act (1873), S. 14.

Where a claim to property attached in execution of a decree is dismissed and the claimant files a suit within one year to avoid attachment and to have his title to the property declared, the property has to be valued for purposes of jurisdiction not on the market value but on value under S. 7, Cl. (5), Court-fees Act : *Case law discussed.*

[P 442 C 1]

K. Balasubramanya Ayyar—for Petitioner.

N.K. Mohanarangam Pillai—for Opposite Parties.

Judgment. — This petition affords a good example of the regrettable delays to which litigation has now become subject owing to questions of court-fee and jurisdiction having become a common feature in the subordinate Courts which take years for their determination. In this case the suit was of a common enough kind and was brought in 1928. At the end of 1932 it remains still to be decided which is the proper Court to try it. The plaintiff had bought some property from defendant 2 and his mother for Rs. 3,700. Defendant 1 obtained a decree for Rs. 1,170 in 1927 against defendant 2 alone and attached that property. The plaintiff preferred a claim in execution which was dismissed. Within the year allowed for a suit he brought this suit impleading the decree-holder, defendant 1, and the judgment-debtor, defendant 2. In the plaint he set out these facts as affording the cause of action and prayed (here the trouble begins) (1) to cancel the order dated 6th October 1928 on the claim petition; (2) to declare the plaintiff's title to the

property under his sale-deeds; (3) to raise the attachment and; (4) for a permanent injunction against the execution being continued to sale. It will be observed that although the plaintiff made four prayers, the substance of the whole matter was that his property had been illegally attached and he wanted that to be avoided; all else were mere words. The first and third prayers mean the same thing that the plaintiff wanted the claim order avoided. The fourth prayer is the consequence of that and the second is incidental to it. In this suit the plaintiff paid a court-fee of Rs. 10 under Sch. 2, Art. 17, Court-fees Act. That this was right there is now no question. The matter is set at rest by the decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra* (1), a very similar case in which their Lordships point out that in spite of unnecessary prayers the substance of the suit should be looked at to determine what the court-fee payable is.

But the question was raised as to the proper Court for purposes of jurisdiction which was to try this suit. One would have thought at this distance of time that there can be no arguable question on such a matter. But not only has it been argued, but while the District Munsif held following *Narayana Singh v. Aiyasami Reddi* (2) that he had no jurisdiction to entertain the suit because the value for purposes of jurisdiction is according to him the market value of the property which is more than Rupees 3,000 as the plaintiff admittedly bought it for Rs. 3,700, the learned Subordinate Judge in appeal held following *Krishnaswami Naidu v. Somasundaram Chettiar* (3) that the value for jurisdiction is the amount of the debt Rs. 1,170; that even if it be considered to be the value of the property it was not more than one-half of Rs. 3,700 the market value, viz. Rs. 1,850 as a result of the Madras amendment to S. 7-iv (c), Court-fees Act; but that in his view the value of the land should be computed for purposes of jurisdiction according to S. 7, Cl. 5, Court-fees Act (i. e.) at ten times the assessment in which case the whole value would be less than Rs. 3,000.

In this Court learned counsel for the petitioner has addressed a very able argument that the view of the Munsif is right. He certainly has one or two decisions which would seem to support by parity of reasoning his argument that in a suit like this which must be deemed a declaratory suit respecting land the proper value for purposes of jurisdiction is the full market value of that land and not either the value as determined under S. 7, Cl. 5, Court-fees Act, or half the market value according to the Madras amendment to S. 7, Cl. 4 (c). The decisions he relies upon are *Sasireddi Veeramma v. Butchayya* (4) and *C. Ramiah v. C. Ramaswami* (5) which it relies on and follows. On the other hand the respondent's learned advocate argues that the Subordinate Judge's view is right and that the value for purposes of jurisdiction in the present suit is the amount of the debt Rs. 1,170 and even if the subject-matter is taken to be the land its value should be computed as prescribed by S. 14, Madras Civil Courts Act, which adopts the valuation in S. 7, Cl. 5, Court-fees Act, for purposes of jurisdiction in all cases, where the subject-matter of the suit is land, houses or gardens.

Now if this suit were really of the same nature as that in *Sasireddi Veeramma v. Butchayya* (4) or *C. Ramiah v. C. Ramaswami* (5), I should be bound by them, because they are Bench decisions. But *Sasireddi Veeramma's* case (4) was a suit to establish the validity of an adoption and not one in which the subject-matter was land. The Court held that the properties which might accrue to the adopted person were not the subject-matter of the suit, but only the adoption itself. The grounds of the decision are entitled to very great weight but the decision itself was on the point just stated, viz., that in a suit to establish an adoption S. 14, Madras Civil Courts Act, which relates only to cases where land is the subject-matter, is not applicable. Similarly in *C. Ramiah v. C. Ramaswami* (5) the suit was one for partition of lands of which the plaintiff was in joint possession and what was held was that in such a suit the plaintiff was entitled to place his own valuation

1. (1908) 35 Cal 202=35 I A 22=7 C L J 36=12 C W N 169 (P C).

2. (1916) 39 Mad 602=31 I C 188.

3. (1907) 30 Mad 335=17 M L J 95 (F B).

4. A I R 1927 Mad 563=101 I C 379=50 Mad 646.

5 (1912) 18 I C 903.

for the purposes of jurisdiction. Although there were observations as to the effect of S. 14, Civil Courts Act, in that case also, they were for purposes of that decision that the plaintiff was entitled to value the relief for purposes of jurisdiction as he liked.

It appears to me that in the suit before me even if it is governed by *Narayan Singh v. Aiyasami Reddi* (2) and not by *Krishnasami Naidu v. Somasundaram Chettiar* (3), all that it leads to is that the subject-matter is the land and not the debt. The plaintiff's land was attached, his claim thereto was dismissed, and he wants that summary decision set aside. Assuming that in such a suit the subject-matter is the land concerned in the claim order, S. 14, Madras Civil Courts Act, is explicit when it declares that when the subject-matter of any suit or proceeding is land, a house or garden its value shall for purposes of jurisdiction conferred by that Act be assessed in the manner provided by the Court-fees Act of 1870, S. 7, Cl. 5. In my opinion those words are imperative and clear. But it is said that that section is applicable only in classes of suits referred to in S. 3, Suits Valuation Act, viz., suits governed by S. 7, paras. 5, 6 and 10 (d), Court-fees Act; that is, possession of land, pre-emption, and specific performance of an award. This method of interpreting this section is adopted by inference from the effect of S. 6 of that Act. It says that when rules under S. 3 are made for the territories under the administration of the Madras Government, S. 14 shall stand repealed as regards this presidency. A fallacy lurks in this inference because the effect of S. 4, Suits Valuation Act, which is material in this connexion is left out.

That section says that when rules for valuing land have been made under S. 3 the same value shall be applicable as a maximum in suits relating to land or an interest in land falling within S. 7, Cl. 4 or Sch. 2, Art. 17. Now the suits relating to land in S. 7, Cl. 4, are in sub-Cls. (b), (c), (d) and (e). Cl. (b) deals with suits for partition; Cl. (c) with declaratory suits where consequential relief is prayed; Cl. (d) for injunction; and Cl. (e) for a right to some benefit not otherwise provided for to arise out of land. In these suits and suits falling like the present one under Sch. 2, Art. 17

relating to land the valuation according to the rules made under S. 3 are to be adopted, but as a maximum. This is to prevent over-valuation of such suits. In suits for partition, declaration or injunction in respect of land or for some benefit to arise out of land not otherwise provided for, it would be necessary to value the land and it would be also necessary to value the interest involved and in such cases the section provides that the valuation of land under rules made under S. 3 shall be adopted as a maximum. The effect of this section on S. 6 is that if rules are made under S. 3 the valuation thereby prescribed will be applicable also to the suits mentioned in S. 4 and then the need for S. 14, Civil Courts Act, ceasing to exist that section shall stand repealed. Therefore it seems to me incorrect to say that S. 14, Civil Courts Act, refers only to suits mentioned in S. 3, Suits Valuation Act.

The present is a suit falling within Sch. 2, Art. 17, Court-fees Act, which is expressly mentioned in S. 4, Suits Valuation Act, as a class to which the valuation under S. 3 will apply. Therefore if the subject-matter of the suit is land not only is there nothing in the Suits Valuation Act which prevents the application of S. 14, Civil Courts Act, to this suit, but that section requires that the proper method of valuing land for purposes of jurisdiction is under S. 7, Cl. 5, Court-fees Act. This view of S. 14 is fortified by a decision in *Narayanan Nair v. Kathir Kutty* (6), where it was held that the valuation therein prescribed is applicable to suits for pre-emption which are governed by S. 7, Cl. 6.

Reliance was placed for the petitioner on the decision in *Narayana Singh v. Aiyasami Reddi* (2) and by the other side on the Full Bench decision in *Krishnaswami Naidu v. Somasundaram Chettiar* (3). It seems to me that the principle of the Full Bench decision has been upheld by the Privy Council in *Phul Kumari v. Ghanshyam Misra* (1) that it is the substance and object of the suit which should be regarded and not the words and also that where the debt is less than the value of the property it is the former that determines the value of the suit to the plaintiff. But in *Narayana Singh v. Aiyasami Reddi* (2) em-

6. A I R 1919 Mad 1062=41 Mad 721=45.
I C 81.

phasis was laid on the words of the various prayers, which it was thought took the case out of the category of cases dealt with by the Full Bench. In the Full Bench case which was decided at a time when the Munsif's jurisdiction was only Rs. 2,000 it was held that a suit to avoid a claim was not a suit to obtain declaration of title to the property, but one for getting rid of the effect of the order disallowing the claim and ought to be valued for purposes of jurisdiction at the amount for which the property was attached when such amount is less than the value of the property which was more than Rs. 2,000.

In *Narayana Singh's* case (2) a distinction was made that where the judgment-debtor is party to the claim order and there is a distinct prayer for declaration of title to the property it is the value of that property which determines the jurisdiction. This distinction has no bearing to the present case because assuming that it is the value of the property which does determine the jurisdiction the Munsif would still have jurisdiction. (The remark in *Narayana Singh v. Aiyasami Reddi* (2) that the Full Bench decision does not refer to the Privy Council decision in *Phul Kumari v. Ghanshyam Misra* (1) must be due to an oversight as the former was the earlier). The only point in dispute is how the property is to be valued whether on the market value or under S. 7, Cl. 5, Court-fees Act. I have given grounds for thinking that the latter is the correct view. The learned Judge's order was therefore right in either view and this petition must be dismissed with costs.

P.R.S./K.S. *Petition dismissed.*

* A. I. R. 1933 Madras 442

MADHAVAN NAIR AND JACKSON, JJ.

Jujisti Mahapatro—Appellant.

v.

Korada Magata Patro and others—Respondents.

Appeal No. 286 of 1930, Decided on 8th November 1932, against order of Dist. Judge, Ganjam, D/- 9th March 1928.

* Limitation Act (1908), Art. 181—Preliminary decree—Appeal against preliminary decree withdrawn and dismissed—Time for applying for final decree is three years from such order of dismissal—Civil P. C. (1908), S. 2.

A preliminary decree for sale was passed on

12th December 1921 fixing six months for payment of decree amount. An appeal was filed by the judgment-debtor. After some of the respondents were served, the appeal itself was withdrawn and the Court passed the order "appeal is withdrawn, it is dismissed with costs," and there was a direction as to distribution of costs. The above order was passed on 21st January 1924. On 21st January 1927 the transferee decree-holder applied for the passing of the final decree.

Held: the order of dismissal was a decree within meaning of S. 2, that the preliminary decree became merged in the appellate decree and that time for applying for final decree was three years from 21st January 1924, the date of the appellate order, and not three years from 12th June 1922 when the amount was payable: *A I R* 1914 *P C* 66, *Expl* and *Dist*; 30 *Mad* 1; *A I R* 1921 *Pat* 6; *A I R* 1927 *Cal* 760; *A I R* 1921 *Mad* 414 and *A I R* 1926 *All* 440, *Ref.* [P 446 C 1]

B. Jagannadha Doss and *S. A. Seshadri Ayyengar*—for Appellants.

C. Sambasiva Rao—for Respondents.

Madhavan Nair, J.—I have had the advantage of reading the judgment which my learned brother is going to deliver and I agree with him. As the question involved in the appeal is of some importance, I will briefly record my reasons in support of my conclusion. This appeal arises out of an application filed by the transferee decree-holder for passing a final decree in a mortgage suit. The facts of this case are not disputed. In O. S. No. 7 of 1918, on the file of the District Court of Ganjam which was a suit on a mortgage, a preliminary decree for sale was passed on 12th December 1921, fixing six months for the payment of the decree amount. An appeal against the decree was filed in the High Court, Appeal No. 259 of 1923 by the fifth judgment-debtor. Notice was ordered in the appeal, and some of the respondents were served. At this stage the appeal itself was withdrawn by the appellant and it was dismissed with the costs of those respondents that appeared. The order passed by the High Court runs thus:

"The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate."

This order was passed on 21st January 1924. On 21st January 1927 the transferee-decree-holder presented I. A. No. 36 of 1927 in the District Court for a final decree. The question that arises for decision is whether this petition is in time.

Under Art. 181, Lim. Act, which is applicable to the case, the period of limitation for applying for a final decree is three years from the time when the right to apply accrues. In the present

case the right to apply accrued on 12th June 1922. The time for filing the application for the final decree expired on 12th June 1925. I. A. No. 36 of 1927 presented on 21st January 1927 would therefore be clearly barred by time. But the petitioner argues that having regard to the fact that an appeal was filed to the High Court against the judgment and decree in O. S. No. 7 of 1918, that judgment and decree became merged in the final decree of the High Court in Appeal No. 259 of 1923, that limitation runs from 21st January 1924, the date of the final decree and that since I. A. No. 36 of 1927 was presented on 21st January 1927, within three years of the High Court's decree, the petition is in time. The respondent argues that since the appeal filed against the preliminary decree was withdrawn and dismissed without consideration of merits, it cannot be said that the original decree has been merged in the appellate decree and that therefore the filing of the appeal cannot be availed of by the petitioner for the purpose of getting a fresh starting point for limitation.

The question for determination is whether in a case where an appeal against a preliminary decree was filed, but was withdrawn and dismissed with costs, the time for applying for final decree would run from the date fixed in the preliminary decree for payment or from the date of the order dismissing the appeal. The learned District Judge relying on a decision of the Privy Council in *Chandri Abdul Majid v. Jawahir Lal* (1), declined to accept the petitioner's contention and held that the application was barred by time. It is argued for the petitioner that the present case does not fall within the scope of the Privy Council decision and that his application is within time as having been filed within three years of the date of the High Court's decree. In the appeal before the Privy Council which also arose out of an application for a final decree, the facts were as follows: In a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on 12th May 1890. This decree was confirmed by the High Court on 8th April 1893. Against the decree of the High Court an appeal to the Privy Coun-

cil was admitted, but was dismissed for want of prosecution on 13th May 1901. On 11th June 1909 an application was made to the Subordinate Judge "for an order absolute" to sell the mortgaged properties; in other words,

"for an order directing enforcement of the order nisi which had been confirmed by the decision of the High Court of 8th April 1893."

This application was obviously barred under Art. 179, Lim. Act of 1877 (which applied to the case) as having been filed after the expiry of three years from the order of the High Court confirming the decree which was the final order of the appellate Court; but it was argued before the Privy Council that the decree which was sought to be enforced had been "constructively turned" into a decree of the Privy Council by virtue of the dismissal of the appeal on 13th May 1901 and that therefore the period of limitation was 12 years from 13th May 1901 under Art. 180, Lim. Act of 1877, which corresponds to Art. 183 of the present Limitation Act. This contention was rejected by their Lordships of the Privy Council with the following observations:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated 8th April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation."

The same conclusion was reached by their Lordships of the Privy Council in *Batuk Nath v. Munni Dei* (2) which was also a case where the appeal before His Majesty in Council was dismissed as the appellant or his agent had not taken any effective steps for prosecution. The observations of their Lordships quoted above from *Chandri Abdul Majid v. Jawahir Lal* (1) were quoted by their Lordships in *Sachindranath Roy v. Maharaj Bahadur Singh* (3). These ob-

2. A I R 1914 P C 65=23 I C 644=41 I A 104=36 All 284 (P C).

3. A I R 1922 P C 187=74 I C 660=48 I A 335=49 Cal 203 (P C).

1. A I R 1914 P C 66=23 I C 649=36 All 350 (P C).

servations, says the respondent's learned counsel, make it clear that in their Lordships' opinion the decree of the lower Court cannot be considered to have become merged in the decree of the appellate Court unless the appellate Court dealt judicially with the matter in the suit; in other words, heard it on the merits. If this is the basis of the decision of *Chandri Abdul Majid v. Jawahir Lal* (1) it must follow the judgment and decree in O. S. No. 7 of 1918; in the present case cannot be said to have become merged in the order of the High Court as that order did not deal with the subject-matter of the appeal on its merits, since the appeal was withdrawn by the appellant. But the appellant seeks to distinguish the decision in *Chandri Abdul Majid v. Jawahir Lal* (1) on the ground that what was decided in that case was that there was formally no appeal before the Privy Council, that therefore there was no decree of the Privy Council to which Art. 183, Lim. Act, would apply, and that the same reasoning should not be applied to the present case, inasmuch as there was an appeal formally before the Court and that appeal was finally disposed of by an order of the High Court. According to the appellant's contention where an appeal lay, and that appeal was disposed of by an order, that order will amount to a final order in which the original order appealed against gets merged except as in the case dealt with by the Privy Council which was a case of dismissal for default. He would confine the operation of the decision in *Chandri Abdul Majid v. Jawahir Lal* (1) strictly to cases which have been dismissed for default of prosecution and not to cases like the present one in which the appeal was formally brought before the Court but was withdrawn and dismissed. The question is whether this distinction sought to be drawn by the appellant's counsel can be maintained.

I find it somewhat difficult to make up my mind on this point but after giving my best consideration, I am inclined to accept the appellant's contention. At first sight it may appear, if I may say so with very great respect, that the reasoning of their Lordships that for a judgment of the lower Court to become merged in the judgment of the appellate Court, the order of the appellate Court

should deal judicially with the matter of the suit, would apply equally to cases where an appeal has been dismissed for want of prosecution as well as to cases where, as in the one before us, the appeal was formally withdrawn and dismissed and an order was drawn up dismissing it with costs. But having regard to the circumstances in which the observations were made, I do not think this is a correct interpretation of their Lordships' judgment. In the case their Lordships decided that the dismissal of appeal by His Majesty in Council for want of prosecution does not give a fresh starting point of limitation under Art. 179, Lim. Act of 1877 and that the limitation ran from the order of the High Court confirming the decree which was the final order of the appellate Court. The observations so strongly relied upon by the respondent that

"the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from,"

were made by their Lordships to meet the argument that the order of the Privy Council must be taken to have constructively turned the decree that was sought to be enforced into a decree of the Privy Council. That was all. Their Lordships' observations do not in any way relate to an order referred to in Cl. 2, Art. 179, though at first sight it may appear that in their Lordships' view such an order should also be one dealing judicially with the merits of the appeal. But this point—the nature of the final order within the meaning of Cl. 2—cannot be said to have been inferentially decided as the existence of such an order does not seem to have been an essential part of the argument, for the real point urged was that there was what was alleged to be a decree of the Privy Council and that S. 180, Lim. Act, applied to the case; and then, their Lordships pointed out that in the circumstances referred to, the order passed by them dismissing the appeal for want of prosecution cannot be said to be a judicial order. If it is to be understood that in their Lordships' view that the order referred to in Cl. 2, Art. 179, should also be an order dealing judicially with the merits of the appeal, then the decision in *Peria Kovil Rama-*

naja v. Lakshmi Doss (4) of this Court may have to be reconsidered. In that case a second appeal was filed against the lower appellate Court's decree but that was withdrawn and the High Court passed the following order :

"The appellant's vakil having applied for permission to withdraw the appeal, it is ordered that this appeal be and hereby is, dismissed ; and it is further ordered that the appellant do pay to the respondent his costs of this second appeal."

The Full Bench decided that ;

"where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order ; and it makes no difference that such second appeal was withdrawn by the appellant."

This case is very much like the one before us; though the second appeal was not disposed of on the merits, time for limitation was calculated from the date of the appellate order as it had the effect of finally disposing of the appeal. In my opinion what was laid down by their Lordships of the Privy Council in *Chandri Abdul Majid v. Jawahir Lal* (1) was only this: viz., that in that case the order passed by their Lordships cannot be considered to be a judicial order passed on appeal because the appeal itself for the reason stated in their Lordships' judgment never came up for disposal by their Lordships and therefore the period of limitation should not be calculated from the date of the order passed in appeal within the meaning of Art. 183, Limitation Act. The other decision of the Privy Council reported in *Batuk Nath v. Muni Dei* (2) does not carry the matter much further. In that case as the appellant had not taken effectual steps for the prosecution of the appeal presented to His Majesty in Council the Registrar under R. 5 of the order in Council dismissed the appeal for non-prosecution. It was held by their Lordships of the Privy Council that :

"Such a dismissal for want of prosecution is not the final decree of an appellate Court within the meaning of Art. 179, Cl. 2, Sch. 2, Limitation Act, from which the period of limitation can be reckoned under the article in support of the application for the execution of a decree."

The true scope of these two decisions of the Privy Council has been pointed out in *Raghu Prasad Singh v. Jadunandan Prasad Singh* (5): see also the

4. (1907) 30 Mad 1=16 M L J 393.

5. A I R 1921 Pat 6=59 I C 896=6 Pat L J 27.

decision in *Gohur Bepari v. Ramkrishna Shaha* (6). It follows from what I have said above that the observations in *Chandri Abdul Majid v. Jawahir Lal* (1) relied on by the learned counsel for the respondent should be strictly confined to cases where the appeals are dismissed for want of prosecution and should not be applied to a case like the one before us where the appeal was formally brought before the Court for disposal and was finally disposed of by an order dismissing it with costs. In such a case, in my opinion, the order of the lower appellate Court supersedes the order of the Court appealed against and time begins to run under Art. 181 from the date of the order passed in appeal. In *Jayanti Venkayya v. Damaisetti Sattiraju* (7) it was held that an application for a final decree for sale under O. 34, R. 5, Civil P. C., is governed by Art. 181, Limitation Act, and the starting point, in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed or varied the preliminary decree. I think the same should be the decision in the present case also, notwithstanding the fact that the appeal was withdrawn and dismissed without a consideration of the merits. In my opinion, the observations referred to in *Chandri Abdul Majid v. Jawahir Lal* (1) cannot be said to apply to a case like the one now under consideration.

In this connexion the following observation of the learned Judges in *Nandalal Saran v. Dharam Kirti Saran* (8) may also be referred to with advantage. In that case it was held that :

"Where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of 12 years under S. 48, Civil P. C., should begin from the date of the decree of the appellate Court, but where it has been held that no appeal lay, the order disposing of the so-called appeal will not amount to a decree and therefore the period of limitation, in such a case should be counted from the date of the original decree and not from the date of the so-called appeal."

After referring to the decisions of the Privy Council in *Chandri Abdul Majid v. Jawahir Lal* (1) and the decision in *Sachindranath Roy v. Maharaj Bahadur Singh* (3) and pointing out that the

6. A I R 1927 Cal 730=104 I C 566.

7. A I R 1921 Mad 414=64 I C 470=44 Mad 714.

8. A I R 1926 All 440=94 I C 961=48 All 377.

case before them was stronger " because in the Privy Council case an appeal did lie and had been properly preferred " while in the case before them no appeal lay at all and the proceedings did not terminate in an order dealing judicially with the matter in the suit the learned Judges observed as follows :

" The converse proposition, though it is not necessary for us to decide this, would also seem to be in conformity with the spirit of S. 2, with the decision of their Lordships of the Privy Council and with Indian judicial authority, viz., where an appeal lay and that appeal was disposed of by an order, that order will amount to a decree except as in the case dealt with by their Lordships of the Privy Council (a case of dismissal for default) and in other special cases where it is expressly declared by S. 2 that the order shall not amount to a decree."

For the above reasons I think it must be held that an order passed by a decree dismissing the appeal with costs, notwithstanding the fact that the appeal was withdrawn by the appellant, should be held to be an order finally disposing of the appeal superseding the order of the Court appealed against and that for the purpose of the present case time begins to run from the date of the order of the High Court and therefore I. A. No. 36 of 1927, the application for passing of the final decree, is not barred by limitation. I would therefore allow the appeal with costs. The result is that the petition will be disposed of by the lower Court on the merits. The court-fee on the appeal memo will be refunded.

Jackson, J. — The present point for determination is whether a mortgagee decree-holder, who obtained his preliminary decree on 12th December 1921, is within time when applying for a final decree on 21st January 1927 because an appeal against that preliminary decree was withdrawn and dismissed on 21st January 1924. It is pleaded that the preliminary decree became merged in the appellate decree, upon the date of which the right to apply accrued, and therefore the application is within time. Although under the Civil Procedure Code (O. 41, R. 5) an appeal shall not operate as a stay of proceedings under a decree, yet if there is an appeal against the preliminary decree there is no conclusive decree under which the decree-holder can proceed :

"The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred it is

the decree of the appellate Court which is the (final) decree in the cause : *Jowad Hussain v. Gendan Singh* (9)."

The "final" which I have bracketed means of course conclusive ; it is not the antithesis of preliminary. So far there is no difficulty ; time runs from the appellate Court's decree. But then the question has arisen : what if the appellate Court does not decree ? The Allahabad High Court attempted to get over this difficulty by ruling that whenever the appellate Court dismisses an appeal, it passes a decree : *Abdul Majid v. Jawahir Lal* (10). But the special case under its consideration where the Privy Council had recommended His Majesty to dismiss the appeal for non-prosecution was taken up on appeal to the Privy Council which pronounced as follows :

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all . . . there is no decree of His Majesty in Council in which the preliminary decree has become merged: *Chandri Abdul Majid v. Jawahir Lal* (1)."

Then comes the question : Is a dismissal upon withdrawal also a mere recognition that the appellant has not complied with requisite conditions, or is it a decree ? Although the withdrawal of an appeal is mentioned in O. 41, Rule 22 (4), the Code nowhere lays down the procedure of the Court upon such withdrawal, and any consequent dismissal must presumably be under S. 151, Civil P. C. In Bombay it may not be the practice to dismiss ; for in *Patloji v. Gam* (11) the High Court appears simply to have permitted withdrawal ; and such permission was held not to be a decree. This ruling is considered by a Full Bench of our Court in *Peria Kovil Ramanuja v. Lakshmi Doss* (4), where it is held that time runs from the date of an order which has the effect of finally disposing of an appeal. The Full Bench does not say whether in its opinion an order of dismissal consequent upon a withdrawal is a decree. The determining factor would seem to be whether or no the

9. A I R 1926 P C 93=98 I C 499=58 I A 197 =6 Pat 24 (P O).

10. (1911) 33 All 154=7 I C 926 (F B).

11. (1891) 15 Bom 370.

Court has in in the terms of S. 2, Civil P. C., "expressed an adjudication" or in the terms of the Privy Council ruling has "dealt judicially with the matter." The exact order of dismissal runs thus :

"The appeal is withdrawn. It is dismissed with costs. The costs will be proportionate to the interests of respondents 6 and 7 who appear by counsel."

No doubt if the Court had been so disposed it might simply have recorded : "Leave granted to withdraw," and then the appellant would be in the same position as if he had not appealed at all ; but when the Court went further and considered the award and distribution of costs it is difficult to see how it has not expressed an adjudication and therefore passed a decree. How are the costs recoverable except under the decree of the High Court ? If the principle applicable to non-compliance of conditions is extended to withdrawal, it may lead to deplorable results. A mortgagee obtains a preliminary decree, which becomes inconclusive by reason of an appeal being lodged. Then if preliminary conditions are not complied with, in all human probability, although the decree-holder is thrown back upon the original date of his decree, he will be within three years, and may not have much cause to complain that the unjustifiable action of his judgment-debtor in preferring an infructuous appeal has deprived him of several months to which the statute entitled him. But suppose the preliminary conditions are duly complied with, and the appeal comes on for hearing, and then the appellants withdraw. Then the decree-holder may find himself time barred ; for in these days an appeal may well be pending over three years. No doubt in such circumstances the Court might refuse withdrawal ; but it is startling to consider that the perfectly normal and natural order of the Court ; "withdrawn ; dismissed, costs to respondents," would have the effect of unsuited the respondents as barred by limitation.

But apart from this reductio ad absurdum, in my opinion the order "dismissed with costs," is a decree, and time runs from that order. I should allow this appeal with costs to appellant.

P.R.S./K.S.

Appeal allowed.

* A. I. R. 1933 Madras 447

PANDALAI, J.

A. V. R. M. S. P. S. Ramaswami Chettiar—Appellant.

v.

M. Paramasivan Pillai—Respondent.

Appeal No 375 of 1931, Decided on 21st September 1932, against order of Sub Judge, Tuticorin, D/- 15th October 1931.

* (a) Mortgage—Suit on simple mortgage—Interim receiver can be appointed for taking rent and profits only when mortgagor is personally bound to pay debt or commits waste—Civil P. C. (1908), O. 40, R. 1.

Where the mortgagor is personally bound to pay the debt in a simple mortgage and either he has defaulted to pay the interest while enjoying the property or the property has diminished in value so as not to be sufficient to satisfy the whole debt, the mortgagee may in a suit on the mortgage obtain a receiver for taking the rents and profits of the mortgaged property and paying them into Court for the benefit of the mortgagee and so deprive the mortgagor of possession even before the sale. The same would of course be the case if the mortgagor is wasting or damaging or not taking due care of the property. [P 448 C 2; P 449 C 1]

But where there is no personal covenant on his part to pay or where it has become barred or where the mortgagee has deliberately given it up and therefore the decree does not and cannot contemplate a personal decree for any deficiency found at the sale a receiver cannot be appointed as such appointment amounts to enlarge the security of the right of the mortgagee to the prejudice of parties: *Case law discussed.*

[P 449 C 1].
* (b) Transfer of Property Act (1882), S. 58—Future income can be mortgaged but should be expressly included.

The future income of property is capable of being mortgaged by a simple mortgage just like the corpus. But where the income is not expressly included in the security, all that a simple mortgage comprises as security is the corpus: 19 *Mad* 249 (P C), *Ref.* [P 449 C 1].

K. S. Ramabadra Ayyar—for Appellant.

K. V. Sesha Iyengar—for Respondent.

Judgment.—This is an appeal against the appointment in a suit on a simple mortgage of a receiver of the rents and profits of property covered by the mortgage at the instance of the plaintiff mortgagee. The appellant is defendant 3 who is in possession as purchaser before suit of the mortgaged and other property of the mortgagors (defendants 1 and 2), part of the consideration (Rs. 24,500) being the mortgage debt which he undertook in the sale deed to pay but has not paid. The mortgage debt amounted on 29th September 1930, the date of the preliminary decree, to

nearly Rs. 37,000. The property consists of a compound and 20 houses in Tuticorin yielding a gross annual rental of Rs. 2,316 and a net income of about Rs. 1,300. The application for receiver was made on 14th August 1931. I am informed that the final decree was passed in May 1932 pending this appeal.

The chief ground on which the receiver was applied for and granted was that having regard to the great fall in the value of property the mortgage debt will not be realized by the sale of the properties and that defendant 3, realizing this, is not only not paying off the debt or even the interest but throwing obstacles and causing delays by vexatious Court proceedings so as to enjoy the property as long as possible and put off the sale. If this appeal depended on the above or similar considerations which affect receiver applications in ordinary simple mortgage suits, I should have no hesitation in confirming the order of the learned Judge:

"If the decree is for sale and it is established that the security is not sufficient to satisfy the judgment debt, a receiver will be appointed as a matter of course specially if there has been default in the payment of interest: *Khub Surat Koer v. Saroda Charan Guha* (1). Whether the mortgagee is or is not entitled to possession he may invite the Court to appoint a receiver if the demands of justice require that the mortgagor should be deprived of possession."

Rameshwar Singh v. Chunilal Shaha (2) cited with approval in *Maharajah of Pittapuram v. Gokul Doss Govardhan Doss* (3). I am satisfied that the likelihood is that the property will not be enough for the mortgage debt and that the appellant realizing this is trying to delay the realization of the debt as long as possible as it is profitable for him to do so. On the merits I am against the appellant. But it is urged that the plaintiffs in this case (mortgagees) have as declared in the preliminary decree given up their right to personal remedies against the mortgagors and are therefore not entitled to proceed against their other property for any deficiency that may arise on the sale and that in such circumstances the Court has no jurisdiction to appoint a receiver, as it amounts to allowing the plaintiffs

through the machinery of receiver to take what they have given up and are not legally entitled to get. If the appellant is entitled to succeed on this point my opinion on the merits does not matter. It is admitted before me that the plaintiffs have expressly given up in the lower Court all rights to a personal remedy: see para 5 of the preliminary decree. The learned advocates on both sides stated that they have not been able to find any direct decision. But *Venkata Raja Gopala Surya Row v. Bastvi Reddy* (4) appears to me to contain a direct decision, though the opinion of the learned Judges on the point was in conflict. I have therefore to examine the matter on principle. The appellant's argument is that where the mortgagor, as in the case of all simple mortgages in India, is lawfully in possession and is under no personal liability to pay the debt either by the terms of the instrument or otherwise and the decree preliminary or final does not contemplate the enforcement of any personal liability for any deficiency that may arise on the sale, the income of the property till the judicial sale belongs lawfully to the mortgagor and cannot be proceeded against for the decree because it is not part of the security and ex hypothesi the plaintiff is not entitled to go against anything else but the security. To appoint a receiver on the plaintiff's application in such a case is either to enlarge the security or proceed against the other property of the mortgagor, neither of which the Court has any right to do.

Since the decision of Kumaraswami Sastri, J., in *Ethirajalu Chetti v. Rajagopalachariyar* (5) which he followed the next day in respect of a simple money claim (*Nedungadi Bank Ltd., Madras v. Official Assignee, Madras*) A. I. R. 1929 Mad. 184 at p. 186, it may be taken to be the view of this Court agreeing with that of the Calcutta, Bombay, Rangoon and Lahore High Courts that at least in a case where the mortgagor is personally bound to pay the debt in a simple mortgage and either he has defaulted to pay the interest while enjoying the property or the property has diminished in value so

1. (1911) 12 I C 165.

2. A I R 1920 Cal 545=56 I C 839=47 Cal 418.

3. A I R 1931 Mad. 626=133 I C 504=54 Mad 565.

4. A I R 1915 Mad 133=26 I C 986.

5. A I R 1929 Mad 188=115 I C 244=52 Mad 979.

as not to be sufficient to satisfy the whole debt, the mortgagee may in a suit on the mortgage obtain a receiver for taking the rents and profits of the mortgaged property and paying them into Court for the benefit of the mortgagee and so deprive the mortgagor of possession even before the sale. The same would, of course, be the case if the mortgagor is wasting or damaging or not taking due care of the property. Therefore I am not prepared to follow the view of the Allahabad High Court that execution by way of receiver is totally inadmissible in execution of mortgage decrees: *Makhan Lal v. Mushtaq Ali* (6). But can a receiver be appointed and the mortgagor be deprived of possession before the Court sale where there is no personal covenant on his part to pay or where it has become barred or where, as in this case, the plaintiff has deliberately given it up and therefore the decree does not and cannot contemplate a personal decree for any deficiency found at the sale? I can find nothing in principle to support this unless it be held that in a simple mortgage in India the security extends not merely to the corpus of the property but its future income.

The future income of property is capable of being mortgaged by a simple mortgage just like the corpus. The mortgage in *Sri Raja Papamma Rao v. Vira Pratapa H.V. Ramachandra Raju* (7), was one of this character:

"One possessed of land may grant the fruits which shall arise upon it and the property shall pass as soon as the fruits are in being: Fisher on Mortgagee End. 7, p. 49.

I know of recent cases where on the ground of the income being included in the mortgage, the simple mortgagee was held entitled to the benefit of decrees obtained by the mortgagor for rent on the property in preference to simple money creditors. Phillips, J., and I so held in *A. A. O. No. 418 of 1927*. But where the income is not expressly included in the security, all that a simple mortgage comprises as security is the corpus. In applying English decisions on the appointment of receivers in mortgage suits the great differences between the English and Indian systems of mortgage must not be lost sight of. For

Indian lawyers a detailed and thorough knowledge of the old English system and of the great changes in it brought about in theory and practice by the important legislation of 1925 is not easy or indeed necessary to acquire. But the most important differences in the best known forms of mortgage in England are enough to justify the caution. The legal mortgagee's right to possession which followed from his legal ownership according to the old theory and practice of conveyancing is preserved to him under the new Law of Property Act (1925) which however confers the legal ownership on the mortgagor (S. 87) and a similar right now belongs to holders of a legal charge and of a registered charge: see Fisher on Mortgages 7th Edn. 376. It was on the analogy of a legal mortgagee that an equitable mortgagee who as such was not entitled to and had no means of taking possession was accorded a receiver as a means of realizing his security: Kerr on Receivers p. 35. In practice now both kinds of mortgagees are accorded a receiver under the same conditions and almost as a matter of course. Again a personal covenant to pay is either expressed or implied in every mortgage. For every mortgage implies a loan, and every loan implies a debt for which the borrower is personally liable though he has entered into neither bond nor covenant for payment of it: Fisher p. 349. But where there is no personal covenant express or implied as in a mortgage of a public undertaking the lender can only recover from the security mortgaged, i.e., the undertaking and has no right to sue the corporation or proceed against any other property: Fisher p. 350. In India the right to possession is expressly conferred only on usufructuary mortgages and some anomalous mortgages like kanom and may also in theory be exercised by English mortgagees and mortgagees by conditional sale. Neither a simple mortgagee nor mortgagee by deposit of title-deeds has such right; but there is a covenant for payment in both; express in the former, implied in the latter. In all cases of receiver in India which I have come across, either the personal liability of the mortgagor existed or was assumed or the mortgagee was entitled to take or treat the income as part of the security.

6. A I R 1927 All 419=100 I C 795.

7. (1896) 19 Mad 249=23 I A 32=7 Sar 10 (PC)

In the simple mortgage now in question the plaintiff is neither entitled to a charge on the income nor has he reserved his right to a personal decree. Nor has the learned Judge upheld the allegation that the appellant is wasting or damaging the property or not taking due care of it. All that we have is that while the interest is mounting up, the corpus of the property is steadily becoming more and more insufficient to pay off the whole debt and the appellant is enjoying the rents and profits without paying even the sum which he undertook with the mortgagors to pay to the mortgagee. In brief the receiver is not required to preserve the property, as the property is being properly preserved. Nor is he required to realize the security because the security does not comprise the income. Nor can the income become liable to be seized because the mortgagors are not liable to pay the debt except from the security. I fail to see how it is just or convenient to seize a man's property which is not charged for a debt and for the payment of which there being no personal liability that property is not liable. In that respect I see no difference between the income of the mortgaged property and any other property of the mortgagor which the plaintiff cannot proceed against. As for the authorities certain remarks in *Khub Surat Koer v. Saroda Charan Guha* (1), already referred to are suggestive. That was an appeal from an order for appointment of a receiver in a mortgage suit. The mortgage was either an English mortgage or one by conditional sale as appears from the decree which was for foreclosure. After remarking that where there is a decree for sale a receiver will be appointed the learned Judge points out that in that case the mortgagee has obtained a decree for foreclosure which does not entitle him to recover even the costs of the litigation from the mortgagors personally, and that on the decree as it stands the only right of the mortgagee is to foreclose the mortgagors and to take the property in lieu of his dues on his security and that he is not entitled to the profits of the property. "Even if a receiver were appointed he could not apply the profits of the property for the benefit of the mortgagee." It seems to me that for reasons already stated that is the position here.

There is a remark in *Chockalingam Pillai v. Pichappa Chettiar* (8), which though made in other circumstances is not without application here. In that case a receiver had been appointed in a suit for specific performance of an agreement to execute a simple mortgage. It was urged and the Court adopted the contention that the Court will not by way of receivership do what it would not be entitled to do even by way of decree.

But the judgments of Oldfield and Sadasiva Iyer, JJ., in *Venkata Rajagopala Surya Row Bahadur v. Basivi Reddi* (4), are, though conflicting, directly in point. There had been a compromise decree against a minor on two mortgages. The minor brought a subsequent suit questioning the decree alleging fraud of his guardian and obtained an order staying the execution of the former decree. All chance of obtaining a personal decree for any deficiency which might occur at the sale was barred by limitation before the suit. The mortgaged property continued in the enjoyment of the debtor and the decree amount had swelled to about 10 times the value of the property. In these circumstances the mortgagee applied for and obtained an order for a receiver of the mortgaged property to collect the rents and profits. Oldfield, J., took the view that none of the decisions contains any reference to personal liability as the basis of appointment of a receiver. On the ground that the English and Indian decisions do not require the existence of any personal liability he upheld the order. As to this view it is to be observed that in *Weatherall v. Eastern Mortgage Agency Co.* (9) and *Eastern Mortgage and Agency Co. Ltd. v. Rakea Khatun* (10), two of the cases which the learned Judge thought to be in favour of the respondent, the former was a case of an English mortgage in the ordinary form and the latter was also a similar mortgage but in the form of conveyance to trustees for payment of interest and principal from the rents and profits. Thus in both cases the income had become part of the security and the receiver was appointed to realize the security for that reason. In *Khub Surat Koer v.*

8. A I R 1926 Mad 155=92 I C 599.

9. (1911) 9 I C 985.

10. (1912) 17 I C 202.

Saroda Charan Guha (1), which I have already noticed and to which Oldfield, J., also refers, a receiver was refused on the definite ground that according to the decree the profits of the property could not be used for the benefit of the mortgagee. Sadasiva Iyer, J., took the opposite view and held that unless either the income is charged for the debt, or where the income is not so charged there is a personal liability in satisfaction of which it can be seized, or except to preserve the corpus from destruction or waste by the mortgagor, a receiver cannot be appointed in a simple mortgage suit. He understood the decision in *Arunachalam Chettiar v. Manicka Varaher Desiker* (11) as illustrating his opinion that there must be the possibility of a personal decree before a receiver can be appointed in such a case. Of the above views I prefer that of Sadasiva Iyer, J., though I am free to confess as to the opposite view that it is very difficult to resist the appeal of a creditor in the circumstances of that case. As to that, the mortgagee's difficulty in that case arose from the execution of his decree being stayed and the stay being continued without taking any security for the loss caused by the delay.

In a recent decision, A. A. O. 445 of 1928 the present question was left open by Venkatasubba Rao and Reilly, JJ. But the learned Judges expressed doubts about the correctness of *Maharajah of Pittapuram v. Gokul Doss Goverdhan Doss* (3), so far as it held that when a receiver is appointed in a simple mortgage suit the mortgagee gets preferential rights to the income so taken by the receiver over other creditors and the Assignee in Insolvency. The remarks of Reilly, J., about applying English decisions to mortgages in India and his opinion that in the case of a simple mortgage a receiver should not be appointed unless the mortgagee has still a personal remedy in his debt against the mortgagor and that such a mortgagee cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties who have acquired rights on the equity of redemption support the view of Sadasiva Iyer, J. On the best consideration I can give, I think the lower Court had no power to ap-

11. (1909) 3 I C 437.

point a receiver in this case and that appointment must be set aside. In view of a possible appeal which I hope will be taken so that the point may be settled, the possession of the receiver will not be disturbed for one month from this day, and the receiver if he has taken possession must hand over possession after that period subject of course to any orders that may be passed by the appellate Court. The appellant must have his costs in this Court.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 451

CURGENVEN AND SUNDARAM
CHETTY, JJ.

Sivasubramania Thevar—Defendant
—Appellant.

v.

T. N. S. Theerthapathi — Plaintiff—
Respondent.

Appeals Nos. 59 and 157 of 1927, Decided on 14th February 1933, against decree of Sub-Judge, Tinnevely, in O. S. No. 17 of 1925.

(a) **Transfer of Property Act (1882), S. 117**—Agricultural leases are excluded by S. 117 but if in writing they should be registered—**Registration Act (1908), S. 17.**

Agricultural leases are excluded by S. 117, They can be made either orally or in writing, though if in writing S. 17, Registration Act, requires that they should have been registered.

[P 452 C 2]

(b) **Lease—Agricultural lease—Land leased by auction—Acceptance of bid effects oral contract of lease**

Where lands are leased by auction, by the acceptance of bid an oral lease can be completed unless the parties commit the lease to writing: 13 W. R. 4, Ref.

[P 452 C 2; P 453 C 1]

(c) **Evidence Act (1872), S. 65—Party not producing document in his possession should not be allowed to prove contents by secondary evidence.**

A party who does not produce a document which is in his possession should not be allowed to prove the contents by secondary evidence.

[P 453 C 2]

(d) **Evidence Act (1872), Art. 114, Illus. (g)**—Party suppressing document — Opposite party is entitled to make presumption in his favour.

Where a party in possession of a document suppresses it, the opposite party is entitled to make every presumption in his favour.

[P 454 C 1]

K. Rajah Ayyar and *K. Venkateswara Ayyar*—for Appellant.

Advocate-General and *L. S. Veeraraghava Ayyar*—for Respondent.

Curgenv, J.—The suit of which these appeals arise was brought by the Zamin-dar of Singampatti and three other

plaintiffs in the following circumstances. With the object of leasing certain home-farm lands within the zamindari for a term of seven years (Faslis 1331 to 1337) an auction was held in March 1921, the lease to go to the competitor who bid the highest lease amount. Defendant 1 (hereafter to be called the defendant) secured it for a sum of Rs. 9,000. Towards this amount he deposited Rs. 500 on 14th March and the balance was to be paid in five yearly instalments of Rs. 1,500 and a final instalment of Rs. 1,000. By March 1924 he had paid Rs. 6,500. The defendant was let into possession of the lands as from 1st July 1921, i. e., the commencement of Fasli 1331, and continued in uninterrupted possession until, as a result of proceedings taken by him in 1924, under S. 145, Criminal P. C., a receiver was appointed to harvest the crops and realize the sale proceeds. What had happened was that the zamindar, alleging a voluntary surrender by the defendant in May 1924, had leased the lands afresh to plaintiffs 2 to 4. In view of the situation thus created, the zamindar, and his new tenants filed the present suit praying for either a permanent injunction restraining the defendants from interfering with the plaintiffs' possession or, if it should be found that the defendants were in possession, for delivery; and further for a declaration that the plaintiffs were entitled to the sum of Rs. 5,600 deposited in Court by the receiver appointed in the possession proceedings. It was alleged in the plaint that the defendant's lease was only for one year. There were further allegations that the defendant, while in occupation of the land, had caused damage amounting to Rs. 4,000 to trees and to a tank, and that, to compound for his liability he had, as already stated, voluntarily surrendered the lease in May 1924. It was added that he was understood to be setting up a seven years' lease, and that even if true the lease was invalid, the document which purported to create it being unregistered. The defendant, in his written statement, traversed the allegations of fact in the plaint and maintained that the lease was for seven years, and was valid.

The findings at the trial were in the first place that so far from the plaintiff succeeding in establishing a lease for one year there was overwhelming evidence

that it was false, and that, subject to the question of its validity, the lease was for a term of seven years. The allegations of damage and of consequent surrender were also discredited. On the question of the validity of the lease however and the further question of the effect of part performance, the learned additional Subordinate Judge found for the plaintiff, and accordingly decreed possession. This decision is attacked by the defendant in A. S. 59 of 1927. In A. S. 157 of 1927 the plaintiff claims the sum realized by the receiver, a question which will only arise if the decision of the trial Court upon the main point is confirmed. Dealing then with A. S. No. 59, we may note to begin with, that the whole story of a year's lease of the defendant's acts of waste and damage, and of a voluntary surrender, has been here abandoned. We are now concerned only with the question whether the steps taken by auction and otherwise to let the property for seven years resulted in a valid lease. The law applicable to the case is clear. If the lease had fallen within the Transfer of Property Act it could only have been made, as S. 107 provides, by a registered instrument. But it was an agricultural lease, and such leases are excluded by S. 117. It could therefore have been made either orally or in writing, though if in writing S. 17, Registration Act, requires that it should have been registered. Admittedly there is no registered lease or agreement to lease. For the lease to be valid, then, it must be found that it originated in an oral contract.

The case for the appellant is that such an oral contract is to be found in the auction proceedings, terminating with the acceptance by the Dewan, on behalf of the zamindar of his bid of Rs. 9,000. If any written documents came into existence subsequently, he contends they did not embody the contract, which was already completed. Per contra the learned Advocate-General for the respondent has endeavoured to show that there was an intention common to the parties that a lease-deed should be executed, and that this intention was fulfilled. No attempt has been made to dispute the position that, if no proof is forthcoming that the parties committed the lease to writing, a completed oral contract of lease resulted from the acceptance by

the selling officer of the defendant's bid. If authority be needed for this proposition it is to be found in the Privy Council case *Sheo Lall Bohra v. Sheik Mahomed* (1) where some lands were sold by Government, and their Lordships held that

"in the sale the Government was exactly in the situation of an individual selling his property by auction; and when the property was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder."

So far as the sale of goods is concerned, this principle has been embodied in S. 64, Act 3 of 1930. A case bearing some resemblance to the present one is *Chitibobu Adenna v. Garimalla Jaggarayadu* (2). The Vizianagaram Samasthanam sold the occupancy rights in a jeroyiti land by auction to the defendants, and subsequently granted a cowle to the plaintiff, who sued in ejectment. It was held that the defendants' title was complete as soon as the land was knocked down and the contention that it could only be completed by an exchange of patta and muchilika was repelled.

The requirements of an oral lease being thus satisfied, we have then to see whether what would otherwise stand as such a lease has been replaced by some document which may be construed so far as its terms are concerned, as a lease in writing, and which would therefore render oral proof of the terms of the lease inadmissible under S. 91, Evidence Act, and would in its turn, being unregistered, fail to effect the contract or to be admissible in evidence of it, under S. 49, Registration Act. The learned Advocate-General offers three such documents, either alternatively or in combination, as fulfilling this requirement. They are (a) the auction list, (b) a muchilika which the defendant is said to have signed on the day after the auction, and (c) an agreement dated 15th June 1921 but not signed by the Dewan until 29th July. Only the last of these documents has been produced, by the defendant (Ex. 21). There is even some doubt whether document (b) came into existence at all; but assuming that it did, both it and the auction list have been withheld by the

plaintiff, and since no explanation has been offered in justification of this conduct we can only conclude that they have been suppressed because they would have fatally exposed the falsity of the case originally set up. In their absence the plaintiff has sought to establish their contents by secondary evidences, largely in the shape of admissions extracted from the defendant. It seems to us in the highest degree improper that such a method of proof should be allowed. The point has not been fully argued, but we can find no justification for such a course in S. 65, Evidence Act, and upon general principles a party ought not to be allowed to defeat his opponent by force of a document which he has in his possession and will not produce. The learned Advocate-General has sought to draw a distinction between the secondary evidence of the contents of a document and oral evidence to the effect that the bargain between the parties was committed to writing, and contends that he is entitled to use the latter kind of evidence and that it is enough for his purpose. Whatever may be the merits of this distinction, we are clear that that evidence is not enough for his purpose, and that unless we can ascertain with some close approach to accuracy and completeness what the two missing documents contain we cannot safely conclude that either, or both together, amounts to a lease deed. To take first the auction list, the defendant admits that he signed it.

In one place he says that it contained all the terms to be found in Ex. 21, and that he signed no other document. Later on he speaks of signing a muchilika on the day after the auction, and that, he says, was the document in which all the terms of the lease were embodied. "I thought that that muchilika was to be the sole record of the lease." From two of his witnesses, D. Ws. 3 and 4, was extracted the statement that the defendant signed a muchilika containing the terms of the lease. We are not prepared to act upon these statements, couched as they are in the most general terms, in the circumstances of the case. It is unnecessary to cite examples from the case law upon the subject in illustration of the difficulty which Courts have sometimes

1. (1870) 13 W R 4 (P C).

2. (1915) 29 I C 12.

felt in deciding. often after finding it necessary to make a close scrutiny of its terms, whether a given document, in the language of the Privy Council in *Subramanian v. Lutchman* (3), constitutes the bargain between the parties, or is merely the record of an already completed transaction. It is not even necessarily enough that the document should contain a complete recital of the terms, which is the most that can be derived from the statements of the witnesses. It may well be that, if these documents were examined, we should be led to the conclusion that the completion of the auction, and not they or one of them, marked the completion of the contract: see for example *Narain Coomary v. Ramkrishna Dass* (4) for an instance of this kind. The defendant is entitled to ask us to make every presumption in his favour, both because the objection taken is a technical one, not affecting the substantial justice of the case, and in view of the plaintiffs' conduct in suppressing these documents. We attach no importance to the argument that it is improbable that the parties should not have had a written instrument in contemplation, in face of the defendant's assertion that the Dewan assured him that registration was unnecessary since he held the zamindar's power of attorney. We are accordingly unable to find that the oral lease which was constituted by the acceptance of the defendant's bid was embodied either in the auction list or in the muchilika.

There remains the document, Ex. 21, signed by the Dewan. This is styled an agreement and opens with the recital: "You have settled the fixed lease (or rent) . . . at Rs. 9,000." It goes on to define some of the terms upon which the defendant is to hold the land. It may be that, if internal evidence alone were in question, it could be read as a lease-deed. But it was not signed by the Dewan until some four and a half months had elapsed since the auction, and by then the defendant had not only been for nearly a month in possession of the land but had also made a number of payments, see (Exs. 9 to 12), as lessee. Further, the argument dealt with above

that the lease had already been constituted by the earlier documents leaves little or no room for the contention that this is the instrument which created it.

We are accordingly unable to agree with the lower Court that the lease is invalid under S. 49, Registration Act, because it was a lease in writing. This finding is sufficient to dispose of the case, and the defendant has no need to resort to the doctrine of part performance, upon which some argument was addressed to us. We allow Appeal No. 59 and dismiss the plaintiffs' suit, with costs throughout. Appeal No. 157 by the plaintiffs is dismissed with costs of respondent 1.

P.R.S./K.S.

Order accordingly.

* A. I. R. 1933 Madras 454

PANDALAI, J.

Municipal Council, Calicut—Plaintiff
—Petitioner.

v.

Thazhel Puthan Purayil Kunhipathumma and another—Defendants —
Opposite Parties.

Civil Revn. Petn. No. 1212 of 1929,
Decided on 14th October 1932, from
order of Dist. Munsif, Calicut, in S. C. S.
No. 495 of 1928.

* Civil P. C. (1908), O. 1, R. 10—Suit filed
against dead person—Application to bring
legal representative does not lie—Even if
Court wrongly allows application S. 14, Limi-
tation Act, does not apply—Limitation Act
(1908), S. 14.

Where a plaint is filed against a person who
is in fact dead at the time of presentation, no
application by way of amendment or bringing
on record legal representatives can be validly
made because the whole proceeding is void and
has no effect whatever : 16 *Mad* 319; 31 *Mad*
86 ; (1928) *M W N* 240 and *A I R* 1914 *Cal* 895,
Ref. [P 455 C 2]

And where a Court wrongly allows such an
application and the plaintiff seeks to deduct the
period between the filing of the plaint and the
order of the Court allowing the legal represen-
tative to bring on record so as to bring his suit
within time, S. 14 can have no application as
there are no two proceedings but only one : 12
W R 45, *Expl and Dist.* [P 455 C 2]

K. Kuttikrishna Menon—for Peti-
tioner.

K. P. Ramakrishna Ayyar—for Oppo-
site Parties.

Judgment.—The Municipal Council of
Calicut brought a suit on 10th March
1928, against the original defendant,
Kunhimussa, for recovery of property
tax for the year ending 31st March 1925.
When the summons was taken out it ap-

3. *A I R* 1929 P C 50=71 I C 650=50 I A 77
=50 *Cal* 338=1 *Rang* 66 (P C).

4. (1880) 5 *Cal* 864=6 C L R 286.

peared that Kunhimussa had died on 22nd March 1928. On 21st April the plaintiff applied under O. 1, R. 10, to have the legal representatives of Kunhimussa impleaded, and that application was allowed on 6th June 1928. The widow and son of Kunhimussa who are now on record pleaded that the suit was barred by limitation against them under S. 22, Limitation Act. The plaintiff replied that he was entitled, in computing the period of limitation, to a deduction of the period between 10th March 1928 and 6th June 1928 when his suit against Kunhimussa which was infructuous as he had died before suit must be held to have been pending. The District Munsif did not accept this plea and held that the suit was barred by limitation and dismissed it. That is the only question in this petition.

The decision in *Mohun Chunder Koondoo v. Azeem Gazee Chowkeedar* (1), pronounced in 1869 by Sir Barnes Peacock, Kt., C. J., and Mitter, J., is relied upon for the petitioner. In that suit the plaint was filed on 18th February 1866 on the bond dated 11th March 1865, against the obligor who it appeared later had died a year before the institution of the suit. Thereupon the plaintiff applied under S. 104 of the then Civil P. C., Act 8 of 1859, to bring on the record the legal representatives of the obligor as upon his death. The Judge of the Small Cause Court declined to allow this as the legal representatives pleaded limitation but at the request of the plaintiff's pleader submitted the case to the High Court. The Court held that the defendant in the original suit having died before the filing of the plaint against him, the Court had no jurisdiction to decide upon the case. But it added :

"Under these circumstances, the time during which the suit was being prosecuted bona fide and with due diligence against the dead man may be deducted in calculating the period of limitation against his representatives;"

and it was left to the Judge to determine whether the plaintiff had been prosecuting his suit bona fide and with due diligence. That decision was given on S. 14 of the then Lim. Act, Act 14 of 1859. By that section :

"in computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims,

1. (1869) 12 W R 45=3 Beng L R 233.

shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, bona fide and with due diligence. . . . shall be excluded from such computation."

It will be noticed that the words were "engaged in prosecuting a suit." The corresponding words of S. 14 of the present Limitation Act, are "prosecuting with due diligence another civil proceeding." The difference conveys that there should be two proceedings and that in the second proceeding the period during which the first was being prosecuted may be deducted. In this case there were no two proceedings. There was only one and that was by the plaintiff's own choice; because instead of allowing the first suit to be dismissed he asked the Court to bring on the record the supposed legal representatives of a person who was never on the record. It may be noted that in making this application the plaintiff, and in granting it the Court, were both entirely wrong. Of the numerous decisions on the subject it is sufficient to refer to *Mallikarjuna v. Pullayya* (2), *Veerappa Chetty v. Tindal Ponnen* (3) and *Chidambaram Chettar v. Narayanaswami Ayyar* (4). To the same purport is the Calcutta decision in *Bejoy Chand v. Amulya Charan* (5). All these cases show that where a plaint is filed against a person who is in fact dead at the time of presentation no application by way of amendment or bringing on record legal representatives can be validly made because the whole proceeding is void and has no effect whatever. That being so I do not see how the Court's error in making a wrong order is to be utilized to invoke S. 14, Limitation Act. The decision of the District Munsif was right and the petition is dismissed with costs.

P.R.S./K.S. *Petition dismissed.*

2. (1893) 16 Mad 319.

3. (1909) 31 Mad 86.

4. (1928) M W N 240.

5. A I R 1914 Cal 895=24 I C 112.

* A. I. R. 1933 Madras 455

BEASLEY, C. J. AND BARDSWELL, J.

Venkatesha Kamathi—Petitioner.

v.

Vitla Bhakta and another—Opposite Parties.

Civil Revn. Petn. No. 62 of 1929, Decided on 17th February 1933, from order of Sub-Judge, South Kanara, in Civil Miscellaneous Appeal No. 17 of 1927.

* Civil P. C. (1908), O. 21, R. 90—Person having attachment before judgment and getting decree subsequently has pecuniary interest and is person whose interests are affected by sale within O. 21, R. 90.

A person "whose interests are affected by the sale" can be a person whose pecuniary interests are affected by the sale. These words are not restricted only to persons whose proprietary interests are affected.

A person who has obtained an attachment before judgment and afterwards get a decree is a person whose pecuniary interests are affected and is entitled to apply to have the sale held in execution of a decree by another set aside under O. 21, R. 90. [P 456 C 1]

K. Y. Adiga—for Petitioner.

R. P. Sarvothama Rao—for Opposite Parties.

Beasley, C. J.—The only point for consideration here is whether a decree-holder who had before decree attached the judgment-debtor's property or some of it comes within O. 21, R. 90, Civil P. C. It is conceded that the decree-holder was not the decree-holder in the suit in which the property was brought to sale, nor was he a person entitled to share in a rateable distribution of the assets because he had not put in an execution application. But the question is whether he is a person whose interests are affected by the sale. If his interests are affected by the sale, he may apply to the Court to set aside the sale. That is what respondent 1 did in this case. He got an attachment before judgment and subsequently got a decree in his favour. The passing of the decree confirmed his attachment. At the time when he made the application under O. 21, R. 90, Civil P. C., the property had been attached and he had a decree in his favour. The property was brought to sale by a decree-holder in another suit and sold and then the application was made to set aside the sale. Both the District Munsif and the lower appellate Court held that respondent 1 came within O. 21, R. 90, Civil P. C., and on the merits set aside the sale for the reasons given in their judgments. It is conceded here that a person "whose interests are affected by the sale" can be a person whose pecuniary interests are affected by the sale and that those words do not mean proprietary interest only. That having been conceded, what we have to consider here is whether a person who obtains an attachment before judgement and who afterwards gets a decree is a person who has a pecuniary interest. In

my opinion, he clearly is. It had been held in a number of cases that a decree-holder who attaches in execution is a person who has pecuniary interest and is a person who is within O. 21, R. 90, Civil P. C. I cannot myself see that a person who has got an attachment before judgment and who subsequently gets a decree is in any different position from a person who has attached in execution. If there is any difference at all, it lies in the fact that the person who has attached the property in execution has taken a step in execution which the other person has not taken; but in both cases, the property is already under attachment for the purpose of satisfying the decree. I am clearly of the opinion that such a person as that is a person whose interests are affected by the sale. That being so, this petition is dismissed with costs.

Bardswell, J.—I agree.

P.R.S./K.S. *Petition dismissed.*

* * A. I. R. 1933 Madras 456 Full Bench

RAMESAM, ANANTAKRISHNA AYYAR
AND CORNISH, JJ.

Muthalakkammal—Defendant — Appellant.

v.

Narappa Reddiar — Plaintiff — Respondent.

Appeal No. 376 of 1929, Decided on 6th January 1933, from order of Sub-Judge, Tuticorin, D/- 19th February 1929.

* * Civil P. C. (1908), O. 32, R. 7 — Applicability to execution proceedings.

Order 32, R. 7, Civil P. C., applies to execution proceedings: *Case law reviewed.*

[P 457 C 1]

K. V. Sesha Ayyangar — for Appellant.

B. Somayya for *P. Vedachala Iyer* — for Respondent.

Judgment.—The decision in *Arunachalam Chetty v. Ramanathan Chetty* (1) was in accordance with the earlier decision in *Virupakshappa v. Siddappa* (2), though the latter decision was not actually cited. In the latter case, Sir Lawrence Jenkins, C. J., and Chandavarkar, J., held that proceedings in execution are proceedings in suits and that the compromise of such a proceeding is a compromise with reference to the suit.

1. (1906) 29 Mad 809.

2. (1902) 26 Bom 109=3 Bom L R 565.

These decisions were followed in this Court in *Davud Rowther v. Paramasami Pillai* (3). In *Fani Bhusan v. Surendra Nath Das* (4), the rules of O. 32, Sch. 1, Civil P. C., which were in question were Rr. 1, 3 and 11 and the decision did not turn on the applicability of O. 32, R. 7. The same remarks apply to *Rakhal Chandra De v. Kumidini Debya* (5) and *Bansi Dhar v. Sulaiman* (6). In *Ram Gulam Sahu v. Sham Sahai Das* (7) the learned Judges did not give a final opinion as to the applicability of O. 32, R. 7 in execution, but held that, if it did not apply, the principles of it would apply. We do not think that the authority of *Arunachalam Chetty v. Ramanathan Chetty* (1), *Virupakshappa v. Siddappa* (2) and *Davud Rowther v. Paramasami Pillai* (3), is shaken by *Arunachalam v. Veerappa Chettiar* (8). It is unnecessary to refer in detail to certain other Madras cases cited by the learned advocate for the appellant as they relate to transfer of decrees. We are therefore of opinion that O. 32, R. 7, Sch. 1, Civil P. C., applies to execution proceedings.

The learned advocate for the appellant now applies to us for sanction of the adjustment. The respondent opposes this on the ground that the award, and the decree on the award are collusive. The Subordinate Judge will now enquire into the question whether the adjustment is a proper adjustment and dispose of the matter according to law. Costs will abide the law.

P.R.S./K.S. Order accordingly.

3. (1916) 35 I C 70.
4. A I R 1921 Cal 476=64 I C 25.
5. A I R 1927 Cal 930=104 I C 357.
6. A I R 1926 Lah 490=97 I C 181.
7. A I R 1920 Pat 750=62 IC 234=5 PatLJ 379.
8. A I R 1931 Mad 656=134 I C 806=55 Mad 17 (F B).

* A. I. R. 1933 Madras 457

MADHAVAN NAIR AND JACKSON, JJ.

(Koppula) Kotayya Naidu and others—
Defendants—Appellants.

v.

Chitrapu Mahalakshamma—Plain-
tiff—Respondent.

Appeal No. 7 of 1927, Decided on 25th January 1933, against decree of Dist. Judge, Kistna, in original Suit No. 4 of 1926.

* Civil P. C. (1908), S. 66—Property conveyed at revenue sale benami for effecting

fraud—Fraud committed—Property sold by benamidar to third party—Real owner cannot set up benami as defence to suit by third party—Benami, fraud.

The suit property originally belonged to A. At a revenue sale the property was purchased by B, but A still continued in possession. Later on R, the son of A's brother, brought a suit for partition and recovery of half share of the family property against A. In this suit the contention raised by R that the sale of the suit land to B was benami was denied by A. This suit was compromised. Subsequently B sold the property to C who brought the present suit for recovery of the property from A and B. In this suit the case of A was that the purchase by B was benami for himself, the main object of the benami sale being to defeat the then anticipated claim for partition by R.

Held : that the test to be applied in such cases was that that party must fail who first has to allege the fraud in which he participated, that public policy would be best served by following the rule that a man should not be allowed to plead his own fraud and that in the circumstances of the case it was not open to A to plead his own fraud as a defence to C's suit: 43 IC 352, *Foll on principle of stare decisis*; AIR 1925 Mad 1016, *Appl.*; AIR 1932 Lah 503 (FB), *not Foll.* [P 459 C 1, 2].

P. Somasundaram—for Appellants.

Ch. Raghava Rao—for Respondent.

Madhavan Nair, J.—Defendants 1 to 3 (father and two sons) are the appellants. The suit property originally belonged to defendant 1 and defendant 4 had a mortgage over it. From the evidence it appears that a portion of it belonged to one Sitayya Naidu, another son of defendant 1, but no such distinction has been made in the suit and it is not necessary to refer to it any further. At a revenue sale on 8-5-1918 the property was purchased by defendant 4 for Rs. 762 in the name of his clerk. The case of the appellants is that this purchase by defendant 4 was benami for themselves, the main object of the benami sale being to defeat an anticipated claim for partition from one Ranganayakulu Naidu, the son of defendant 1's brother. Though the property was sold, admittedly the appellants continued in possession; but according to defendant 4, it was thenceforward as his tenants whereas the appellants contend that it was because the real title vested in them. Later on, 6 acres out of this property were sold by defendant 4 to defendant 1's daughter Chittamma for Rs. 1,000. The appellants allege that this sale was for the purpose of reimbursing Chittamma for the money which she lent for the purchase at the auction. Ranganayakulu brought a suit, O. S. No. 42 of 1922, for

partition and recovery of a half-share of the family properties. That suit was directed against the present suit property and another 20 acres sold to one Chelamayya. In that suit the contention was raised by the plaintiff that the sale of the suit land to defendant 4 was benami, but this was denied by the present defendants. After some evidence had been taken in the suit it was compromised on 25th January 1924, as a result of which Ranganayakulu Naidu received 7 acres, 5 acres of which form portion of the suit property. Subsequently, on 5th August 1924, defendant 4 sold the remaining property to the plaintiff for Rs. 4,000 under the sale deed Ex. H, and the present suit was instituted by her for recovery of the property from the defendants.

The defendants denied that defendant 4 had any title to the suit property as it was purchased by her benami for themselves. The plaintiff disputed the benami purchase contending that defendant 4 purchased it for himself. It was also contended by the plaintiff that in the circumstances of the case it was not open to defendants 1 to 3 to raise the plea that the property was purchased benami by defendant 4. Issue 2 in the case related to these contentions. The learned District Judge upheld the contention of the appellants that the property was purchased benami for them by defendant 4, but he declined to give effect to this finding because he held that defendant 1 defrauded Ranganayakulu of some portion of the suit property by setting up the false plea that the property belonged to defendant 4 as a result of the auction purchase. Having been party to a plea of fraud which was successfully carried out, the learned Judge came to the conclusion that it was not open to the defendants to raise the contention that the purchase of property by defendant 4 at the auction sale was benami for them. It was held in *Kamayya v. Mamayya* (1), that a person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the convey-

ance. Following this decision the learned Judge decreed the claim of the plaintiff.

On behalf of the appellants Mr. Somasundaram, accepting the finding that the purchase by defendant 4 was benami for the appellants, argues that no fraud was committed by them in O. S. No. 42 by raising the plea that defendant 4 became the owner of the land by the auction purchase, and that even if a fraud has been committed, since both defendant 4 and the appellants were parties to the fraud, the lower Court should have dismissed the plaintiff's suit. The latter argument raises the question whether *Kamayya v. Mamayya* (1) was correctly decided. Mr. Raghava Rao on behalf of the respondent, besides supporting the judgment of the lower Court on the ground on which it is based, argues further that the learned Judge should have held that the purchase by defendant 4 at the revenue sale was not benami for the appellants but it was for himself. Thus the points arising for consideration in this appeal are; (1) whether the purchase of the suit property at the revenue auction by defendant 4 was benami for the appellants; (2) whether by raising the plea that the property was sold to defendant 4 at the revenue sale the defendants as a matter of fact defrauded Ranganayakulu, the plaintiff in O. S. No. 42 of 1922; and (3) whether in the event of our upholding the findings of the District Judge, effect should not be given to the decision in *Kamayya v. Mamayya* (1). (After considering the evidence, his Lordship held on point 1 that he was unable to agree with the contention that defendant 4 must have purchased the property for himself and on point 2 that the plea of defendant 1 in O. S. No. 42 of 1922 was intended to defraud the plaintiff in that suit and he was without doubt defrauded) Point 3. The next question is whether it is open to the defendants to plead their own fraud as a defence to the present action. The plaintiff as having purchased the property from defendant 4 may be treated as being in the same position as defendant 4 for deciding this point. Mr. Somasundaram argues that the appellants and defendant 4 having been parties to a fraud which has been carried out, the maxim *in pari delicto potior est conditio possidentis* will apply and that the plaintiff's suit should be dismissed. But in

1. (1917) 43 I C 352.

Kamayya v. Mamayya (1) it has been held that even though the plaintiff may have been a party to the fraud the defendant will not be permitted to plead his own fraud as a defence to an action against him. The test given in the case is that that party must fail who first has to allege the fraud in which he participated. It is clear if we apply this test in this case the appellants must fail. The appellants argue that the decision in *Kamayya v. Mamayya* (1) is wrong, that it has not been approved of in other Courts and that before deciding this case we must take the opinion of a Full Bench on the question whether *Kamayya v. Mamayya* (1) has been correctly decided. In this connexion our attention has been invited to the very recent decision in *Qadir Baksh v. Hakam* (2).

As may be seen from that judgment, the law seems to have been differently construed in other Courts. But so far as our own Court is concerned, the decision in *Kamayya v. Mamayya* (1) has been consistently followed in a series of decisions. *Kamayya N. Mamayya* (1) was a decision by Sir John Wallis, C. J., and Coutts-Trotter, J., as he then was. This decision was followed by Sir Walter Schewabe, C. J., and Coutts-Trotter, J., in *Parthasarathi Reddiar v. Kandaswami Mudaliar* (3) and was again followed in *Ramaswami Naicker v. Alamelu Ammal* (4) by Coutts-Trotter and Ramesam, JJ. *Panchayammal v. Devanaiammal* (5) is the next decision of this Court where *Kamayya v. Mamayya* (1) was followed by Waller, J. This decision is interesting as in it the view now urged by Mr. Somasundaram was specifically put before the learned Judge and the Calcutta decision in *Raghupati v. Nrishingha* (6) in support of it was also brought to his notice. The Lahore case had not then been decided. Though he was aware that there was a considerable body of authority in favour of the view that the defendant is entitled to show the real nature of the transaction as against a confederate in the fraud, the learned Judge still preferred to follow the decision in *Kamayya v. Mamayya*

(1) as in his view the principle embodied in that decision was more effective in minimizing fraud than the other view. In this connexion attention may be drawn to the following observations:

"The question is one of public policy, and I think that public policy will be best served by following the rule that a man should not be allowed to plead his own fraud. As Sir Lawrence Jenkins showed in the Bombay case, it is the rule which will be most apt to deter persons from frauds of this kind. It is the fraudulent grantor, who expects to extract the entire or the main benefit from the fraud. And if he realized that the law will give him neither a remedy nor a defence against his confederate, the temptation to commit the fraud will be minimized."

The decision in *Kamayya v. Mamayya* (1) by the then Chief Justice and himself was followed by Coutts-Trotter, J., after he became Chief Justice in *Subbaraya Chetty v. Subbaraya Chetty* (7); and *P. Narayanamurthi v. K. Chandrayya* (8) by Waller, J., is the latest decision of this Court on this point. In that case also *Kamayya v. Mamayya* (1) was followed. Having regard to this strong current of authority in our Court in support of the decision in *Kamayya v. Mamayya* (1) and the absence of any conflict of views, we do not think we will be justified in referring it for a fresh consideration before a Full Bench. Following *Kamayya v. Mamayya* (1) we would therefore hold that in the circumstances of the case it is not open to the appellants to plead their own fraud as a defence to the plaintiff's suit. The appeal therefore fails and must be dismissed with costs. The Government will be entitled to realize their costs from the appellant. The memorandum of objections is for costs only. It is dismissed with costs.

Jackson, J.—I agree that there should be no departure from the rule of law set forth so clearly in *Kamayya v. Mamayya* (1). This may involve some divergence from the law as understood in Northern India, but the Madras practice in my opinion accords with what should be the public policy of this presidency. In fact so far from extending the scope of benamidars, by allowing them first to cheat their victim and then come again into Court with the story that the previous case was false, I should prefer to see benami transactions altogether forbidden, and I consider that this Presi-

2. A I R 1932 Lah 503 = 139 I C 17 = 13 Lah 713 (F B).

3. A I R 1923 Mad 711 = 73 I C 954.

4. A I R 1924 Mad 604 = 78 I C 921.

5. A I R 1925 Mad 1016 = 91 I C 776.

6. A I R 1923 Cal 90 = 71 I C 1.

7. A I R 1926 Mad 1196 = 98 I C 384.

8. A I R 1927 Mad 790 = 102 I C 835.

dency, whatever may be the condition of the less literate parts of India, is now ripe for such legislative action. The treatment of this question by the Civil Justice Committee of 1924-25 was most unfortunate. All the members of the Committee were agreed as to the evils of the benami system, which it denounced in terms both forcible and true. But three of the members considered that the proposed legislation, (preventing any plea short of fraud that the documentary evidence of title is a sham) should not be introduced unless it resulted in the abandonment of the practice within a reasonably short time. Apparently the dissident members envisaged Indians still putting property under fictitious titles and pleading that they had never heard of the new law. Such a fear would be quite groundless in this presidency, and if that fear were removed, the Committee was prepared unanimously to recommend the abolition of benami transactions. It is unnecessary to detail the advantages of such a measure which are fully set forth in the Committee's report. But apart from the resultant benefits to public morality—restricted scope for perjury when registered documents are regarded as conclusive evidence—restraint upon excessive borrowing in the hope of concealing assets, and restraint upon inordinate rates of interest in the knowledge that assets may be concealed, there is a practical advantage which in these times cannot be ignored. Under the present system a greater number of suits is being admitted than can possibly be decided within a reasonable time; and financial stringency precludes the increase of Courts. The remedy must therefore lie in restricting the field of litigation, and that can best be done by making the creation, assignment or extinction of title still more dependent upon registered documents to the exclusion of oral evidence.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 460.

WALSH, J.

(*Thayyil Puthia Purayil*) Ambukutti Vaidier—Plaintiff—Appellant.

v.

Kannoth Koottambath Kelan—Defendant—Respondent.

Appeal No. 1 of 1932, Decided on 3rd January 1933.

(a) Practice—Civil Miscellaneous Appeal can be argued only on question of law.

Civil miscellaneous appeals stand on the same footing as second appeals with regard to their being arguable only on question of law: *AIR 1926 Mad 475, Ref.* [P 460 C 2]

(b) Malabar Tenancy Act (14 of 1930), S. 33—Tenant occupying house built on land for ten years can avail of section.

A tenant who has been occupying a house built on land for ten years can avail himself of S. 33 even though his occupation has not been in conformity with the original terms of the lease. [P 460 C 2]

O. T. G. Nambiar and A. Achuthan Nambiar—for Appellant.

K. Kuttikrishna Menon—for Respondent.

Judgment.—Though this appeal is tried as a civil miscellaneous Appeal, the decision in *Seshammal v. Kuppanaiyangar* (1), shows that such appeals stand on the same footing as second appeals with regard to their being arguable only on question of law. It is not therefore open to the appellant to contest the finding of fact that the site round the house in question is necessary for and has been used for the convenient enjoyment of the residence. It certainly cannot be said in the light of the Commissioner's plan that there is no evidence for such a finding of fact. On the north and south of the house there is only a narrow strip of land, the distance between the southernmost extremity of the building and the southernmost boundary is only 1 and 3/4 koles and the distance between the northern verandah and the northern boundary is 4½ koles out of which a portion has to be deducted for the yard of the house. The fact that the tenant may have built a larger house on the property than he was allowed to build by the marupat of 1894 is of no avail if he comes within the specific words of S. 33 of the Act (Malabar Tenancy Act). It is admitted that he has been occupying the house in question for 10 years and there is no qualification in S. 33 which says that he cannot avail himself of this section if his occupation has not been in conformity with the original terms of the lease. In these circumstances I see no reason to allow this appeal which is dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 461 (1)

BURN, J.

Narayanawamy Padayachi and another—Petitioners—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 590 and 600 of 1932, and Criminal Revn. Petns. Nos. 546 and 556 of 1932, Decided on 3rd November 1932, from order of Subdivisional Magistrate, Mayavaram, in Criminal Appeals Nos. 38 and 37 of 1932.

Criminal P. C. (1898), S. 188, Proviso 1—Mere dishonest retention of stolen property in foreign territory—Certificate of Political Agent is necessary for trial.

Where the accused is charged with mere dishonest retention of stolen property in foreign territory, certificate of the Political Agent is necessary under S. 188, Proviso 1 and a trial without such certificate is without jurisdiction. [P 461 C 1]

R. Somasundaram Ayyar and V. Rathinam—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The objection that the trial was barred under the first proviso to S. 188, Criminal P. C., for want of the certificate of the Political Agent for Karaikal appears to me to be sound. As against the accused 1 (petitioner in Criminal R. C. No. 600 of 1932) there was evidence that he was seen near the place from which the buffalo was stolen (in British territory). If the learned Sub-Magistrate had held that his possession in French territory afforded a ground for presuming that he had committed the theft in British territory, S. 188, proviso 1 would have had no application. But the learned Sub-Magistrate convicted both the accused merely for dishonest retention, and the only evidence of retention was of retention in French territory. This is I think precisely one of the cases which Prov. 1, S. 188, Criminal P. C., was intended to meet. The trial was therefore without jurisdiction. I set aside the conviction and sentences and direct that the bail bonds executed by the petitioners be cancelled.

P.R.S./K.S.

Conviction set aside.

A. I. R. 1933 Madras 461 (2)

CURGENVEN, J.

R. P. O'Hearn, Petitioner, *In re.*

Criminal Revn. Case No. 710 of 1932 and Criminal Revn. Petn. No. 663 of 1932, Decided on 8th November 1932, from order of Third Presidency Magistrate, Egmore, D/- 26th August 1932.

Madras Local Authorities Entertainments Act (20 of 1927), S. 6 — Tickets sold for value of more than four annas — Defence that excess over four annas was to go towards accessory expenses held unsustainable.

The petitioner got up a dance. Tickets for this dance were to cost 12 annas for a gentleman and eight annas for a lady and were purchasable at a certain place and if tickets were bought at the door at the time of the entertainment they were to cost one rupee. The petitioner was convicted under S. 6 of not complying with the terms of S. 4. His defence was that the cost of admission to his entertainment was no more than four annas and that the rest of the cost of the tickets was to go towards certain accessory expenses which the affair committed him to :

Held : that such a defence cannot be upheld for a moment. [P 461 C 2; P 462 C 1]

T. S. Anantaraman for the Crown
Prosecutor—for the Crown.

Order.—The petitioner got up a dance which he advertised in the "Madras Mail" on 13th April last (Ex. I-A). Tickets for this dance were to cost 12 annas for a gentleman and eight annas for a lady and were purchasable at a certain place in Madras, and if tickets were bought at the door at the time of the entertainment they were to cost one rupee. I do not think there is any doubt that a perusal of this advertisement shows that these were the sums which were chargeable for the tickets themselves. The tickets that were issued were not stamped with any embossed or adhesive stamp showing that any tax had been paid, as is required by S. 4, Madras Local Authorities Entertainments Act, and accordingly the petitioner has been convicted under S. 6 of not complying with the terms of S. 4 and has been sentenced to pay a fine of Rs. 30 together with the amount of the tax. His defence is that the cost of admission to his entertainment was no more than four annas and that the rest of the cost of the tickets was to go towards certain accessory expenses which the affair committed him to. If a ticket costs no more than four annas it is exempt from tax under S. 3 (2) of the Act. The lower Court has not accepted this

position and I am unable to say that it is wrong in the view which it takes.

An examination of the tickets shows that to all appearances they were sold for the sums already specified, and the various components which the petitioner would now say formed part of those sums were not expressly stated. Nor do I think that if they had been so stated the position would have been really different. Such things as programmes, seating accommodation, lighting, ventilation by electric fans, etc., if they are provided to persons who frequent entertainments, must necessarily be regarded as accessories to those entertainments and included in the price of the tickets which give admission to it, and it seems to me that the Act could be very easily evaded if the purveyor of an entertainment were himself to fix the amount at which he valued admission to it and then to tack on to it a number of other charges which the persons admitted would have to pay but which would not be liable to the assessment of the tax. Such a position of course cannot be upheld for a moment. I find accordingly that the lower Court has applied the law in the only reasonable manner to the facts of the case and that there is no ground for revising its order upon that score. As regards the amount of the tax levied, there was the evidence of the assessing officer, P. W. 1, that 82 persons, comprising 47 gentlemen and 35 ladies, attended the entertainment, which would make up the amount levied from the petitioner. His own evidence consists in producing the unsold tickets and the retained portions of those that were sold. I am unable to say that the lower Court was not justified in refusing to accept evidence of that character as conclusive.

As regards the amount of the fine it is pleaded that what was done, was done in ignorance of how the law stood, but I cannot find that the petitioner took any sufficient steps to ascertain the correct course, and his letter to the Revenue Officer expressing his intention of charging only four annas for admittance, the remainder being for incidental charges, was written only on the 13th, two days before the Ball and did not reach the addressee until two days later. The reply to that letter was delivered to the petitioner on the 15th asking him for

certain particulars and saying that on receipt of them the tax would be fixed. But that letter, which appears to have given him an opportunity to avoid a prosecution received no reply. In these circumstances I am not disposed to interfere with the fine of Rs. 30 which has been imposed. The revision petition is dismissed.

P.R.S./V.S.

Petition dismissed.

A. I. R. 1933 Madras 462

CURGENVEN AND

SUNDARAM CHETTY, JJ.

Maharajah of Pittapuram — Appellant.

v.

Ravu Venkata Mahipati Gangadhararamarao and others—Respondents.

Second Appeal No. 336 of 1929, Decided on 29th April 1932, from decree of Sub-Judge, Cocanada, in O. S. No. 20 of 1926.

(a) **Madras Estates Land Act (1 of 1908), Ss. 3 (5), (10) and 6—Private land granted by zamindar to adopted son for maintenance—Land registered as raiyati with adopted son as landholder—Tenants settled on land under adopted son have occupancy rights.**

The Raja of Pittapuram granted certain private land to his adopted son for maintenance. The grantee and Raja fell out and the adopted boy went away. During settlement the land was recorded as raiyati with the adopted son as landholder and two tenants as two raiyats, being specifically described as dharimilla inam.

Held: that the land must be deemed to be raiyati land throughout even though it was used temporarily as a private land, that the adopted son was a landholder within the meaning of the Act as on the terms of the grant he was given a life estate, that the tenants admitted by the adopted son acquired permanent right of occupancy and that the Raja was entitled only to melwaram. [P 464 C 1, 2; P 465 C 1]

(b) **Madras Estates Land Act (1 of 1908), S. 3 (5)—Owner of life-estate is landholder.**

An owner of a life-estate will be a "landholder" within the definition under S. 3 (5), whereas no such status will be acquired by a person to whom the mere right of residence upon the property has been accorded. [P 464 C 2]

Advocate-General—for Appellant.

P. Venkataramana Rao—for Respondents.

Curgenven, J.—The suit out of which this appeal arises was filed by the Maharaja of Pittapuram to recover possession of a piece of land measuring about 40 acres, which, with buildings upon it, formed part of a maintenance grant made by the late Raja of Pittapuram to his adopted son, Ramakrishna Rao, father of defendants 1 to 4. Particulars of the

litigation which arose out of that grant have been summarized in the judgment of the learned Subordinate Judge and it is enough to say here that so far as the nature and legal effect of the grant are concerned it has been decided that it was for the maintenance only of Ramakrishna Rao, that it lapsed at his death and that the property is recoverable by the plaintiff as his father's heir. While adopting this position however the lower Court has given the plaintiff a decree only for the melwaram interest in the land, and it is against the decree so limited that the plaintiff appeals.

The primary question arising depends upon the provisions of the Madras Estates Land Act, whether the land is raiyati and as defined in that Act or whether it is private land. The learned Subordinate Judge has found that prior to the maintenance grant, which took place in 1882, the land was private land. But he thinks that owing to certain statements made, and orders passed at the time (19th February 1913) that a Record of Rights was prepared of the Pittapuram estate, it came to be treated as raiyati land and must be so regarded. Under S. 185 of the Act, land in an estate shall be presumed not to be private land until the contrary is shown. They show that it was private land; the plaintiff has produced certain records, Ex. C series, and has examined two witnesses, P. Ws. 1 and 2. The records cover the years 1874 to 1878 and consist of estate correspondence relating to the care of this land and the buildings upon it. They undoubtedly show that the land was not during that period under cultivation or in the hands of raiyats, but afforded a site and compound for certain buildings belonging to the Rajah. In all these records the land is referred to as Suryaraopet haveli. It is contended that the word "haveli" is the local equivalent of pannai or home-farm lands and therefore to be included in "private land" as defined in S. 3 (10) of the Act. Brown's Dictionary gives "mansion, palace" as the English equivalent of this word. In Maclean's Manual of the Administration of the Madras Presidency (1893) the glossary contains the word "havelly" which it translates as "environs" and defines as "the tract of country adjacent to a capital town and originally annexed to it for the supply of

public establishments: afterwards came to signify lands under direct Government management: cf. "home-farms."

Under "home farms" we find reference to the villages round the area comprising the original grants for building: Fort Saint George, such as Chetput, Egmore, Nungambakkam, etc. These authorities do not throw much light on how this word should be understood when used in relation to zamindar's estates. But it may perhaps be taken that it was intended to denote by its use that the lands were reserved for the zamindar's personal use and were not available for grant in the ordinary way. The witnesses speak to the previous existence of buildings upon this land, and there can be no doubt that during the period to which they refer it afforded no more than a large compound for these buildings. Doubtless because it contained a suitable house, it was given by the previous Raja to his adopted son for his residence. Father and son however fell out; the adopted son went away and spent the remainder of his life in Madras and a good many years ago the buildings fell down or were demolished, and the land was divided into two portions, each cultivated by a tenant. That was the condition of affairs when the Record of Rights already referred to was prepared. The procedure for the preparation of such a record is laid down in Ch. 11 of the Act. It provides opportunities for landholders and raiyats to represent their claims and to present objections. When this land came up for registration an objection statement (Ex. 2) was made on behalf of the Raja by one of his thanedars. It appears that in the draft record the land had been described as poramboke and the objection was made that it was not poramboke but was raiyati land:

"It was given to the adopted son of the late Raja free of rent and it is now being used for cultivation purposes. Prays that it may be registered as subsequent inam."

The Revenue Officer who prepared the record upon this passed orders (Ex. 3) in the course of which he stated that an examination of the azmoish chitta showed that the land in question correspond to azmoish Nos. 100, 101 and 102 which were raiyati lands, that the building which it once contained had disappeared and that the land was being cultivated with dry crops by the tenants

of Ramakrishna Rao. It was accordingly registered in these terms as raiyati land with Ramakrishna Rao as landholder and with the two tenants as his raiyats, being specifically described as dhari-milla inam. It appears very difficult for the plaintiff, in the face of this record, to contend that the land is or has ever been anything but raiyati land. The statement, Ex. 2, was made by his accredited agent who must be supposed to have had knowledge of all the facts, and in formal proceeding involving permanent consequences. The facts appear to me to be reconcilable not with the view of the learned Subordinate Judge that the land which had been private land became converted by this action into raiyati land, but that the estate never had any intention of permanently reserving the land for private purposes. It must be presumed, because the contrary has not been shown, that prior to the period to which Ex. C series relate the land had been treated as raiyati land, and clearly enough it was again treated as raiyati land after the Raja's adopted son had abandoned it. In these circumstances I think that the only conclusion to be drawn is that from the point of view of the Madras Estates Land Act, it had remained raiyati land throughout, although it was temporarily devoted to a purpose more characteristic of private land.

The next question is, assuming the land to have been throughout raiyati land, who, after its grant in 1882 to Ramakrishna Rao, occupied the position of landholder with respect to it. S. 3 (5) of the Act runs thus :

"'Landholder' means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law."

Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector, subject to any decree or order of a competent civil Court, may recognise or nominate as such landholder in accordance with rules to be framed

by the Local Government in this behalf. It is not disputed that an owner of a life estate will be a "landholder" within this definition, whereas no such status will be acquired by a person to whom the mere right of residence upon the property has been accorded. The question thus is: What was the extent of the right conferred upon Ramakrishna Rao in respect of this land by the terms of the maintenance grant? The material portion of the grant (Ex. B) has been extracted in para. 8 of the lower Court's judgment. The Raja says that whereas he has agreed to give him a house at Cocanada to reside in he covenants to put him in possession and to allow him to reside peaceably in the house. This may perhaps be read in two ways: either as giving a right of residence upon the property and no more, or as giving the property itself, for so long as the grant of maintenance was in force, the reference to residence being merely a recital of the occasion of the grant, I have come to the conclusion that the latter is more probably the true construction, that a life-estate was given to the adopted son in this property and not a mere license to occupy. "I have agreed to give a house at Cocanada to reside in" does not merely mean "I have agreed to allow you to reside in my house at Cocanada." There is no provision for disfeance in the event of the property being put to any other purpose. And if there is ambiguity in the document, extrinsic evidence will be admissible in explanation of what the parties intended; and we have in Ex. 2 the unequivocal declaration of the successor to the grantor, who may be presumed to have known his father's intentions, that the grant amounted to a dharimilla inam. I conclude accordingly that the interest conveyed to Ramakrishna Rao was sufficient to constitute him landlord within the meaning of the Madras Estates Land Act.

If that be so, it is not disputed that he admitted the two tenants to the land so that, under S. 6 of the Act, they acquired a permanent right of occupancy. Whether or not that right was conveyed to defendant 1 under Exs. 4 to 6 is a question which need not be decided in this appeal. Wherever the occupancy right may reside, upon the above findings the plaintiff will be entitled only

to the melvaram, and this is what the lower Court has decreed to him. I would accordingly dismiss the appeal with costs.

Sundaram Chetty, J.—I concur.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 465

CURGENVEN, J.

Vaskuri Ayyanna—Appellant.

v.

Vedangi Gangayya—Respondent.

Second Appeal No. 1590 of 1928, Decided on 2nd December 1932, against decree of Sub-Judge, Narsapur, in A. S. No. 268 of 1927.

(a) Civil P. C. (1908), O. 41, R. 22 — Respondent in appeal cannot take cross-objections unless he has filed memorandum of objections.

Order 41, R. 22, Civil P. C., while it allows a respondent to support the decree on any of the grounds decided against him, will not permit him to take cross-objections to it unless he has filed a memorandum of objections. [P 465 C 2]

(b) Transfer of Property Act (1882), S. 108 — Question of determination of mesne profits — Receiver appointed to auction land — Security bond to raise second crops and give certain amount of paddy — Executant is in position of lessee.

In connexion with proceedings for the determination of mesne profits, a receiver was appointed to auction the land and the respondent executed a security bond to raise the second crop and give a certain amount of paddy.

Held: that though the Transfer of Property Act did not apply, the principles of S. 108 applied and that the respondent's liabilities were those of a lessee subject to the same legal incidents. [P 466 C 1]

(c) Transfer of Property Act (1882), S. 108 (c)—Covenant of quiet enjoyment does not extend to disturbance by trespasser.

The covenant for quiet enjoyment, is only a covenant against disturbance by somebody claiming under unlawful title. It does not extend to disturbance by a trespasser: *A I R 1922 Cal 87*; *15 Mad 111* and *A I R 1915 Mad 717*, *Rel on.* [P 466 C 1]

P. Somasundaram—for Appellant.

G. Lakshmananna—for Respondent.

Judgment.—In connexion with proceedings for the determination of mesne profits a receiver was appointed to auction the land and the respondent in this case has executed a document in respect of the second crop, due for harvest in February 1923. The document is Ex. J and is styled a security bond. Under it the respondent undertook to raise the dalva (second) crop of 1923 and to deliver 70 bags of dalva paddy. If he failed so to deliver them, he bound himself personally for the loss which might be

awarded by the Court. In pursuance of this arrangement an application was made to the Court to enforce the terms of the document and the District Munsif passed a decree for the full 70 bags at the rate of Rs. 6-4-0 per bag. In appeal by the respondent the learned Subordinate Judge found on the merits that he was prevented from raising the crop according to his undertaking and reduced the amount payable to 20 bags. This is a second appeal preferred by one of the plaintiffs in the original action, claiming the full amount according to Ex. J.

Mr. Lakshmananna wants to take the preliminary point that an application of this nature would not lie and that the proper course would be to enforce Ex. J in a separate suit. The learned Subordinate Judge has discussed this question, though not very lucidly, and, as his decision shows, must be taken to have accepted the maintainability of the application. Here I do not think that I can entertain an objection of this character because O. 41, R. 22, Civil P. C., while it allows a respondent to support the decree on any of the grounds decided against him, will not permit him to take cross-objections to it unless he has filed a memorandum of objections. The effect of this objection would be not to support the decree, but to cut the ground from under it, and accordingly as there is no memorandum of objections I must hold that it is inadmissible.

Coming now to the merits, the respondent made objection to the claim on two separate grounds. The first was that he was prevented from taking possession of the land by one Venkataratnam. As to this the learned Subordinate Judge finds the allegation unproved. Mr. Lakshmananna would put his objection on a wider ground, namely, that it is not shown that the lessor has put the lessee into possession of the property. But this again would be an objection of a character which could only be made by a memorandum of objections because if it were to succeed the award of the lower Court must be set aside altogether.

The other objection is based on the ground that the respondent was prevented from cultivating the land with paddy. The circumstances have been given in para. 11 of the Subordinate Judge's judgment. It is no doubt true

that the neighbouring land owners exercised pressure upon him not to cultivate the dalva crop, but I must agree with the lower Court that they had no legal grounds for doing so and that, since sufficient water was available, the respondent was not prevented by any physical causes from raising the crop. If he had gone ahead in spite of the obstruction offered and had been resisted, I infer that that resistance would have been an illegal act. The law upon this subject is quite clear. I think that, whether or not Ex. J is technically a lease, it had for the present purpose the same practical effect as a lease and was subject to the same legal incidents. I have not been shown that the respondent's liabilities under it would be in any respect different from those of a lessee and I must take it that they would be subject to the same qualifications. Although the Transfer of Property Act may not apply, the principles of S. 108, which defines the rights and liabilities of a lessor and a lessee, will apply, Cl. (c) embodying a covenant for quiet enjoyment, Cl. (b) binding the lessee as regards the payment of rent and Cl. (e) defining the only circumstances in which the lease shall be deemed to be void. So far as the covenant for quiet enjoyment forms part of the contract, the law is that the lessor does not covenant against the wrongful acts of strangers: "for the law itself does defend every man against wrong and therefore though one warrants land to another expressly or covenants for quiet enjoyment generally yet he does not defend against tortious entries: Woodfall, Edn 22, p. 876."

This principle has received extended consideration by Mookerjee, J., in *Udaykumar Das v. Katyani Debi* (1). Other authorities for the same proposition are *Vithilinga Padayachi v. Vithilinga Mudali* (2) and *Srinivasa Aiyangar v. Rangasami Aiyangar* (3). The covenant for quiet enjoyment, they lay down, is only a covenant against disturbance by somebody claiming under a lawful title. It does not extend to disturbance by a trespasser. On the finding therefore that the respondent was not prevented from cultivating by any lawful act on the part of a third party, he cannot plead that he is excused payment of any portion of the amount contracted for. Nor

is it open to the Court to exercise its discretion in reducing that amount. The learned Subordinate Judge has not defined the legal principles upon which he conceives himself competent to make such a reduction, but from expressions which he uses he would appear to be under the impression that he was assessing mesne profits, because one test which he applies is whether the appellant exercised ordinary diligence. I do not think that this is the correct view to take of the law and the facts, and I must uphold the decision of the District Munsif that the appellant is entitled to an award of the full sum. The appeal is accordingly allowed and the decree of the lower appellate Court set aside and that of the District Munsif restored with costs here and in the lower appellate Court.

P.R.S./K.S.

*Appeal allowed.***A. I. R. 1933 Madras 466**

WALSH AND BARDSWELL, JJ.

Azagappa Chetti — Defendant — Appellant.

v.

S. A. Ramanathan Chettiar — Plaintiff — Respondent.

Appeal No. 235 of 1929, Decided on 21st October 1932, against order of Sub-Judge, Cuddalore, D/- 17th April 1929.

(a) **Decree—Execution—Compromise decree—Parties deliberately limiting recourse to execution proceedings to sole contingency—Decree cannot be executed except on happening of that contingency.**

Where the parties to a compromise decree deliberately limit recourse being had to execution proceedings to a sole contingency the decree cannot be executed except on the happening of the contingency mentioned. [P 469 C 2]

(b) **Civil P. C. (1908), S. 11—S. 11 is not applicable to execution proceedings but analogous principles can be applied.**

Section 11 is not applicable to execution proceedings as it relates to matters decided in suits. It is only on principles analogous to that section that res judicata can be applied to execution proceedings. [P 469 C 2]

(c) **Civil P. C. (1908), S. 11—Execution proceedings—Party not appearing and not being heard—Unless summons has been declared to be served principle of res judicata will not apply.**

The principle of constructive res judicata should be very cautiously applied.

In order that the principle of res judicata may be applied to execution proceedings, where the party has neither appeared nor has been heard, the Court should have declared that the summons was duly served: *A I R 1927 Mad 818* and *A I R 1922 Pat 289, Ref.* [P 469 C 2]

(d) **Civil P. C. (1908), O. 5, R. 19—Unless requirements of O. 5, R. 19 are carried out,**

1. A I R 1922 Cal 87=49 Cal 948=69 I C 126.

2. (1892) 15 Mad 111.

3. A I R 1915 Mad 717=25 I C 812.

summons cannot be held to have been served

Unless the imperative requirements of O. 5, R. 19; have been carried out the summons cannot be held to have been served: *AIR 9 4 Mad 153, Dist; 10 Bom 202, Ref.* [P 470 C 1]

(e) Civil P. C. (1908), S. 11 — Execution proceedings—Execution taken for amount greater than that mentioned in decree — Failure of judgment-debtor to appear is not res judicata—Execution.

Where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not act as res judicata and prevent him from showing in subsequent proceedings that that amount is not due: *AIR 1915 All 344 and AIR 1929 Mad 903, Rel on.* [P 471 C 1]

(f) Decree—Execution — Compromise decree—Execution specifically barred except on one matter—Execution taken not on such matter—Failure to appear on notice of execution does not make every part of decree executable

When by the terms of the compromise decree between the parties it has been specifically decided that the enforcement of the decree by means of execution is absolutely barred except on one matter, the mere failure to appear on notice of execution petition being taken out when execution is being sought not on that matter, will not render every part of the decree executable in spite of the fact that the parties have agreed by the compromise that it is not executable: *6 All 269, Expl; AIR 1923 Mad 649 and AIR 1926 All 71, Dist.; A I R 1924 Mad 1 (F B) and 24 Mad 681, Ref.* [P 471 C 1]

Advocate-General and E. Vinayaka Rao—for Appellant.

S. Varadachari for A. Swaminatha Iyer and R. Rajagopala Iyengar—for Respondent.

Walsh, J.—This appeal arises out of a certain execution proceeding in which the plaintiff in O. S. No. 31 of 1919 seeks to execute a part of a compromise decree passed in that case. There are two related families which for the purpose of this case we may call the S. A. and the S. N. families. These families had endowed certain charities. The plaintiff in O. S. No. 31 of 1919 belongs to the S. A. family and he brought a suit against the S. N. family for reliefs which will be detailed later. The parties compromised the suit by an agreement, reduced to writing, on 20th April 1921. A decree in terms of the compromise was granted on 7th September 1921. The plaintiff put in an execution petition, Ex. A, on 2nd March 1925 in which he asked for the arrest of defendant, and for delivery of documents as per terms of the decree. It is stated in the remarks at the end of the petition that the petition is not barred by

limitation as the suit was one in respect of a scheme. The application being more than a year after the date of the decree, notice was ordered under O. 21, R. 22, Civil P. C., for 27th April 1925. This notice was ordered on 31st March 1925. Another E. P., M. P. R. No. 131 of 1925, was put in on 1st April 1925 for transmission of the decree to the Court of the Subordinate Judge of Sivaganga for execution. The subsequent proceedings are not very clearly to be made out from endorsements, nor can it be made out from the two returns, Exs. B and B 1, which return related to which notice. We may gather from the order that the return, Ex. B-1, relates to the application for transmission and the return, Ex. B, relates to the application for arrest. Even in the order there is a mistake on this point because the learned Subordinate Judge says that the endorsement that the judgment-debtor left two days previously is on Ex. B and he says that Ex. B is the return on the notice for transmission.

But this is the entry on Ex. B-1 and the return on Ex. B is that defendant 1 had gone a week ago to Madras. On Ex. A, the endorsement by the Court on 27th April 1925 is "notice not returned from Ramnad. Adjourned to 8th July." The next entry is "Not yet returned. Arrest by 3rd August," and it is dated 8th July 1925. If that entry is correct it would automatically establish the defendant appellant's case that he was not served with that notice before the arrest order was passed. But it seems clear there is an error here because both the notices had been returned as served by that date. Ex. B is marked "District Court, South Arcot, 10th May 1925" and Ex. B 1 is marked "District and Sessions Court, South Arcot, Cuddalore, 11th May 1925." As it has not been contended before us that the notices were not returned to Court as served before the date of the orders, this matter need not be further mentioned, except to say that in Ex. A not only is there no order that the service is sufficient but there is not even a note that it has been served in any way and that without any such record being made, arrest by 3rd August was ordered on 8th July 1925. As the batta was not paid the petition was dismissed on 3rd August

1925. As regards the transmission petition Ex. A-1 the orders are "notice for 8th July 1925" dated 6th April 1925 and "Defendants 1 and 3 to 7 absent, affixed. Defendants absent. Granted" on 8th July 1925. The decree was transmitted for execution but as no execution was applied for within six months it was retransmitted. More than two years afterwards the plaintiff presented another execution petition, M. P. R. No. 272 of 1927, dated 3rd November 1927. The defendants pleaded that the decree was not executable. The plaintiff had also applied to add the legal representatives of the deceased defendant 4 and to transmit the decree to the Court of the Subordinate Judge of Devakotta for execution. The defendants had no objection to the adding of the legal representative or to the transmission of the decree, provided it was executable, but they contended that it was not executable. The learned Subordinate Judge held that the question regarding the executability of the decree was a matter to be decided by the Court to which it was to be transmitted. On this matter an appeal was taken to the High Court and in their order dated 4th April 1928, Madhavan Nair and Jackson, JJ., held that this was a matter to be decided by the Sub-Court which transfers the decree. The Subordinate Judge then decided that per se the decree was not executable, that the defendants were barred on the principle of res judicata from raising this contention on account of the execution proceedings taken out in 1925. Against this order the present appeal is preferred.

We will first deal with the matter whether the decree is, apart from the question of res judicata, capable of execution. We have no hesitation in agreeing with the Subordinate Judge that it is not, though for different and much stronger reasons than those which he assigns. To understand the matter it is necessary to look at the prayer in the original plaint which is set out in the prologue to the decree as follows:

"The suit is (1) to declare that the properties described in Sch. A of the plaint are the endowments and funds of the common family charity trust of plaintiff and defendants; (2) to declare that plaintiff is entitled to a share in the common charity and its appurtenant properties and that he is entitled to manage the same for one year in every three years; (3) to direct defen-

dant 1 to deliver charge of the management with all its appurtenant properties and accumulated surplus; (4) to direct defendant 1 to render accounts (including an inquiry as to the loss caused to the charity by his misappropriations etc.); (5) to declare that plaintiff is entitled to manage the trust for a further period of three years from 16th August 1917 (his usual period being one year from 16th August 1916) and to allow him to manage for that period; (6) to frame a scheme of management if necessary."

Reliefs 1 and 2 are merely for declaration and they have been entirely settled by the terms of the compromise decree. Reliefs 4 and 5 were expressly given up in para 21 of the compromise decree where it is emphatically stated:

"Nobody shall have any manner of claim whatsoever at any time against A. N. Subrahmanyam Chettiar in respect of the said reliefs."

Yet relief 4 is one of those now sought. As regards the remaining relief 3, "to direct defendant 1 to deliver charge of the management and accumulated surplus," it will be noticed that the date of the compromise agreement was 20th April 1921 and that under its terms the trust was to be vested in three branches of the family, each to be in charge of the management for a year. The first of these years was to begin on 20th June 1921 on which date defendant 1 was to hand over to the plaintiff the documents and records and the amount of cash balance after deducting the expenses up to that date. There can be little doubt that this interval of about two months before the first year was allowed so that defendant 1 might put the accounts, etc. in order. Charge was duly handed over under this clause to plaintiff and it will be noted that although the compromise agreement did not become a decree of the Court until 7th September 1921, the plaintiff raised no sort of objection at the time of the decree that the properties and management had not been handed over to him. In fact before he put in his first execution petition, Ex. A, on 2nd March 1925 he had had still another turn of management without raising any complaint. Now in the particular clause of the compromise of which execution is now sought it is a sum of Rs. 5,000 with interest thereon which it is said was unjustly taken by defendant 1 for the second time for Court expenses, etc. contrary to the provision in Item 2, Sch. B, in the razinamah decree. Interest thereon is said to be from 27th June 1921. This therefore is money which according to the plaintiff should

have been, and was not, paid on 27th June 1921 and in spite of this failure no objection was taken and a compromise decree was accepted long afterwards. In Ex. A the plaintiff prayed for the arrest of defendant 1 and delivery of the documents in terms of the decree, but those documents must have been handed over to him on 27th June 1921. But there is an even more obvious reason why the decree cannot be executed. Being members of related families the parties very rightly wished at the time of the compromise to avoid future litigation. They therefore arranged an elaborate scheme in the compromise by which every dispute, whether arising under the compromise or not, should be settled outside the Court. Para. 11 provides for the manner of settlement of such disputes on points covered by the scheme. Para. 17 provides the manner of settlement of disputes not mentioned in the razinama. There is only one single point on which the razinama if not observed is to be executed by Court, and that is contained in para. 27 which runs thus:

"In the matter of administering the said trust by turns every year as aforesaid, if any manager in charge fails to hand over the management etc. to his successor, he shall be bound by the terms in para. 24 hereof, and his successor shall be entitled to recover the management by means of a precept of Court in execution of this decree."

In para. 24 it is arranged that if a manager in charge fails to hand over the management and the necessary records relating thereto to his successor as stated in para. 6 thereof he shall not only forgo a period of management due to him, but the period enjoyed by him over and above his legitimate period shall be deducted from his other periods; and that the period so lost by him shall be added to that of his successor. Therefore under para. 27 the parties have deliberately limited recourse to execution proceedings to the sole case in which the manager fails to hand over the management.

There is no allegation of any such thing being the case here. The management was handed over, as observed above, by defendant 1 in June 1921 and the compromise agreement was made a decree of the Court in September of that year without objection. The plaintiff had even another turn in 1924. Therefore there can be no question that,

apart from the plea of res judicata, the decree is not executable except on the sole ground mentioned in para. 27 which is not a ground on which execution is now sought. We will now turn to the question of res judicata. Admittedly, S. 11, Civil P. C., is not applicable as it relates to matters decided in suits. It is only on principles analogous to that section that res judicata can be applied to execution proceedings. Now the basis of any such application, where the party has not appeared and had not been heard, must be that he had had notice. O. 5, R. 17, lays down the manner in which processes are to be served, and O. 5, R. 19 says:

"Where a summons is returned under R. 1⁷ the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

It is argued before us, and we think perfectly correctly, that as there has been no declaration by the Court in this case, that the summons was duly served the principle of res judicata cannot be invoked against the defendants. In this connexion it is to be noticed that there has been an important change in the view of law taken owing to the recent decision of the Full Bench in *Arunachalam v. Veerappa Chettiar* (1) where it was held that O. 9, R. 13 does not apply to execution proceedings. (We understand that this defect will be shortly remedied). The view that a party could apply to have an ex parte order set aside under O. 9, R. 13, which was taken in *Subbiah Naicker v. Ramanathan Chettiar* (2) and which the learned Subordinate Judge had taken in this case, is therefore incorrect; and in view of the fact that this relief is not now open to him, the remark in *Subramania Ayyar v. Raja Rajeswara Dorai* (3), at p. 1026, which was made even before this decision, that the principle of constructive res judicata should be very cautiously applied to execution

1. AIR 1931 Mad 656=134 I C 806=55 Mad 17 (F B).
2. AIR 1914 Mad 162=22 I C 899=37 Mad 462.
3. (1917) 40 Mad 1016=38 I C 627.

proceedings, becomes of still greater weight; even before this Full Bench decision in *Sundra Rajulu v. Narayanaswami*, A. I. R. 1927 Mad 813, it was held that the Court must make an order as to the sufficiency of service if the doctrine of constructive res judicata is to be availed of: see also *Prithi Mahton v. Jamshad Khan* (4). In the light of these decisions let us consider the reasons given by the learned Subordinate Judge for enforcing the doctrine as against the defendants in this case. He says that defendant 1 came to know as early as February 1927 of the previous applications and the orders passed thereon and that he admittedly made no attempt to set aside the orders on the previous application either by an application under O. 9, R. 13, Civil P. C., or by an appeal. He proceeds:

"Assuming for the sake of argument, and only for the sake of argument, that the returns on the previous notices were either falsely or fraudulently made by the process-server at the instance of the decree-holder, defendant 1 should have sought to set aside the orders on the previous execution application either by an application under O. 9, R. 13, Civil P. C. or by an appeal. Having failed to do so, it is not open to him in the present proceedings to challenge the validity of the orders passed on the previous execution applications and the orders thereon operate as res judicata as against him."

Now, according to the Full Bench ruling, the remedy under O. 9, R. 13 is not open to him. There remains only therefore the remedy by way of appeal against the order itself. If he had gone upon appeal against either of these orders when he came to know of them he would have been at once informed by the appellate Court that both the petitions had either been dismissed or become inoperative, the petition for arrest owing to non-payment of batta, and the petition for transmission by the fact that the records had been returned to the transmitting Court since execution had not been applied for within six months. His appeal would therefore not have been entertained at all and he would have been left without any remedy. As against the view that since the imperative requirements of O. 5, R. 19 have not been carried out the summons cannot be held to have been served, no authority has been quoted to us. In *Mahamed Meera*

Rowther v. Kadir Meera Rowther (5) there was a petition to set aside a sale from want of proper service of an attachment notice. That is a different matter for a sale cannot be set aside on the mere ground of irregularity in proceedings unless it can also be shown that the sale was materially affected by the irregularity. It may also be observed in that case that the learned Judge found that the circumstances of the case showed that as a matter of fact the judgment debtor had full notice. On the other hand it was held in *Nasur Mahomed v. Kazbai* (6) that:

"Where the service of summons has been effected on a copy of the summons on the door of his dwelling house, the Court must decide whether the summons has been duly served by such affixing or not and if it decides in the negative a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service it must be satisfied that the defendant is keeping out of the way for the purpose of evading service."

In that case in spite of an order of the Court to the following effect:

"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on 22nd December, 1884 at 9 a. m. and proof of the same having been duly taken by me it is ordered that the summons be returned,"

it was held that there was no sufficient service. In the present case there is nothing to show that the Court even looked at one of the returns before ordering the petition. As stated above on Ex. A the order "Arrest by 3rd August" is actually written under "not yet returned."

In the second Ex. A-1 it passed no sort of order holding the service sufficient. (After discussing the circumstances of the case, the judgment proceeded.) It is not however, as we said, necessary for the purposes of this case to find that the service was not genuine though we strongly suspect it. It is sufficient to say that the Court has not declared it sufficient, as it is imperatively required to do under O. 5, R. 19, and in a case, where it is sought to apply the constructive principle of res judicata against the defendants, the omission is fatal and the appeal must be allowed. We must however say that we have great doubts whether in any case the principles of res judicata by mere absence of the other

party could in execution proceedings be pushed to the extreme to which it is sought to be done in this case.

There is ample authority for instance that, where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not act as *res judicata* and prevent him from showing in subsequent proceedings that that amount is not due: vide *Kalyan Singh v Jagan Prasad* (7) and *Ulaganatha v. Alagappa*, A. I. R. 1929 Mad. 903. The latter decision was by a member of the present Bench together with Sir Kumaraswami Sastri, J. An order of execution on such a decree, it was held, does not amount to an order to execute the decree for the exact sum named. The present case is a much more extreme instance. When by the terms of the compromise decree between the parties it has been specifically decided that the enforcement of the decree by means of execution is absolutely barred except on one matter, we are asked to hold that the mere failure to appear on notice of execution petition being taken out when execution is being sought not on that matter, will render every part of the decree executable in spite of the fact that the parties have agreed by the compromise that it is not executable, we should feel very great hesitation to concede such a thing. The only decision which approaches such a view is *Ramkirpal v. Rup Kuari* (8). In that case a Court having jurisdiction decided in the course of execution proceedings (in an order which was not appealed against) that the decree to be executed awarded mesne profits according to its true construction. In spite of a subsequent decision of the High Court that the decree on its true construction did not award mesne profits, the Privy Council held that the decision of the Court in execution proceedings had become final between the parties on general principles of law.

In that case however the question as to whether the decree did or did not award mesne profits was specifically decided by a Court which, as observed by the Privy Council, was competent to decide the matter, whether it decided rightly or wrongly. That is altogether

7. A I R 1915 All 344=30 I C 523=37 All 589.
S. (1884) 6 All 269=11 I A 37 (P O).

a different thing from saying that without any decision on the matter by a Court, a compromise decree which is by consent of the parties and by its express terms was deliberately made not executable becomes executable on a mere applied principle of constructive *res judicata*, because the defendants, having had notice, failed to appear on an execution petition: *Govinda Menon v. Krishnamannadiar* (9) and *Dip Prakash v. Bohra Dwaraka Prasad* (10), quoted for the respondent are not at all parallel: *Chidambaram Chetti v. Theivanai Ammal* (11) and *Nilyananda v. Gajapati Vasudeva* (12), quoted for appellant, are more in point. We should imagine also that there must be some distinctness on what matter the orders passed on the execution petitions are *res judicata*. In one of these petitions the only execution which could really have been held to be finally ordered was a mere transmission of the decree. In the other there was a mere order of arrest which was never carried out. Could those orders, without anything further, imply that the elaborate provisions of the decree by which disputes whether provided for or not in the scheme were to be referred to decision by the three families or to arbitration and were not to be taken to Court, were to be regarded as superseded? Can relief No. 4 of the plaint which was expressly given up in para. 21 of the compromise decree be now obtained by this sort of constructive *res judicata*? We feel we should require very strong authority to accede to such propositions, but it is not necessary in the view which we have taken to give any final decision on these matters. In the result the appeal is allowed and the execution petition dismissed with costs in both Courts.

P.R.S./K.S.

Appeal allowed.

9. A I R 1923 Mad 649=72 I C 397.
10. A I R 1923 All 71=90 I C 83=48 All 201.
11. A I R 1924 Mad 1=74 I C 155=46 Mad 768 (F B).
12. (1901) 24 Mad 681=11 M L J 313.

A. I. R. 1933 Madras 471

WALSH, J.

(Bala) Venkatarama Chetty—Appellant.
v.

Angathayammal and another—Respondents.

Appeal No. 147 of 1929, Decided on 18th January 1933.

(a) Civil P. C. (1908), S. 100—Finding of fact.

It is not open to the High Court in second appeal to disturb a finding of fact. [P 473 C 1]

(b) Provincial Insolvency Act (1920), Ss. 4 and 68—Official Receiver passing order on claim petition which he had no jurisdiction to do—No appeal preferred under S. 68—Application under S. 4 is not barred.

Where the Official Receiver passes an order on a claim petition which he has no jurisdiction to pass, even though no appeal is filed under S. 68, an application under S. 4 is not barred because the remedy under S. 4 is much larger than that could be got under S. 68. In fact the correct procedure is under S. 4 and not by appeal under S. 68: *AIR 1924 Mad 529, Rel on.*; 47 IC 62; *AIR 1926 Mad 363*; *AIR 1931 Mad 745* and *AIR 1932 Cal 642, Ref.* [P 473 C 2; P 474 C 1]

(c) Jurisdiction—Consent of parties cannot give jurisdiction: 11 Bom 153, held Overruled.

When a Judge has no jurisdiction over the subject-matter of a suit, parties cannot by their mutual consent convert it into a proper judicial process: 11 Bom 153, held Overruled; 9 All 191; 11 Mad 26 and *AIR 1923 Lah 425, Rel on.* [P 474 C 1]

(d) Provincial Insolvency Act (1920), S. 56—Official Receiver is only executive officer.

The Official Receiver is not even a Court but a mere executive officer. He is not entitled to take evidence in an inquiry under S. 53 though ordered by the District Judge. So limited is his power and so subject to interference that any person can ask the Court to modify or reverse his decision: *AIR 1919 Cal 965*; *AIR 1925 Mad 381*; *AIR 1920 Lah 361* and *AIR 1932 Lah 84, Rel on.* [P 474 C 2]

(e) Remand—To remand matter for decision to person who has no jurisdiction—Whether mere irregularity—*Quaere.*

Quaere.—Whether to remand a matter for decision to a person who has no jurisdiction to decide it is a mere irregularity. [P 475 C 1]

(f) Arbitration—Arbitration outside suit.

Arbitration outside suit is a fact to be established like anything else. [P 475 C 1]

(g) Evidence Act (1872), S. 115—No estoppel unless other party has changed position on faith of representation.

There is no estoppel unless the other party has changed his position on the faith of the representation. [P 475 C 1]

V. Balasundaram Iyer—for Appellant.

N. S. Mani—for Respondents.

Judgment.—The appellant is a creditor of an insolvent. The Official Receiver brought the property of the insolvent to sale and the insolvent's wife (respondent 1) claimed a certain share in the house. The documents relating to this house show that the insolvent's father Krishna Chetty sold it under Ex. F on 26th February 1912 to one Tirumalammal, his sister. Krishna Chetty had three sons one of whom was the insolvent. The others were Ramaswamy Chetty and Kandaswami Chetty. These latter two sons distinctly state in the sale-deed

that the house was the self-acquired property of their father in which they had been jointly living and which they had been enjoying. On 29th November 1913 there was a deed of partition, Ex. E, between the father Krishna Chetty and the two brothers of the insolvent Ramaswami Chetty and Kandaswami Chetty. The insolvent does not appear there. There is a statement in the deed that the persons dividing possess no immovable property. On the same day Tirumalammal reconveyed under Ex. G the house to Krishna Chetty and on 9th June 1916 the latter sold a portion of it under Ex. H to his son Kandaswami Chetty, who under Ex. B on 22nd March 1917 mortgaged his portion to Tirumalammal usufructually and by Ex. A he sold it to the insolvent's wife (respondent 1) to clear off Tirumalammal's mortgage.

The father Krishna Chetty having died, Kandasawmi Chetty succeeded to another portion of the house which he sold under Ex. C on 27th October 1919 to the insolvent's wife. When the insolvent's wife made her claim, the Official Receiver proceeded to determine the same and her claim was allowed by him. On appeal, preferred under S. 68, Insolvency Act, the matter was by consent of parties remanded to the Official Receiver who on further inquiry found in favour of the insolvent's possession. His order was dated 20th April 1927. On 17th July 1927 the insolvent's wife (respondent 1) put in a petition under S. 4 and on this petition her claim was admitted by the learned District Munsif and on appeal his order was confirmed by the learned District Judge. Against this order this second appeal is preferred. The question of fact involved in the case was whether a portion of the house sold to the insolvent's wife under Exs. A and C by Kandaswami Chetty belonged to him or to the insolvent. The allegation for the insolvent's wife was that the insolvent had been separated from the family before the partition of his brothers with his father under Ex. E, that the house had been built by Krishna Chetty, the insolvent's father, with his own funds and that the insolvent's wife had purchased it with funds provided by her mother. In the trial before the learned District Munsif respondent 1 (insolvent's wife) called

certain witnesses and filed certain documents' but the appellant (the insolvent's creditor) contented himself with marking certain depositions given before the Official Receiver in his inquiry. It is sought to attack the finding of fact in second appeal by saying that both the Courts ignored the evidence (Exs. 4 to 8) given for the appellant and said that he had adduced no evidence. That is not however correct. What the District Munsif says is :

"There is no evidence on behalf of the counter-petitioner to show that the insolvent advanced money to the petitioner to purchase under Exs. A and C."

This was the counter-petitioner's case and it is correct that the counter-petitioner did not adduce any evidence on this point. The statement relied on in the order of the District Judge is as follows :

"As the learned District Munsif has properly pointed out, the burden lay upon the Official Receiver to prove that the property to which the respondent laid claim was the property of the insolvent. He did not let in any evidence to prove that."

"He" here evidently refers to the Official Receiver. The statement is perfectly correct and it is a matter of some importance. The Official Receiver had himself come to the conclusion that the property belonged to the insolvent. He might therefore quite easily have himself put in a petition to annul the sale-deeds in favour of the insolvent's wife if he had been strongly convinced of the falsity of her claim. But he neither did this nor did he give or produce any evidence leaving the whole matter to the present appellant. There is therefore nothing to show that the trial and appellate Courts did not consider Exs. 4 to 8 which were filed as evidence by the present appellant. They had ample evidence for the findings of fact based on documents, one of which goes back to 1912 long anterior to the insolvency proceedings. The documents bear out the respondent's case. It is not open to me in second appeal to disturb this finding of fact. As regards the question of onus the whole evidence was before the Court and, as observed above while respondent 1 put in cogent documentary evidence the appellant contented himself merely by filing statements given by the witnesses before the Official Receiver. The next point argued is that respondent 1 having failed to appeal

against the order of the Official Receiver could not bring a suit under S. 4. It is further argued that the consent of the parties to the matter being remanded to the Official Receiver validates the proceedings and that at the best it is merely an irregular procedure on the part of the Official Receiver to have adjudicated the matter. It is not denied that the Official Receiver had no jurisdiction to determine a claim of this sort. *Vellayappa Chettiar v. Ramanathan Chettiar* (1) is clear authority on that point. That case also indicates that the remedy against an order on a claim petition passed by the Official Receiver without jurisdiction is not by way of appeal under S. 68, Provincial Insolvency Act, but by moving under S. 4.

It is true that in that case it was held that the party who appealed under S. 68 was not really affected by the Official Receiver's order. At the same time it was held that if he had been aggrieved the remedy was by way of an application under S. 4. If that view is correct it follows that the argument that no appeal having been filed under Ss. 68, S. 4 cannot be invoked entirely vanishes. The meaning of the words in S. 4 "subject to the provisions of the Act" has been considered in several cases, but none has been quoted in which it has been held that S. 4 would not be applicable because an appeal had not been preferred under S. 68 against an order which the Official Receiver had no jurisdiction to pass. It is to be noted that the relief which the respondent wanted under S. 4 was much larger than anything she could have got by an appeal under S. 68. An order in her favour under S. 68 would only have set aside the Official Receiver's order, but what she wanted was to have her claim to possession of the property recognized. It would seem, *prima facie*, unreasonable that she should be barred from seeking the chief remedy she wanted under S. 4, because she had not sought a lesser one by an appeal under S. 68. Taking the cases quoted for the appellant as to the meaning of the words "subject to the provisions of this Act:" *Radha Krishna Thakur v. Official Receiver*, A I R 1932 Cal 642 does not help us on the point. It merely lays down that the words restrict the

1. AIR 1924 Mad 529 = 47 Mad 446 = 78 IC 1017.

power conferred by the section only to this extent: that it may not be exercised in any such manner as would be in conflict with any provision in the Act. The decision there was, that under S. 4 the insolvency Court can deal with and decide questions of title as between the Official Receiver and a stranger to property which is claimed on the one hand as the insolvent's and on the other as the stranger's. *Alagiri Subba Naick v. Official Receiver, Tinnevely* (2), held that S. 4 was subject to S. 53. For instance, while the insolvency Court must dispose of a matter falling under S. 53 it cannot by taking the same matter up under S. 4 refuse to deal with it. In that case it was held that a decision under S. 53 is not one under S. 4 and so no second appeal lies against it.

For the appellant is quoted *Chittam-mal v. Ponnuswami Naicker* (3). There a lessee under the Official Receiver applied to be given possession and the District Judge made an order under S. 56 (3). It was held that this was not an order passed under S. 4 and did not finally determine the rights of the parties. None of the cases quoted by either side are in my opinion of assistance except *Vellayappa Chettiar v. Ramanathan Chettiar* (1), where the implication would seem to be that, so far from the failure to appeal under S. 68 against an order of this sort made by the Official Receiver being a bar to an application under S. 4 the correct procedure is under S. 4 and not by appeal under S. 68. *Charu Chandra Bhat-tarcharjee v. Hem Chandra Mukerjee* (4) quoted for the appellant was before S. 4 had been introduced and so is not an authority on the present Act. The next argument is that the respondent having acquiesced in the order remanding the matter for enquiry to the Official Receiver is barred from questioning his orders.

This is connected with the question whether consent of parties can give jurisdiction to a Court which it has not got. The law seems to be well settled that it cannot. In *Vishnu Sakharam Nagarkar v. Krishna Rao Malhar* (5), at p. 171, means otherwise, it must be taken to

have been overruled by *Ledgard v. Bull* (6), the leading case on the subject. The same thing was laid down again by the Privy Council in *Meenakshi v. Subramanaya* (7) where their Lordships say that when a Judge has no jurisdiction over the subject-matter of a suit, parties cannot by their mutual consent convert it into a proper judicial process: see also remarks in *Kidri Prasad v. K. R. Khosalar* (8). In this connexion it may be noted that the Official Receiver is not even a Court but a mere executive officer: *Nilamony Chowdry v. Durga Charan Chowdry* (9). He is not entitled to take evidence in an enquiry under S. 53 though ordered to do so by the District Judge. *Krishna Iyer v. Official Receiver, Trichinopoly* (10). It was held in that case that as the parties had consented to his taking evidence the irregularity was cured. That is quite different from saying that an order by him in an enquiry which he has no power to make, such as the present, will be validated by consent of parties.

So limited is the power of the Official Receiver and so subject to interference that any person can ask the Court to modify or reverse a decision of the Official Receiver: *Datta Ram v. Deoki Nardan* (11) followed in *Haveli Shah v. Mt. Zoharajan*, AIR 1932 Lah 84. The appellant relies on *Ramchandra Rao v. Gurraju* (12). There a father of a Hindu family with a son was adjudicated insolvent on his own application. The Official Receiver proceeded to sell the family properties in spite of a protest by the son that he was not liable. The Official Receiver did not decide the claim of the son, but simply ordered that the son's objection should be notified to the bidders at the time of the sale. In appeal it was held that the Official Receiver should have investigated the son's liability before ordering sale, but that the son having failed to appeal under S. 68 the objection could not be gone into. That case is clearly distinguishable from the present. The question of the power of the Official Receiver to sell an undivided son's property for the in-

2. AIR 1931 Mad 745=132 IC 641 = 54 Mad 989.

3. AIR 1926 Mad 363=49 Mad 762.

4. (1915) 47 IC 62.

5. (1887) 11 Bom 153.

6. (1887) 9 All 191=13 IA 134=4 Sar 741 (PC).

7. (1888) 11 Mad 26=14 IA 160 (PC).

8. AIR 1923 Lah 425=75 IC 590.

9. AIR 1919 Cal 965=46 IC 377.

10. AIR 1925 Mad 321=75 IC 445.

11. AIR 1920 Lah 361=58 IC 6=1 Lah 307.

12. AIR 1924 Mad 147=76 IC 977.

solvent's debts is a difficult one. According to that case the learned Judges held that he could have gone into the question of the son's liability and had he found him liable could have sold his share but that he should not have sold it without first determining the question. His failure to determine this point first was clearly a mere irregularity in procedure and not a case of acting without jurisdiction. Consequently the son having failed to appeal under S. 68, could not raise the point afterwards.

It was attempted to be argued before me that in the present case there was a mere irregularity in procedure. This cannot possibly be maintained. We have to deal, not with the order of remand by the Court which was competent to decide the matter, but with the decision of the Official Receiver who had no jurisdiction to decide the matter at all. Even as regards the remand order, to remand a matter for decision to a person who has no jurisdiction at all to decide it, is not in my opinion a mere irregularity. However it is not necessary to determine that point. A faint suggestion was made before me that the parties are to be regarded as having made the Official Receiver an arbitrator, and a remark in *Ledgard v. Bull* (6) at p. 203 is quoted where their Lordships after the sentence quoted above that when the Judge has no inherent jurisdiction over the subject-matter of the suit the parties cannot by their mutual consent convert it into a proper judicial process say:

"although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him."

This is not the case here, for the Court whose decision was sought under S. 4 was not the Official Receiver. Arbitration outside a suit is a fact to be established like anything else and presumably, if proved in a case like the present, is then only useful if estoppel could be pleaded and there is no estoppel unless the other party has changed his position on the faith of the representation. It is much too late to go into any question of that sort now. It was the jurisdiction of the District Munsif that was challenged in the proceedings, and, in first appeal, to judge from the appellate order, none of the present legal points raised as to want of jurisdiction to try the case under S. 4 on account of

the failure to appeal under S. 68 were even urged in arguing the appeal, let alone any theory of arbitration apart from Court. The appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 475

WALSH, J.

Nachimuthu Chettiar—Appellant.

v.

Ramakkal—Respondent.

Appeal No. 70 of 1929, Decided on 31st January 1933.

(a) **Provincial Insolvency Act (1920), S. 75 — Lower appellate Court entertaining appeal which does not lie to it—Second appeal lies from its decision.**

If a District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision. The appealability from such decision does not depend on the view taken by the lower appellate Court with regard to the competency of appeal before it: *AIR 1930 Pat* and *AIR 1931 Mad 471, Ref.*; 23 *Mad* 517, *Dist.* 280; [P 477 C 2]

(b) **Hindu Law—Joint family—Sale by Official Receiver conveying only right, title and interest of insolvent father — Suit by minor sons for partition decreed before sale—Share of sons in property is not sold — Provincial Insolvency Act (1920), S. 28 (2).**

Where a sale deed executed by the Official Receiver conveyed only the right, title and interest of the insolvent father in a Hindu joint family and the minor sons had obtained in a suit for partition a decree before such sale:

Held: that the share of the sons in the property was not sold: *AIR 1916 PC 220, Dist.*

[P 478 C 2]

(c) **Provincial Insolvency Act (1920), Ss. 4 and 5 — Hindu joint family of father and minor sons—Insolvency of father and sale of insolvent's property by Official Receiver but without previous declaration under S. 4 as to liability of sons' share—Partition suit by sons and decree—Son's share found liable to father's mortgage debt — Official Receiver cannot apply for delivery of possession under S. 4 of son's share but must file separate suit—Insolvency Court cannot execute civil Court's decree.**

In a partition suit by minor sons a decree was passed subject to the mortgage debt of their father. On the insolvency of the father, the Official Receiver sold the insolvent's property but without a previous declaration under S. 4 as to liability of son's share

Held: that the Official Receiver could not apply under S. 4 for recovery of possession of sons' share but must file a separate suit for the same

Held further: that the insolvency Court could not execute the decree of the civil Court and that the civil Court decree can be executed only by the Court which passed it or by some Court to which it had been transferred: *AIR 1928 Mad 735 (FB), Rel on; AIR 1932 Mad 381 and AIR 1931 Mad 317, Ref.*

[P 480 C 2]

(d) Provincial Insolvency Act (1920), Ss. 4 and 5—Execution powers of insolvency Court.

Though the insolvency Court has powers of execution under Ss. 4 and 5, the procedure is only analogous to and not identical with that under O. 21, Civil P. C.: *AIR 1914 All 264, Ref.* [P 479 C 1]

Watrapp S. Subramanya Ayyar — for Appellant.

A. C. Sampath Ayyangar and T. R. Srinivasa Iyer—for Respondent.

Judgment.—The appellant is a mortgagee from a Hindu father of a joint family consisting of himself and his two minor sons. The father applied in I. P. No. 37 of 1923 of the District Court of Coimbatore to be adjudicated an insolvent. The application was on 21st March 1923. It was transferred on 26th March 1923 to the Official Receiver who was appointed interim receiver. The Official Receiver compounded with the appellant who agreed to relinquish his mortgage and have the properties sold free of encumbrance provided he was first satisfied out of the sale proceeds. The Official Receiver got him to reduce the interest also substantially, applied for permission to sell the property free of the mortgage and advertised it for sale for 26th April 1924. Then a suit was filed in the name of the minor sons for partition and an injunction was obtained restraining the Official Receiver from proceeding with the sale. The Official Receiver and the appellant were made parties to the suit. The minor sons, represented by their mother as next friend, contended that the mortgage by the father in the appellant's favour was for purposes not binding on them and therefore should not be recognized. The Court found that the mortgage was for paying off antecedent debts and other binding purposes. A preliminary decree was accordingly given on 24th June 1926 for partition of the entire family property subject to the encumbrance in favour of the appellant. The final decree was passed on 10th August 1926. With that decree the injunction against the Official Receiver came to an end. He again applied to the insolvency Court for permission to sell the entire property including the son's shares. He set out the advantages to the minors and pointed out the benefit to the estate by selling the property free of the mortgage. On this the District Court passed an order dated 3rd March 1927. The report of

the Official Receiver is there summed up as one

"requesting that he may be permitted to hold a sale of the insolvent's property free of the mortgage dated 1st June 1919 and to pay the mortgagee the amount due out of the proceeds of sale as per reduced rate of interest."

The order is "permitted." It may be noted that what the Official Receiver actually asked permission to sell in his application was the whole of the suit properties. It is unfortunate that the gist of his application in the order is stated as "the sale of the insolvent's property" which creates some uncertainty as to what the Court really ordered to be sold. The minor sons then presented a petition to the Official Receiver that their shares should be excluded from the sale. It was dismissed and the sale was held on 14th April 1927 and the properties were purchased by the mortgagee. The minor sons then filed an appeal under S. 68, Provincial Insolvency Act, against the order of the Official Receiver. This appeal was first filed in the District Court, but subsequently, jurisdiction having been extended to the Sub-Court, it came up for disposal before the Subordinate Judge of Coimbatore. I may perhaps remark that this has unfortunately tended to increase the difficulties of the case. The District Judge who sanctioned the sale in the order referred to above was Mr. Mackay and as noted above the application of the Official Receiver is not correctly set out in the abstract on which the order was passed. And Mr. Burn (now Burn, J.) who succeeded Mr. Mackay had taken the view throughout what was sold was only the insolvent's interest in the property. It is contended before me that everybody understood that what was sold was the whole property including the sons' interest and the view of the Subordinate Judge throughout is that the entire interest of both the father and the two sons was sold.

When this appeal by the minor sons was transferred to the Subordinate Judge he dismissed it on the ground that as the debt has been found to be binding on the minors, the entire property could be sold. Against this decision the minor sons preferred an appeal to the District Court. The learned District Judge without calling on the respondent, the auction purchaser (the present appellant) dismissed the appeal on the ground that

"the sale deed executed by the Official Receiver expressly conveys to the purchaser only the right, title and interest of the insolvent himself and as it was executed after the insolvent's sons had got a decree for partition of their shares it is quite clear that the sale deed could not by any stretch of the language or of the imagination be held to convey the shares of his sons also."

As regards the request for a declaration that the sale by the Official Receiver did not affect the sons' shares he held there was no provision in the Insolvency Act for an application to the insolvency Court to declare the effect of a sale deed executed by the Official Receiver; and that as the appellants were not aggrieved by the sale itself, there could be no appeal. This order adversely affected the present appellant the auction-purchaser. It was passed without notice to him, and the sons and their mother had obstructed him, from taking possession. He therefore filed an application on 6th October 1927 described as being under S. 4 and S. 56 of the Act, to remove the obstruction. The minor sons had also on 27th June 1927, filed a petition before the Subordinate Judge under S. 68 praying that the sale of the land should be set aside. These two petitions were heard together by the Subordinate Judge. The appeal by the minors was dismissed on the ground that mortgage deed had been held to be binding on the shares of the sons and the present appellant's petition was allowed. Against this decision an appeal was taken to the District Court but only by the mother of the minors and in this appeal she did not describe herself as representing the minors. The learned District Judge held that the Official Receiver did not sell the shares of the minors so he had no power to deliver their shares to the vendee and that even if he had been able, on the date of the sale, to exercise the disposing power of the father with regard to the shares of the minors he could not put the appellant in possession by means of an application to the insolvency Court. He must have recourse to a separate suit. He quoted *Venkataram v. Chokkier* (1). The appeal was accordingly allowed and against this, the auction-purchaser has preferred this second appeal.

A preliminary objection is raised that this appeal does not lie because the

1. AIR 1928 Mad 531=109 I C 516=51 Mad 567.

learned District Judge has found that the appellant's remedy was by way of a separate suit, therefore impliedly holding that S. 4 is not applicable and there is no second appeal under S. 56 (vide S. 75). The contention cannot I think be sustained. The petition was put in under S. 4 as well as under S. 56 in the Court of first instance which treated it as one under S. 4. The appellate Court entertained the appeal on this basis. Though one of the two reasons which it gave for dismissing the application was that the appellant could not have proceeded under S. 4 originally, yet its discussion of the power of the Official Receiver to sell the sons' shares was incompetent, if the insolvency Court had no jurisdiction to decide the matter on the ground that no appeal lay. In any case the appealability of the order does not depend upon the view taken by the lower appellate Court with regard to the competency of the appeal before it. *Ram Ratan Prasad v. Banarsi Lal* (2) is clear authority where it was held at p. 692 (of 9 Pat.), that if the District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision. I do not find that any of the cases quoted would render the present second appeal incompetent. *Adinarayana Chetty v. Narasimha Chetty* (3) was a case decided by the learned Chief Justice and myself where what was described as an order was really a decree. We held that it must be regarded as a decree and therefore the remedy was by way of a second appeal. In that case we distinguished certain cases like that in *Abdur Rahiman Sahib v. Ganapathi Bhatta* (4) where the Court passed an order which it had no power to pass but which was an appealable order against which an appeal would not be barred. In such a case we remarked that the question was whether or not by adoption of a wrong procedure by a Court the litigant should be deprived of his remedy. I hold that the preliminary objection fails.

I will now first deal with the first ground on which the learned District Judge dismissed the appeal, namely, that the Official Receiver did not sell the

2. AIR 1930 Pat 280=122 I C 589=9 Pat 685.

3. AIR 1931 Mad 471=132 I C 654=54 Mad 337.

4. (1900) 23 Mad 517=10 M L J 305.

sons' shares to the purchaser and therefore cannot deliver them. I have pointed out that a wrong summing up of the Official Receiver's original application itself was given at the head of the sale order and the fact that during the course of the proceedings the original insolvency power was transferred from the District Court to the Sub-Court and that the two Courts afterwards proceeded to take differing views as to what was sold has considerably increased the difficulty in deciding this question. The dismissal of the petition of the sons to the Official Receiver to exclude their shares no doubt shows that the Official Receiver meant to sell what he had applied to sell, that is, the whole property including the sons' shares. But as pointed out by the learned District Judge though he may have meant to sell the entire property the sale deed executed by the Official Receiver to the appellant conveys only "the right, title and interest of the insolvent" in the property. *Sripat Singh Dugar v. Prodyot Kumar Tagore* (5) is quoted for the appellant to show that in spite of this the sale may be regarded as that of the sons' interest also. But that case is clearly distinguishable. In view of a suit which was being brought at the time by the sons to have it declared that the debt was not binding upon them, the Court there allowed the sale to proceed stating that it was "the right, title and interest of the father" which was being sold but also stating at the time that these words could not have the effect of taking away the rights of either party. Subsequently, it was held that the debt was binding on the sons.

The Privy Council held that their rights had been conveyed under the sale, in spite of the insertion of those words. That case differs from the present in two points: the liability of the sons in the present case had been found by the civil Court before the sale itself was held and there was therefore no reason for putting in any limiting clause in the sale deed to meet the contingency of the sons' shares not being held liable; secondly, it appears in the case in *Sripat Singh Dugar v. Prodyot Kumar Tagore* (5) that at the time of inserting the words the Court stated to the parties that they would not affect their future rights. I

am of opinion therefore that the learned District Judge is right in holding on the clear terms of the sale deed that the share of the sons in the property was not sold and so delivery cannot be given. However some other objections raised by the appellant against the validity of the appeal to the District Court itself have to be considered. The first of these is that the minor sons were not parties to the appeal and therefore it was not maintainable and that the learned District Judge was not entitled to discuss the question of the son's position at all. It is certainly somewhat curious that in an appeal against the order on a petition put in by the minor sons, they should drop out in the appeal and that the appeal should be presented only by the mother apparently on her own behalf. However that may be, I think the objection cannot be sustained. The petition by the respondent to remove the obstruction which was heard at the same time as the petition by the sons and disposed of the order, says that for the reasons stated in I. A. 876/27 (that is the sons' petition) the respondents have no right to obstruct delivery to the petitioner.

The appellant had stated in that petition that he had been obstructed by the mother and the two minor sons and that these three persons had no business to do so against the decree of the civil Court. Having asked for the obstruction by these three persons to be removed I think he cannot reasonably say that an appeal by one of them against that order which was virtually a joint one, with the order on the sons' petition is incompetent. In cases of this sort a person who is obstructed in taking possession must prove his title to possession, and it can be objected to even by third party who is not in possession. This ground, viz., that the appeal to the District Court is incompetent therefore fails. The second objection rests on the argument that under S. 4, Provincial Insolvency Act, the Court which is asked to remove the obstruction is acting under O. 21, R. 98, Civil P. C., and that the order passed under this section is not appealable, the only remedy being by way of a separate suit.

The respondent has argued that the power of the Court under S. 4 is confined to giving a declaration as to the rights of the parties and that it has no power

5. AIR 1916 P C 220=39 I C 252=44 I A 1=44 Cal 524 (P C).

to carry it into execution. This must be done by the party taking the declaration to another Court. It is clear I think that the insolvency Court must have some power to remove the obstruction of the sort indicated in S. 53. Such form is I think at best only analogous to the powers under O. 21, Civil P. C., as was held in *Hashmat Bibi v. Bhagwan-das* (6), which was a decision under the old Code. For instance the insolvency Court has not got to attach the property in order to bring it to sale which it is required to do under O. 21, Civil P. C., and it can set aside sales (for reasons which are not permitted under that order). Again, the order of sale by the Official Receiver can be confirmed at once if there is no objection. Surely, if by some unexpected windfall the insolvent is freed from debt and is put in possession of funds, it could not be within the power of the insolvency Court after the sale to the purchaser has been completed to cancel it by paying down the sale amount plus 5 per cent and costs. I merely mention these points to indicate that while conceding that the insolvency Court must have some powers of execution the procedure is only analogous to and not identical with that under O. 21.

Now, with regard to the power of the insolvency Court to determine the liability as between the father and the son and the power to act on a petition to be put in possession by the purchaser from the Official Receiver, there is no doubt that *Venkatram v. Chokkier* (7) has held that the Official Receiver is not entitled to apply under S. 4, Provincial Insolvency Act, for delivery of possession of the property so far as the sons' share is concerned. His remedy is there said to be by way of instituting a suit in the ordinary civil Courts. In that case *Ramaswami Chettiar v. Ramaswami Iyengar* (8) was not followed though no doubt it is said in the judgement that some distinction can be made because there both the property of the sons and the property of the insolvent was in dispute. It has been argued before me that the series of cases subsequent to *Ramaswami Chettiar v. Ramaswami Iyengar* (8), referred to as placing the posi-

tion of the sons on a different footing from that of the father. *Official Receiver South Arcot v. Perumal Pillai* (9) and *Chittammal v. Ponnuswami Naricker* (10), do not really support the argument of Ramesam, J. Sitting as a single Judge. I cannot canvass such arguments. I am bound by the decision in *Venkatram v. Chokkier* (7) relied on by the lower appellate Court provided it is applicable. But the distinction sought to be drawn by the appellant between that case and the present is this: In that case the purchaser from the Official Receiver proceeded directly under S. 4 to get delivery made to him by the Official Receiver and without getting any previous adjudication by Court as to the liability of the son's share. In this case it is argued that the liability of the sons' share for the mortgage debt had been already adjudicated on. The insolvency Court had therefore power to proceed against the sons' shares in execution. Now if the insolvency Court had decided the liability of the sons, I should have felt that it would have raised very several difficult questions.

It has in fact been argued before me both that the insolvency Court has no jurisdiction to investigate a matter of that sort, and even if it has, after deciding the matter it would have no power to sell the sons' share if liable in a case like the present where they had partitioned from their father. In *Re, Balaswami Aiyar* (11), at p. 439, it was pointed out that the partition only deprived the Official Receiver of one remedy, that is by way of private sale, but that he had still other remedies open, viz. (1) to sue the sons for debts; (2) to make himself a party in the action and compel an adjudication on the binding nature of the creditor's debts and ask the Court to discharge the binding debts and then divide the rest of the property; (3) possibly to proceed against the sons on a garnishee action provided that they fill that character, before the insolvency Court itself.

Acting on this third possible remedy, it was held by a Bench in *Ramchandra Aiyar v. Official Assignee, Madras* (12),

6. AIR 1914 All 26 = 24 I C 752 = 36 All 65.

7. AIR 1928 Mad 531 = 109 I C 516 = 51 Mad 567.

8. AIR 1922 Mad 147 = 65 I C 394 = 45 Mad 434.

9. AIR 1924 Mad 387 = 79 I C 322.

10. AIR 1926 Mad 363 = 92 I C 573 = 49 Mad 762.

11. AIR 1928 Mad 735 = 112 I C 541 = 51 Mad 417 (FB).

12. AIR 1931 Mad 317 = 131 I C 481 = 54 Mad 789.

that the insolvency Court could go into the question of liabilities between the father and the sons and it was remarked obiter by Curgenvin, J., that after such a declaration the Court has consequently the power to direct the sale of the sons' share in the property. But in a later Bench case *Krishnamurthi v. Sundaramurthy* (13), it was stated by Ramesam, J., who had in his judgment in *Re, Baluswami Aiyar* (11), alluded to the possible course against the sons in the insolvency Court as garnishees that the procedure against the sons as garnishees is not possible as the sons are not indebted to the father; and secondly, the Court should not decide this matter nor proceed to find the debt binding on the sons to sell their share. If, in the present case, the insolvency Court had passed the decision holding the sons liable for the debt I should have been inclined to ask for a reference to a Full Bench in view of the conflict between *Ramachandraiyyar v. Official Assignee of Madras* (12) and *Krishnamurthy v. Sundaramurthy* (13). But I am saved discussing the matter at all and also a great many other further difficult points by the fact that the Court which found the sons liable for the mortgage debt is not the insolvency Court, and that when the Official Receiver proceeded to sell the property he was not executing a decree of the insolvency Court passed by it under S. 4. It is urged for the appellant that the Official Receiver had in fact taken course No. 2 referred to in *Re, Baluswami Aiyar* (11), had made himself a party to the partition suit and could therefore as a result of the decree in that suit proceed to sell the property of the sons. It may be noted in the first place, that the sort of decree contemplated in *Re, Baluswami Aiyar* (11) is that the binding debt should first be discharged and then the property divided.

In the present case there has been no such decree asked for or obtained in the civil Court, the decree merely being that in the partition the sons' share is also liable for the mortgage debt. Assuming, however that this can be taken, as a decree to first realize the mortgage debt by sale of the properties and then effect the partition no case has been quoted to me to support the argument that the insolvency Court can proceed to execute

through the Official Receiver a decree of a civil Court. It seems clear to me that the insolvency Court could not execute such a decree, which must be executed by the Court which passed it, or by some Court to which it had transferred it. Therefore the case is in my opinion on all fours with in *Re, Baluswami Aiyar* (11) and it is not open to me to canvass the correctness of that decision. So far as the insolvency Court is concerned this is a simple case of the Official Receiver selling the property without any previous declaration having been made by the insolvency Court under S. 4, as to the liability of the sons' share and the purchaser from the Official Receiver applying to the Court to be put in possession. The case directly falls under the decision in *Re, Baluswami Aiyar* (11) and it is unnecessary to discuss the various questions which might arise had the insolvency Court itself decided in an inquiry under S. 4 as to the binding nature of the mortgage on the share of the sons. I hold therefore that the view which the lower appellate Court took in this matter is correct.

The appellants appear to have, I am bound to say, very little merits in the matter. It is perfectly obvious that the sale by the Official Receiver, without the expenses of attachment and court-fees, and with the interest amount on the mortgage considerably reduced, is much more beneficial to the estate than for the mortgagee to file a suit on his mortgage on the basis of the decree in the partition suit and sell the property under a mortgage decree. As the learned District Judge himself states:

"It is quite possible as contended by the learned vakil for the contesting respondent that the obstruction to delivery and the suit for partition were vexatiously engineered by the insolvent himself. If that is the case, it has to be admitted that his scheme has so far been successful."

I must however decide this appeal purely on the question of law and procedure and following in *Re, Baluswami Aiyar* (11) I dismiss this second appeal, but without costs in the circumstances. Leave to appellants to apply to the insolvency Court to have the sale by the Official Receiver cancelled subject to the objections if any by the respondent allowed.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 481

BEASLEY, C. J. AND BARDSWELL, J.
Sri Chidambara Sivaprakasa Pandara Sannadhi Avergal — Plaintiff—Appellant.

v.

Manickam Pillai and another—Defendants—Respondents.

Letters Patent Appeal No. 115 of 1929, Decided on 11th January 1933, against judgment of Sundaram Chetty, J. D/- 3rd September 1929, reported in *A. I. R. 1930 Mad. 422*.

Hindu Law—Religious endowment — Permanent lease by head of mutt enures for his lifetime.

The head of a mutt is not in the position of a trustee holding property vested in him or in the religious institution for any specific purpose. If therefore the head of a mutt grants a permanent lease, though it is one not for any benefit or necessity of mutt, still the lease enures for the life time of such lessor and is not void ab initio. And hence a suit for possession by such lessor against the lessee who has committed no default cannot be maintained : *AIR 1922 PC 123* and *AIR 1923 IC 175, Rel on ; AIR 1927 Mad 829, Dist ; AIR 1930 Mad 422, Affir.*

[P 481 C 1, 2, P 482 C 1, 2]

T. V. Ramanatha Ayyar—for Appellant.

V. Balasundaram—for Respondents.

Beasley, C. J.—This Letters Patent Appeal arises out of a suit filed by the plaintiff-appellant for the recovery of possession of the plaint-mentioned mana together with arrears of rent from the defendants to whose ancestor this site was granted by the plaintiff under a registered lease deed Ex. A dated 3rd July 1891. The appellant's case is that he is the head of Sivaprakasa Swamigal Mutt, that the suit property which is situated in Madapuram village belongs to the aforesaid mutt and that it was leased out to the father of defendants 1 to 3 who took it for erecting a house upon it for his occupation. The plaintiff's claim was resisted by the defendants on several grounds. It was urged that the lease granted by the plaintiff was a permanent lease, that no default was made in the payment of rent, that the plaintiff's suit was barred by limitation and that in the case of eviction a sum of Rs. 1,000 should be paid as compensation for the house built on the suit site. The lower Courts found that the lease granted under Ex. A was a permanent lease. The Subordinate Judge found that the permanent lease was not granted for any benefit or necessity of

the mutt; but, on a consideration of the case law upon the point, he held that the lease in question was good till the end of the plaintiff's lifetime whatever might be the binding character of it so far as the plaintiff's successor was concerned. The Subordinate Judge therefore dismissed the plaintiff's suit, confirming the decision of the first Court. On second appeal, Sundaram Chetty, J., upheld the view of the Subordinate Judge and dismissed the appeal.

It is clear from the plaint that the claim was put forward in respect of this property as being the property with which the mutt was generally endowed and therefore the position does not fall to be considered from any other point of view. The position therefore is that the appellant, the head of the mutt, is not in the position of a trustee holding property vested in him or in the religious institution for any specific purpose. He occupies the position of the head of a mutt, not that of a trustee and our learned brother in second appeal rightly draws the distinction between the two classes of person. It is argued here that it is well settled that, though the head of a mutt may grant a lease of property of the mutt, he can only do so for his lifetime and that any alienation beyond his lifetime is invalid and, it is argued also, void ab initio. It is of course well-settled that the head of a mutt can grant a lease of the property of the mutt for his lifetime. In this case we are not dealing with an alienation made by the predecessor of the plaintiff. It was the plaintiff himself who granted the lease and he granted a permanent lease. What is the position? Is that lease at any rate valid for his lifetime or is he entitled during his lifetime to go behind what he has done and to have that lease declared invalid? It is worthy of note that except by inference even in this suit there is no claim for any such declaration. It seems to be merely a suit for possession but, in my opinion, even had there been a claim in this suit or a claim put forward by the plaintiff to set aside his alienation, it must have failed. The whole question really turns upon what is the effect of an alienation by the head of a mutt beyond his lifetime.

What is to happen to a permanent lease granted by the head of a mutt? It

is argued here, as before stated, on behalf of the appellant that the effect is to render the whole lease void. It is argued that the Court cannot separate the good part of the lease from the bad part; and in support of this proposition a decision of this Court has been referred to, viz., *Andalam Hanumanthu v. Peruri Kristabrahmam* (1), a decision of Kumaraswami Sastri, J., where he held that an alienation made by a trustee of wakf property was void ab initio. Whatever may be the position of a trustee of a wakf, we are not here faced with that position at all. We are faced with an alienation made by the head of a mutt and in my opinion, the decision referred to is of no application here; and even if it were, it is not a decision which I should be inclined to follow much though I respect the decision of that very learned Judge. But in my opinion we are not called upon to say whether that decision was a correct one or not. It is perfectly clear to me as it was indeed to Sundaram Chetty, J., that, if the head of a mutt grants a permanent lease, the lease at least enures for his lifetime and is a valid one. This was what was held in *Vidya Varuthi v. Balusami Ayyar* (2), and it was there held amongst other things that the endowments of a Hindu mutt are not "conveyed in trust" nor is the head of a mutt "a trustee" with regard to them save as to any specific property proved to be in the head for a specific and definite object. This case of course is very much in point in distinguishing the position of a trustee and what he does from the position of the head of a mutt. It was held also in that case that where the head of a mutt has granted a permanent lease the lessee cannot claim adverse possession as against the grantor of that permanent lease although different considerations may arise when the successor of the grantor comes upon the field and adverse possession may at any rate be obtained against him. The position is dealt with at p. 854 where the argument of the question of limitation is considered as follows:

"That article (Art. 141) declares that for a suit for 'possession of immovable property of any interest therein not hereby (i.e. by the schedule) otherwise specially provided for' the period of

1. A I R 1927 Mad 829=104 I C 345.

2. AIR 1922 PC 123=65 IC 161=48 IC 302=44 Mad 831 (PC).

limitation is 12 years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well-settled law of India (apart from the question of necessity which does not here arise) a Mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life."

It was accordingly held that the lessee as against Mahant No. 1 did not acquire a title by adverse possession as he was unable to prescribe against Mahant No. 1 who was, although purporting to grant a permanent lease, granting a lease which was to enure only for his lifetime. This case was considered in a more recent decision of the Privy Council in *Subbaiya Pandaram v. Mahammad Mustapha Marcayar* (3):

"A further argument has been put forward to the effect that the Statute of Limitation begins to run afresh as each new trustee succeeds to the office, and in support of that view reliance is placed on the case of *Iswar Shyam Chand Jiu v. Ram Kanai Ghose* (4) and on the case of *Vidya Varuthi Baluswami Ayyar* (2), but these authorities do not assist the appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mukarari lease. This he has no power to do though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good but good only to the extent of his own life interest."

In both these cases there is, in my opinion, clear authority for the view taken by Sundaram Chetty, J., that although the permanent lease was invalid it was good at least for the lifetime of the plaintiff. For these reasons, I agree with the judgment of Sundaram Chetty, J., and dismiss this Letters Patent appeal with costs.

Bardswell, J.—I agree with my Lord, the Chief Justice and have nothing to add.

P.R.S./K.S. *Appeal dismissed.*

3. AIR 1923 PC 175=50 IA 295=46 Mad 751.

4. (1911) 38 Cal 526=10 IC 693=38 IA 76 (PC).

A. I. R. 1933 Madras 482

WALSH, J.

Hariharan Pattar—Appellant.

v.

Pachurettial Narayana Menon—Respondent.

Appeal No. 145 of 1928, Decided on 1st December 1932, against order of Sub-Judge, South Malabar, D/- 3rd July 1928.

(a) Civil P. C. (1908), O. 21, R. 100—Purchase of property by decree-holder and confirmation of sale—Application for possession of property by one of parties to suit under O. 21, R. 100—Alternative relief for crops as party under S. 47, Civil P. C., cannot be entertained.

A decree-holder purchased the property in auction and a puisne mortgagee of the same property who was impleaded in the suit failing to have the sale set aside filed an application under S. 21, R. 100, after the confirmation of the sale, for possession of the property. In the same application he applied for the alternative relief as regards crops as a party under S. 47, Civil P. C. :

Held : that in the petition deliberately filed under O. 21, R. 100, the alternative prayer cannot be entertained. [P 483 C 2; P 484 C 1]

(b) Civil P. C. (1908), S. 65—Purchaser in Court sale is entitled to property from date of sale and not from date of confirmation—Transfer of Property Act (1882), S. 8.

Under S. 65, Civil P. C., and S. S, T. P. Act, a purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof : 40 Cal 89 (PC), *Ref.* [P 484 C 2]

(c) Malabar Compensation for Tenants Improvements Act (1 of 1900), S. 10—Whether compensation can be given for paddy crops—*Quaere.*

Quaere.—Whether compensation under the Malabar Tenancy Compensation Act can be given for paddy crops : AIR 1914 Mad 225, *Ref.* [P 484 C 2]

P. G. Krishna Iyer—for Appellant.

C. Unikonda Menon—for Respondent.

Judgment.—The appellant before me is the decree-holder. The decree-holder was the first mortgagee and defendants 1 to 15, members of a joint Hindu family, were the mortgagors. Defendant 16 who is the respondent in this appeal, was impleaded as claiming to be a puisne mortgagee in possession. He put in a written statement, but remained ex parte and his mortgage was not recognized by that decree. The decree-holder obtained his final decree on 12th July 1924 and on 26th November 1925, applied for sale of the property in pursuance of the final decree. The sale was not made subject to respondent's mortgage. Defendant 15 with a view to delaying the execution went on filing various applications, but they were dismissed. The sale was held on 23rd June 1926 and the property was purchased by the decree-holder, the appellant. After the sale, defendant 16 filed E. A. No. 797 of 1926 to have it set aside. The hearing of the petition was adjourned several times, one of the reasons being the petitioner's supposed ill-

health and the Court finally ordered that no further adjournments would be granted and that if his illness was likely to continue he must get himself examined on commission. Finally for default of appearance, his petition was dismissed and the sale was confirmed on 7th October 1926, the confirmation having been delayed by defendant 16 for about four months by various petitions. He then applied to have the order dismissing E. A. No. 797 of 1926 set aside. Again, after a number of adjournments obtained by him the petition was dismissed on which he took up a first appeal and a second appeal to the High Court which were also dismissed. Failing in all his proceedings he then put in an application under O. 21, R. 100, for possession of the property from the purchasing decree-holder. It is important to look at his prayers in this petition. They were three in number :

“(a) Directing re-delivery of all properties delivered under the sale certificate, along with the crops thereon for Kanni 1102 which are to be harvested through amin to the petitioner and if the Court finds that there is no reason for it, granting permission to the petitioner to harvest the same ; (b) directing the counter-petitioner not to harvest the remaining crops till the decision of this petition ; (c) directing the counter-petitioner to pay the aforesaid 450 paras of paddy in case he did not harvest, the remaining harvests and 1,500 paras of paddy in case he should harvest the same and also the cost of this petition with interest thereon to the petitioner.”

It is perfectly obvious that he could not possibly get re-delivery of the property in an application as a party under S. 47 in the teeth of the decree to which he had been a party under which the land has been sold and the sale to the decree-holder confirmed. There was therefore no use coming forward with an application for delivery of possession under S. 47. The only section which talks about getting back possession in execution proceedings in such circumstances is O. 21, R. 100, and he consequently tried to come under that section. When it was obvious that he could not possibly get re-delivery of the land he appears to have asked the Court that he might be given the alternative relief as regards crops as a party under S. 47, Civil P. C. The learned District Munsif has written an order with which I entirely agree. In that he states that he could not entertain it in that peti-

tion which had been deliberately put in to recover possession under O. 21, R. 100. He says :

"On this preliminary ground this petition must fail and the petitioner may agitate the other question if so advised in a properly framed petition or may avail of the proper remedy in such cases."

that is the petition as regards some claim for crops. The petitioner refused to do this. In para. 10 of the counter-affidavit he put in in C. M. P. No. 4066 of 1926 of this Court, he said that "no question of amendment arises." He proceeded further to appeal against the order of the District Munsif and again the ground raised in the appeal related to the recovery of possession of the land: Vide grounds 3 and 4 in which he reiterates his claim for possession. The lower appellate Court said that the point is not seriously pressed before him. Of course, not because it was obviously not untenable. But the learned Subordinate Judge apparently, on the ground that there was an alternative prayer under S. 47, with regard to crops, thought that he was entitled to the value of the crops at the time of the delivery and remanded the petition to the District Munsif for fresh disposal. Against this the present appeal has been filed.

As I said, I am entirely in agreement with the original order of the District Munsif that the execution petition having been primarily preferred under O. 21, R. 100, because that is the only section in the Code under which possession of property can be given to anybody other than the purchaser, appellant could not ask for a different and inconsistent relief in that petition. In fact it is doubtful whether there was any alternative asked for by him. In his petition he asks in Cl. (a) that if the Court finds it impossible to re-deliver the land it should grant him permission to harvest, that an injunction should be granted against the counter-petitioner not to harvest the remaining crops (Cl. b) and that in case the appellant should harvest he should be directed to pay the damages thereof (Cl. c). The petitioner was given every chance by the learned District Munsif for putting in a petition under S. 47 with regard to the crops but he refused to do so. On the other hand he came to the High Court, said no amendment was necessary, and proceeded to fight out his preposterous

claim to upset in execution proceedings the decree granted against him. So long as he stuck to O. 21, R. 100, admittedly no appeal would lie and his appeal petition should have been rejected. The order of the learned Subordinate Judge must be set aside and the order of the District Munsif restored. As I feel no doubt that the respondent is not going to end his endeavours to harass the decree-holder, I think I may express an opinion here on some pure questions of law which may shorten future proceedings. Under S. 65, Civil P. C., and S. 8, T. P. Act, a purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof: see decision in *Bhawani Kumar v. Mathura Prasad Singh* (1).

I may note that throughout the proceedings of this petition the petitioner never put his claim to the patton on the basis of compensation under the Malabar Tenancy Improvements Act. He put it on the ground that he was entitled to hold the property. Even what is alleged to be his alternative claim to the crop is to the whole crop, not to three-fourths of it as would be the case if he were asking for the value of improvements under the Malabar Tenancy Compensation Act. He never mentions the word compensation. I do not propose to discuss the question as to whether compensation under that Act can be given for paddy crops. One case is relied on by the lower appellate Court on the subject: *Narayanan Nambudripad v. Krishna Pattar* (2), but it was decided on the ground that principles in S. 108, T. P. Act, were analogous to those applicable in a case of a tenancy terminable at an uncertain date. So that case does not decide the point whether paddy crops are tenants improvements, and one of the learned Judges, Spencer, J., expressly doubts it. It may be noted also that S. 10, Malabar Compensation for Tenants Improvements Act, states that :

"the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realize if sold by public auction to be cut and carried away."

If it is correct that the decree-holder is entitled to the land from the date of

1. (1913) 40 Cal 89=16 IC 210=39 IA 22S (PC).

2. AIR 1914 Mad 225=22 I C 515.

the sale and not from the date of the confirmation of sale, then even supposing that the respondent is entitled to improvements it would only be for the value of the crop on that date which the respondent says was in one affidavit only about a month old. The value of the paddy crop one month old if harvested and carried away would be nothing. The appeal is allowed with costs throughout.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 485

WALSH, J.

Ravella Krishnamurthy—Petitioner.
v.

Yarlagadda Pitchayya and others—
Opposite Parties.

Civil Revn. Petns. Nos. 1389 and 1390 of 1929, Decided on 11th January 1933, from order of Dist Munsif, Gudivada D. 22nd March 1929.

(a) Civil P. C. (1908), S. 151 and O. 47, R. 1—Dismissal of suit—Each party allowed to bear his costs—Court mentioning as one of reasons in order as to costs, that in case decision of lower Court in another suit is reversed in pending appeal in High Court right of plaintiff to sue in former suit may be revived—Plaintiff is not entitled to have suits revived—Other remedies open, relief under S. 151 cannot be granted.

One R had two wives. He bequeathed his property to a minor son by his first wife. Seeing that his second wife was pregnant he executed a codicil bequeathing his property to second wife and the unborn child. After his death, the will was presented for registration and on the objection of the first wife and her sons to the codicil, registration was refused. The second wife brought a suit under S. 77, Registration Act, to have the codicil registered. After the death of R, his minor sons by the first wife brought suit on two promissory notes in favour of R. While these suits, to which the second wife and her child were made parties, were pending, registration of the codicil was directed by the Court in the suit. On this the plaintiff in the promissory note suits admitting that he was not entitled to sue, had the suits dismissed. The Munsif allowed each party to bear his costs and as one of the reasons for such order mentioned that as an appeal had been filed from the order directing registration, the right of the plaintiff in the promissory notes to recover the amount under the will may be revived if the High Court reversed the order directing registration. The appeal in the High Court was compromised by which the codicil was agreed to be invalid and the debt due under the promissory notes were allotted to the plaintiffs, who sued on them before. They then filed petitions under S. 151, Civil P. C., to have original suits revived. On this date time for filing revision from the original order of dismissal had already expired:

Held: that the suit did not revive as the rea-

son given by the Munsif for the order as to costs did not give plaintiff any right to revive the suits, that the petition could be considered only as revision petition and not as petition under S. 151, that as the period spent in the proceedings in appeal in the High Court from order directing registration could not be excluded revision, petition was barred by time.

Held further: that even if the petitions were to be considered as under S. 151 they did not lie as petitioners had other remedies open to them and that as the debtors under promissory note were not parties to appeal in High Court, the compromise cannot set aside the dismissal of the suits on promissory notes: *AIR 1920 Mad 640 (FB)*; *AIR 1920 Cal 399*; *AIR 1924 Lah 225*; 39 All 8 and *AIR 1930 All 100, Dist.*; *AIR 1923 PC 167, Rel on.* [P 488 C 2]

(b) Civil P. C. (1908), O. 47, R. 1 — Dismissal of suit—Review on ground of discovery of new and important matter—Such matter must be existing at date of decree.

In order that a decree may be reviewed on the ground of discovery of new and important matter, such matter must have been in existence at date of decree: 24 *Mad 1, Ref.*; *C R P's.* Nos. 673 and 674 of 1928, *Rel on.* [P 487 C 2]

G. Lakshmananna and G. Chandrasekhara Sastri—for Petitioner.

Ch. Raghava Rao—for Opposite Parties.

Judgment.—One Ramaswami Mudali had married two wives. He divided with his sons by the first wife one of whom was a minor. This minor son was given his share with his father as guardian. Ramaswami Mudali went to Masulipatam for treatment and there made a will bequeathing his property to this minor son by his first wife. It is then said that seeing that his second wife was pregnant he executed a codicil bequeathing his property to his second wife and the unborn child. After his death the will was presented for registration. The codicil was disputed by his first wife and her sons and registration was refused. The second wife brought a suit under S. 77, Registration Act, to have the codicil registered. The Subordinate Judge directed registration of the codicil and on this an appeal was taken to the High Court. (A. S. No. 415 of 1924). After the death of Ramaswami Mudali his minor son by his first wife brought suits on two promissory notes executed by third parties in favour of Ramaswami Mudali. In those suits he made his brothers, the second wife, and the female child, who had since been born to her, also parties. The female child was defendant 5. The debtors pleaded discharge. The suit to enforce registration was disposed of by the Sub-

Judge while these suits were pending. As a result of this, since the plaintiff admitted that under the judgment of the Subordinate Judge which supported the codicil he was not entitled to the amounts, the suits were dismissed. But the learned Additional District Munsif when he came to the matter of costs gave amongst other reasons for directing each party to bear his own costs, that as the plaintiff had filed an appeal to the High Court against the judgment of the Additional Subordinate Judge his right to recover the said amounts on the basis of the will in his favour would revive if the said judgment is reversed. In the High Court there was a settlement of the matter between the sons of first wife including the minor and also the second wife and her minor daughter, defendant 5. There was a decree in terms of the compromise. It was agreed that the codicil was not valid. At the same time the terms of the will were departed from and a fresh arrangement made. Under this compromise the debts under the two promissory notes which had been sued upon were allotted to the minor son by the first wife who had brought the suits. He thereupon filed petition under S. 151, Civil P. C., to have the suits revived. These petitions were dismissed and it is against these orders that the present revision petitions are filed.

The learned District Munsif who dismissed the petitions was not the same officer who passed the order dismissing the suits. He gave as one of his reasons for refusing the request that defendant 5, who is the person to benefit under the codicil, was not a party to the compromise or the litigation in the High Court. That remark is not quite correct. Defendant 5 was certainly not a party to that litigation because the suit was instituted by her mother before she had been born. But she was a party to the compromise as represented by a guardian. He also treated the petitions which had been filed in September 1928, while the judgment and decree of the High Court had been obtained on 10th April 1928, as review petitions and held that the time necessary for obtaining copies of the High Court's judgment and decree could not be deducted in computing limitation. He considered also the main contention which is put before me, namely, that the

suits should be considered to be still pending, and repelled it.

It is necessary to note exactly the circumstances under which the suits were dismissed and the order passed dismissing them. The following issues were framed in the two suits:

O. S. No. 78 of 1924.—1. Is the plaintiff entitled to the suit amount? 2. Is the suit maintainable without production of succession certificate? 3. Is defendant 4 a necessary party? 4. Is the payment of Rs. 500, pleaded by defendant, true? 5. To what relief?

O. S. No. 128 of 1924.—1. Whether plaintiff is entitled to sue? 2. Whether suit is bad without the succession certificate? 3. Whether defendant 1 is not liable for costs? 4. Whether the discharge pleaded is true? 5. What relief is the plaintiff entitled to?

The rest of the judgment may be quoted in full.

"Issue 1 in both the suits: The suit pro-notes were executed in favour of the plaintiffs' deceased father. The plaintiff seeks to recover the amounts of the suit pro-notes as a legatee of the said amounts under the will of his deceased father. It is admitted by both parties that plaintiff is not entitled to the suit amounts as under the judgment of the Additional Subordinate Judge of Masulipatam in *O. S. No. 22 of 1924* (Ex. 1) a codicil purporting to have been executed by plaintiff's deceased father and revoking the will in plaintiff's favour has been found to be true and genuine and as under the said codicil defendant 5 is entitled to the suit amounts. I therefore find on issue 1 that the plaintiff is not entitled to recover the suit amounts. Issues 2 to 4 in both the suits: In view of my finding on issue 1, these issues do not arise for consideration. Issue 5: In the result, I dismiss the plaintiff's suits. As the suits have not been dismissed as result of a decision on the merits of the case, as plaintiff has filed an appeal to the High Court against the judgment of the Additional Subordinate Judge of Masulipatam in *O. S. No. 22 of 1924*, and as his right to recover the suit amounts on the basis of the will in his favour would revive if the said judgment is reversed, I think it fair and proper to direct each party to bear his own costs of these suits."

The learned District Munsif is clearly right in holding that the suits were not pending and in fact he has put the case too highly for the petitioner when he says that

"in the portion of the judgment relating to costs it is stated as a matter of course the plaintiff may apply for restoring these suits if another suit in the Subordinate Judge's Court, which then stood decided against the plaintiff, was subsequently decided on appeal in plaintiff's favour."

There is no such permission given in the judgment or order as to costs. The

remark about the revival of plaintiff's rights is simply mentioned as one of three reasons for directing each party to bear his own costs. The other two reasons are stated to be that the suits have not been dismissed as a result of a decision on the merits in the cases and that the plaintiff had filed an appeal to the High Court against the judgment of the Additional Subordinate Judge. The second reason is of course merely a part of the third reason which follows it. The statement that the suits were not dismissed as a result of a decision on the merits of the case is, I think, a somewhat loose phrase of which the plaintiff cannot take advantage. It will be seen that for the purposes of the cases at least the plaintiff chose to admit the decision against him in O. S. No. 22 of 1924 as binding. That decision was not res judicata with regard to the suits on the promissory notes and it was perfectly open to him to have asked the Court to raise and decide in the pro-note suits the important matter as to the genuineness and validity of the codicil. The plaintiff having, if only for the purposes of the cases, admitted the correctness of that decision, the Court had no option but to dismiss the suits and such a dismissal was one on the merits. I think the learned District Munsif really meant that the suits had been allowed to be dismissed without contest by the plaintiff, which would have been an equally good reason for the order as to costs. There is no sort of proviso that the suits will be revived if the plaintiff succeeds in the appeal in the High Court. The expression of opinion that they will revive is a pure obiter dictum introduced solely in considering the matter as to costs.

Although therefore the petitions were in form under S. 151 of the Code, and it is still argued before me that that was the correct section, I agree that they must be taken to have been revision petitions. As such, it is not disputed that they were out of time since the period requisite for obtaining copies of the High Court's judgment and decree could not be deducted. I may also perhaps note another obstacle in the way of allowing revision, a reason which has been mentioned in a judgment by Curgenven, J., in *C. R. Ps. Nos. 673 and 674 of 1928* quoted in another connexion in

this case, i. e., that under the decision of the Privy Council in *Kotaghiri Venkatasubbamma Rao v. Venkatarama Row* (1) the new and important matter contemplated by O. 47, R. 1, Civil P. C., must be something which existed at the date of the decree. The learned Judge has there no doubt noted a case in *Maung Kyaw v. Ko Aye* (2), which he says has contrived to reconcile with the Privy Council ruling the grant of review in circumstances something like the present but the learned Judge notes that a contrary view has been taken by Kumaraswami Sastri, J., in *G. Venkamma v. G. Ranga Rao* (3), and since the Subordinate Judge with whom he was dealing in that civil revision petition guided himself by these decisions, which were not dissented from, he was not prepared to interfere. Anyhow it is not disputed before me on the question of limitation that the petitions must fail regarded as revision petitions.

Assuming that the petitions can be regarded as under S. 151 of the Code, the following cases have been quoted in favour of the petitioner *Rameshwar Dayal v. Guru Sahai* (4), by the Judicial Commissioner, Oudh, *Kalyan Singh v. Ramgolam Singh* (5), *Neki v. Chhajju Ram* (6), *Muhammad Shafi v. Chedu*, A. I. R. 1930 All. 100, and *Bhagwan Dayal v. Param Sukh Das* (7). The first is of no authority in this Court, and the facts there were different. It was a suit for pre-emption and the plaintiff at the time had no share in the property. Consequently his suit was dismissed with the following order:

"At this moment the plaintiff owns no share and cannot therefore sue for pre-emption. If his appeal is accepted he may apply for revival of the suit if so advised."

The Court held that this was not a proper order to be passed and that the suit should have been kept pending but it was not prepared to say that it was an illegal order. It had to construe what the Court meant by the order and it held that the order reviving the suit was not without jurisdiction under S. 151 of the Code. As pointed out above, there is no order here that the

1. (1901) 24 Mad 1=27 I A 197 (P C).

2. AIR 1927 Rang 189=103 I C 258=5 Rang 261.

3. AIR 1922 Mad 227=70 I C 741.

4. (1918) 47 I C 137.

5. AIR 1920 Cal 399=56 I C 4.

6. AIR 1924 Lah 225=77 I C 869=4 Lah 445.

7. (1917) 39 All S=36 I C 365.

suit can be revived. Moreover, it has to be noted that the Allahabad High Court, which the Oudh Judicial Commissioner had to follow, has taken a more extended view of the powers of the Court under S. 151 than has been taken by our High Court: vide in *Neelaveni v. Narayana Reddi* (8), where this High Court holds that where there is a specific provision for restoring an ex parte decree under O. 9, R. 13, it is not legitimate to invoke the inherent powers of the Court under S. 151. The reasoning would appear to apply with still greater force where the dismissal of the suit has not been ex parte as here. *Kalyan Singh v. Ramgolam Singh* (5), is a very peculiar case, and there was a definite reservation of the right of revival. A remark in that case that:

"it is the duty of the Judge to try the case set down for trial before him and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantive right of the litigant,"

is relied on. It has, I consider, no application to the present case. For, as pointed out above, once the plaintiff chose to admit for purposes of the cases the correctness of the judgment of the Subordinate Judge with regard to the codicil, the Court had no option but to dismiss his suits on the promissory notes. *Neki v. Chhajju Ram* (6) is not parallel to the present case because the only order passed in the matter had been "No orders necessary," and quite clearly under the circumstances, the application for leave to appeal to the Privy Council was revived. *Bhagwan Dyal v. Param Sukh Das* (7) is a case where a minor had not been properly represented. *Muhammad Shafi v. Chedu*, A. I. R. 1930 All. 100, is a very peculiar case and quite different from the present. As noted above, Allahabad interprets S. 151 in a more liberal way than does Madras. *Khajooroonissa v. Rowshan Jehan* (9) has no application. It related to setting aside compromise on the ground of fraud, and fraud will vitiate the most solemn acts of a Court.

The plaintiff in the present suits could have either (as observed above) taken an issue in the suits on the promissory notes with regard to the codicil or he could have asked the Court to

keep the suits pending until the appeal in the High Court was decided, or he could have appealed against the decrees and asked that those appeals in the High Court be kept pending till the appeal with regard to the codicil was decided. Finally he might have come by way of revision. He did not take any one of the first three courses and he does not profess to have taken the fourth. But if the petitions are to be regarded as for revision, for the reasons pointed out above, they must fail. There can be no question that the obiter dictum of the learned District Munsif that the plaintiff's right to recover the suit amounts on the basis of the will in his favour would revive if the judgment of the Subordinate Judge's Court is reversed, if by this he meant that the right to sue would revive, is incorrect. The alleged debtors under the notes were not parties to the suit before the Subordinate Judge and the decision in that suit could not possibly operate automatically to set aside the decrees dismissing the suits against them. Authority for this proposition is to be found in *Naganna v. Venkatappayya* (10) (a Privy Council case) in which *Shama Pursad Roy v. Hurro Purshad Roy* (11) is distinguished. In this connexion I would refer again to the judgment of Cargenven, J., in C. R. Ps. Nos. 673 and 674 of 1928. That was a stronger case for allowing revival than the present; because the two suits, one of which had been taken in appeal and the other not, had been tried together by consent of parties. The petitioner there preferred an appeal to the High Court against one decree but not against the other and sought to have the decree in the suit in which she had not appealed altered by application to the trial Court. With respect I adopt the language of my learned brother when he says that:

"the contention involves the general proposition that the finding in one suit may operate so as automatically to supersede a finding in a contrary sense in another suit between the same parties."

(in the present case the parties are not even the same) as the decree is based upon that finding so that it is not necessary to follow the ordinary course

8. AIR 1920 Mad 640=53 I C 847=43 Mad 94 (F B).

9. (1876) 2 Cal 184=3 I A 291=3 Sar 629 (PC).

10. AIR 1923 PC 167=76 I C 594=50 I A 301=46 Mad 895 (P C).

11. (1863-66) 10 M I A 203 (P C).

of obtaining a reversal of the decrees on appeal. He then relies on the Privy Council decision cited above to refute this contention. It is true that in the present case the plaintiff might have been misled by the obiter dictum of the Judge of the trial Court in giving direction as to costs; but it is also quite possible that he was induced not to appeal against the decrees in the promissory note suits as it would be less expensive to try and get them revived if he succeeded in the appeal on the other suit. In any case, it is perfectly clear that the Court gave him no promise that the suits would be revived and that the remark was made solely as one reason justifying order as regards costs. I may also add that, in my opinion, the learned District Munsif in dismissing this application is correct in noting the fact that defendant 5 is not a party to the decree passed by the High Court. It would therefore appear that she is still at liberty to assert her own rights under the codicil as against the debtor respondents, in the sense that the compromise decree is not executable against her. It is no doubt argued that any suit by her will be barred by limitation but such a consideration is, I think, insufficient to remove the objections which the alleged debtors under the promissory notes raise to the revival of these suits on the strength of a decree to which defendant 5 was not a party. I consider that the petitions were rightly dismissed and that there is no ground for interference. The revision petitions are dismissed with costs. (In C.R.P. No. 1590 of 1929).

P.R.S./K.S. *Petitions dismissed.*

* A. I. R. 1933 Madras 489

Special Bench

BEASLEY, C. J., CORNISH AND
BARDSWELL, JJ.

*Madras Provincial Co-operative Bank,
Ltd.—Assessee—Petitioner.*

v.

*Commissioner of Income-tax, Madras
—Opposite Party.*

Original Petn. No. 44 of 1932, Decided
on 5th January 1933.

* (a) **Income-tax Act (1922), Ss. 8 and 10—Notification dated 25th August 1925—Interest from securities is not included therein.**

The interest derived by a Co-operative Bank from its investments in Government securities is not to be regarded as part of the profits of its

business *qua* such Bank. The exemption from income-tax given by the Notification of Government of India dated 25th August 1925 is to the profits made by the Bank from its business of a Co-operative Bank. The mere fact that the bye-laws of the Society were amended on 21st December 1929, by the inclusion of object 3 to bye-law No. 1, namely, "to purchase and sell Government Promissory Notes," would not affect the practice since 1904 to tax such interest under S. 8. The notification did not alter that practice: *A. I. R. 1929 Mad. 387 (FB), Rel. on.; Norwich Union Fire Insurance v. Magee, (1896) 3 T. C. 457 and Liverpool and London Globe Insurance Coy. v. Bennett, (1913) A. C. 610, Dist.* [P 490 C 1, 2; P 492 C 1, 2]

(b) **Income-tax Act (1922), S. 10—Exemption—Burden of proof is on assessee.**

When an assessee is under a section of the Income-tax Act assessable to income-tax, it is for that person to show that he has been exempted.

[P 490 C 2]

(c) **Interpretation of Statutes—Successive Acts—Continuous practice followed—Intention of legislature is to confirm that practice.**

When legislation follows a continuous practice and repeats the very words on which that practice was founded, it may fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.

*M. Subbaroya Aiyar—*for Petitioners.

*M. Patanjali Sastri—*for Opposite Party.

*Beasley, C. J.—*The question referred to us is as follows:

"Whether on the finding that investment in Government Securities forms a necessary part of the business of the assessee, the sum of Rs. 56,810, forms the 'profits of any Co-operative Society' within the meaning of the Notification of the Government of India, dated 25th August 1925."

The Notification referred to exempts from income-tax.

"The profits of any Co-operative Society other than the Sanikatta Salt Owners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act, 1912 (2 of 1912) or the dividends or other payments received by the members of any such society on account of profits."

The assessee invests large sums received by them in Government Securities and the income derived from such investments has been assessed to income-tax. The main objects of the Society, as set out in its bye-laws, are: (1) to collect funds for financing Co-operative Societies, (2) to serve as the Provincial Apex Bank for the province of Madras, (3) to purchase and sell Government Promissory Notes, and (4) to carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act and the rules framed thereunder for the time being in force. The Society derives its income (1) from interest on

the loans and advances made mainly to Central Banks and depositors, (2) from interest on investments in Government Securities, (3) from interest on deposits, and (4) from commission and fees. The money used to purchase Government Promissory notes is the money collected by the Society in excess of the money required to finance Central Banks and depositors. The assessee claims that the dividends received from investments in Government Securities are the profits of the Society and are, therefore, under the Government of India Notification exempt from payment of income-tax. This claim is based upon the contention that the purchase and sale of Government Promissory notes is part of the business of the Society and that the Assistant Commissioner of Income-tax has found that such investment is a necessary part of the business of the Society. The bye-laws of the Society were amended on 21st December 1929, by the inclusion of object 3 to bye-law No. 1, namely, "to purchase and sell Government Promissory notes." It is argued that the purchase and sale of Government Promissory notes therefore is a part of the business of the assessee and that the profits derived from such purchase and sale are the profits of the Society.

With regard to this argument, the interest derived from such securities must, of course, be taken as an item of receipt in arriving at the Society's profits and gains from the business, but it does not however follow from this that the interest is a profit of the Society. It is contended by the Commissioner of Income-tax that interest on Government securities has always to be taxed under S. 8, Income-tax Act, whereas the profits of a business have always to be taxed under S. 10 of the Act, and that it is the latter profits alone that are exempt under the notification. The Income-tax Act in S. 6 states the heads of income chargeable to income-tax as follows: 1. Salaries; 2. Interest on Securities; 3. Property; 4. Business; 5. Professional earnings; 6. Other sources.

In respect of these the tax is payable on (i) under S. 7 on (ii) under S. 8, on (iii) under S. 9, on (iv) under S. 10, on (v) under S. 11 and on (vi) under S. 12. Thus all the six sources of income are dealt with by separate sections. S. 8,

as before-mentioned, provides for the taxation of "interest on securities" and there is no other section which does; and it has been the custom ever since 1904, when the exemption of profits similar to those contained in the Government notification came into force, to interpret the exemption as it has been in this instance; and it is argued that the observations of Lord Macnaghten in *Commissioners for Special Purposes of Income-tax v. Pemsel* (1), at p. 591 bear usefully upon this case. They are as follows:

"I cannot help reminding your Lordships, in conclusion, that the Income-tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their Legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred ('Charities,' 1865). It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point, of course, is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grew stronger with each successive re-enactment."

There is nothing new in the exemption contained in the Government notification. For years, the practice has been to interpret "profits as not including interest on Government securities." Since 1904 such interest has always been taxed under S. 8 and it is difficult to imagine that Government's latest notification was intended to alter that practice. When an assessee is under a section of the Income-tax Act assessable to income-tax it is for that person to show that he has been exempted; and in my view, the assessee here has failed to show that it was the intention of Government to exempt such interest. The mere fact that the bye-laws of the Society have recently been amended making the purchase and sale of Government Promissory notes one of its main objects does not, in my view, alter the position. It is conceded that for years this Society

has, even in the absence of such a bye-law, been investing its surplus collections in Government Securities and that the interest received has been assessed to income-tax. An attempt was made recently by this Society to challenge that position in *Commissioner of Income-tax v. Madras Central Urban Bank* (2). There the meaning of the same notification had to be considered by a Full Bench of which I was myself a member. In that case, under orders of Government the Society was bound to keep 40 per cent of its total liability under call deposits in a liquid or fluid form and instead of keeping these fluid assets in their safe or till it kept them in as nearly a fluid form as possible in Government securities upon which as in the present case they received interest. It was claimed by the society that this was a part of the business of the Bank and that unless this interest was received the activities of the Bank would be seriously handicapped—exactly the same contention has been put forward here—and it was held that this investment in Government securities was not a part of the business of the Bank but that such investment fell under S. 8 of the Act. In the course of the judgment reference is made to some English decisions, two of which were relied upon here by Mr. Subbaroya Aiyar for the assesseees, viz., *Norwich Union Fire Insurance v. Magee* (3) and *Liverpool and London Globe Insurance Co. v. Bennett* (4).

In the former case the company besides carrying on business in the United Kingdom carried on business in America and elsewhere. The laws of the United States in reference to the carrying on of insurance business there required the maintenance of a reserve fund there and in order to provide that reserve fund investments were made and interest earned. It was clear that the business of insurance could not be carried on in America without those investments being made there and it followed that the interest on these investments necessarily made for the purpose of the trade was part of the gains of that trade. As appears from the judgment in that case

2. A I R 1929 Mad 387=52 Mad 640=118 I C 107 (FB).

3. (1896) 3 T C 457=73 L T 733=44 W R 384.

4. (1913) A C 610=82 L J K B 1221=109 L T 483=29 T L R 757=57 S J 739=20 Mans 295=51 Sc L R 575.

company did not invest in those foreign securities for the sake of investment or for the sake of making profit by those investments but for the sake of having fund invested in America to answer the requirements of the American law. In the latter case the company carried on business at home and abroad. As in the former case by the laws of certain of the foreign countries in which it conducted its business the company was required to deposit with the Government of those countries certain sums of money and to invest those sums in accordance with the local laws. The company also voluntarily invested certain other sums. It was held that interest on both classes of investments was assessable as being part of the business. As is observed in the judgment of the Full Bench, Hamilton, J., held that the voluntary investments were not for the sake of investments but for the sake of having a fund abroad readily realisable to meet the liabilities of their business and that the making of the investments was just as much part of their mode of conducting the business as the taking of risks and in the event of the current account at the Bank being insufficient to meet the liabilities all the investment funds might have to be called upon at some time or other. The object of the investment was to extend the business, so the making of them was part of the business. This the Full Bench held clearly distinguished *Liverpool and London Globe Insurance Co. v. Bennett* (4), from the case before them. The Full Bench judgment goes on as follows:

"It seems to me impossible, at least without a great deal more information than has been presented to us, to say that these investments of more or less amounts for a longer or shorter time on the part of the Bank in order to prevent their fluid assets from lying absolutely idle in their coffers, formed part of the business of the Bank. It seems to me that they are in the same position as any private person who with a large credit balance in his private account desires to put it into a remunerative form which shall at the same time be readily realizable and therefore invests for shorter or longer periods in Government paper."

and further:

"The obligation on the Bank to keep 40 per cent of its total liabilities in a fluid form is in consequence of an administrative order of Government and does not oblige them, although it may permit them, to invest the fund at all, and it seems to me that as they are to hold the fund in readiness to meet some particular liability which is specified, it cannot be said to be

part of their business as a Bank to invest these liquid assets in the interval."

It seems to me that no new facts are present now. The society has continued to do that which it was then doing. No one suggests that the purchase and sale of Government promissory notes by the society was, before the amendment of its bye-laws, ultra vires, and in my opinion the amendment does not in the least alter the position as it was at the time of the Full Bench decision already referred to. For these reasons in my opinion the question referred to us must be answered in the negative. The assesses must pay the costs of the Commissioner of Income-tax, Rs. 250.

Cornish, J.—I am of the same of opinion. I think there is no real substantial distinction between this case and *Commissioner of Income-tax, Madras v. Madras Central Urban Bank, Ltd., Mylapore* (2). The exemption from income-tax given by the notification is to the profits made by the petitioner from its business of a Co-operative Bank. Unless therefore the interest derived by the Bank from its money invested in Government promissory notes can be regarded as profits from the business carried on by the Bank, it will not be exempt from tax. The petitioner relies on R. 1 of the bye-laws which states that one of the main objects of the Bank is "to purchase and sell Government promissory notes." Taking this to mean that the Bank has been empowered to deal in Government promissory notes as part of its business, I should say that any profits made by the Bank from the purchase and sale of these securities on its own account or as broker for a constituent would be profits from the business of the Bank and exempt from tax under the notification. But in the case before us nothing else appears except that the Bank has invested part of its funds in Government promissory notes and derived interest therefrom.

If there was no opportunity of employing the money by lending it out to Central Banks (which is by R. 12 of the bye-laws declared to be the primary purpose for which the Bank's funds are to be utilized), or by lending it to shareholders or constituents of the Bank (which the Bank is authorized to do by R. 13), the prudent course would un-

doubtedly be to invest the money in some easily realizable security. But there is nothing peculiar to the business of banking in taking this course. As a matter of construction of the bye-laws I hardly think that an investment in Government promissory notes of money lying idle in the Bank can be deemed to be one of the declared objects of the Bank. The petitioner having failed to show that the investment was made for carrying out some purpose for which the Bank has been founded the only ground, as it seems to me, on which the interest from the investment might be held to be profits from the business, disappears.

Bardswell, J.—I agree that the interest derived by a Co-operative Bank from its investments in Government securities is not to be regarded as part of the profits of its business qua such Bank. I would take it that the exemption is meant as an encouragement to the employing of as much capital as possible for the financing of Co-operative Societies and so extending the scope of co-operation. The investing of money in Government securities does not further the cause of co-operation but is only a means of keeping from lying idle funds that cannot immediately be used for such a purpose.

P.R.S., R.K. *Reference answered.*

A. I. R. 1933 Madras 492

BEASLEY, C. J. AND BARDSWELL, J.

Ignatia Brito and others—Appellants—
v.

T. P. Rego and others—Respondents.

Letters Patent Appeals Nos. 17, 18, 19 of 1932, Decided on 25th January 1933, against judgment of Curgenven, J., D/- 1st December 1931.

Deed—Construction—Deed or will—Irrevocability and immediate disposition—Registration as deed—Provision for unborn sons and appointment of wife to work as executrix—Document held to be settlement deed and not will.

Where an instrument is a deed in form there must be something very special in the case to justify it being treated as testamentary in character. A primary test of whether any particular document is a will or not is whether or no it is revocable. If it is irrevocable then it cannot be a will. Another test is that of whether a document confers an immediate right to property. Where a document is not a will under both these tests and is registered as a settlement deed when as a will, it would not have required registration, the provision for

unborn children and the appointment of the wife of the executant to perform functions such as might be performed by an executrix under a will, will not change the deed of settlement into will: 33 *Mad* 304; 8 *C W N* 614; *A I R* 1922 *P C* 281; 18 *M L J* 450 and *A I R* 1927 *Mad* 197, *Rel on*; 32 *All* 227 (*P C*); 12 *Mad* 490, 27 *W R* 492 and 10 *Cal* 792 (*P C*), *Dist.*

[P 493 C 2, P 494 C 1,2]

T. M. Krishnaswamy Iyer for *J. A. Pinto*—for Appellants.

B. Sitarana Rao and *K. Y. Adiga*—for Respondents.

Bardswell, J.—The point to be decided is whether the document, Ex. 1, executed by John Joseph Brito on 18th February 1913, is to be taken as a will or as a deed of settlement. If it is a will then the appellants who are his children are his legal representatives, and their two-thirds share in his properties can be proceeded against in execution of decrees that have been obtained against him by the respondents. If however it is a deed of settlement, by which a present estate was conferred upon the appellants during their father's lifetime, then the properties cannot so be proceeded against in execution.

The trial Court held that Ex. 1 was a deed of settlement, but on appeal the District Judge of South Kanara held that it was a will, and this finding has been upheld by Curgenvén, J., on second appeal. In their view the main purpose for which the document was executed by J. J. Brito was to make arrangements for the disposal of his property after his death. It is pointed out that the wife is to get one-third of the property which is the share which she would receive in the case of an intestacy and that it is the wife who is to divide the properties among the children just as if she were an executrix; but most emphasis is laid on the fact that the document provides for the children's share to be divided, not only among the four children then living, but also among other children whom the wife might in the future bear to the executant; so that the share which each child was to have would not be ascertained till after the executant's death. Ex. 1 is styled as a deed of settlement and has been stamped and registered as such.

A will need not be written on a stamp, neither need it be registered, while its registration costs less than the

registration of a deed of settlement. Had the executant intended the document to be a will he would hardly have undergone this extra expenditure, besides which it has been laid down in *Mahadeva Iyer v. Sankarasubramania Iyer* (1) and reiterated in *Gangaraju v. Somanna*, *A. I. R.* 1927 *Mad* 197, that where an instrument is a deed in form there must be something very special in the case to justify its being treated as testamentary in character. Now a primary test of whether any particular document is a will or not is whether or no it is revocable. If it is irrevocable then it cannot be a will. This has been pointed out in *Rajammal v. Authiammal* (2) and *Sita Koer v. Deo Nath Sahay* (3). Another test is that of whether a document confers an immediate right to property as has been pointed out by the Privy Council in *Muhammad Abdul Ghani v. Fakhr Jahan Begam* (4). Even the reservation of a life estate by the settler does not render the instrument the less a settlement as is remarked in *Rajammal v. Authiammal* (2) already referred to. In Ex. 1 the executant has reserved to himself possession with rights of enjoyment of items 1 and 2 for his maintenance, but he makes it clear that he is retaining no right of ownership in these items as the document recites "I have by this document established and given you right to items 1 and 2" and goes on to say that his retention of enjoyment, which is to be along with his wife, is to be "without in any circumstances incurring debts on their security." It further sets out that a right to his wife and children in those two items "has been established by this document," while as to the properties generally it recites:

"If the properties covered by this deed of settlement are alienated, debts etc., incurred on their security, you shall be entitled to get possession of and enjoy them as you please according to the terms of settlement after getting cancelled such alienations and security bonds."

These recitals clearly indicate that the disposition of property was to take effect at once and that it was to be irrevocable. It is contended for the respondents that the provision as against alienations was only against alienations

1. (1908) 18 *M L J* 450=4 *M L T* 103.

2. (1910) 33 *Mad* 304=7 *I C* 357.

3. (1904) 8 *C W N* 614=3 *C L J.* 370.

4. *A I R* 1922 *P C* 281=68 *I C* 254=49 *I A* 195 (*P C*).

by way of security for debts and not as against other possible alienations, but that is not the way in which it runs while the contention is against the whole tenor of the document. I take it that the proper view is that, having disposed of his properties the executant wished to show how absolute that disposition was by setting out that he could not even incur debt on their security. Curgenvén, J., has felt a difficulty about this provision but has got over it by remarking:

"It may be said that the penalty which the executant imposed upon himself was in the circumstances very unlikely to be enforced and was of little practical importance compared with the dispositions of a testamentary character."

I do not think that such a very clear provision can be brushed aside so lightly. Reference has been made by the learned Advocate for the respondents to the Privy Council decision in *Udai Raj Singh v. Bhagwan Baksh Singh* (5) in which it was held that a document which had been registered as a deed was in fact a will in spite of a clause in it that the executant had relinquished all rights and proprietorship. That clause was explained away on the ground that it was probably to guard against the interference of certain relatives with whom, it was said, he had a blood feud. In like manner it is suggested that the provision against alienation in Ex. 1 was meant merely to protect the property against creditors but it is not shown that this suggestion has any basis. I find it clear that the document not only makes an immediate disposition of the executant's properties but also that it was by its terms irrevocable.

Thus Ex. 1 satisfies the main tests by which it can be seen whether any document is a will or a document of some other character. On the other hand, the point of its making provision for children that may be born in future is not one of such importance by way of a test. It is conceded that provision for unborn children can be made in a deed of settlement and there was such a provision in the document which was found in *Mt. Sita Koer v. Munshi Deo Nath Sahay* (3) to be not a will but a deed of settlement. The fact that the wife has to perform functions such as might be performed by an executor under a will is not, by itself, enough to make the

document a will. It pointed out that recitals in Ex. 1 show that the executant apprehended that he might not live much longer, but this apprehension would be as good a reason for his wishing to make an immediate disposition of his property as for his wishing to dispose of it by will.

No doubt a document may be a will even if it is not so styled. Decisions have been quoted as to this: *Lakshmi v. Subramanya* (6), *Udai Raj Singh v. Bhagwan Baksh Singh* (5) and *Fielding v. Walshaw* (7). In the last mentioned case the executant had expressly told the writer of the document that he had no intention of making a will. In none of these cases does there appear to have been any provision as to irrevocability. Nor was there any such provisions in the document in question in the Privy Council case, to which Curgenvén, J., has referred in *Thakur Ishri Singh v. Thakur Baldeo Singh* (8). The reason why that document was held to be a will was that it was registered as a will though styled as a "tamliknama" (deed of assignment) and stamped as such albeit not correctly: that it provided for the contingency of a child being born when as yet there was no child; and that it did not purport to give anybody any possessory or present interest until the death of the donor. The circumstances of that case are very different from those of the case now under notice. In the same decision it is remarked that, of course, if the document affects the property in the lifetime of the executant it cannot have a testamentary character. In my opinion Ex. 1 is not a will but a deed of settlement. The appeals must therefore be allowed with costs to the appellants on this appeal and on the first and second appeals and the orders of the trial Court must be restored with the modification that execution may proceed against the one-third share of the properties allotted to the wife who was a party to the decree.

Beasley, C. J.—I agree.

P.R.S./M.N.

Appeal allowed.

6. (1889) 12 Mad 490.

7. (1879) 27 W R 492.

8. (1884) 10 Cal 792=11 I A 135=4 Sar 528 (P C).

5. (1910) 32 All 227=6 I C 279=37 I A 46 (PC).

A. I. R. 1933 Madras 495

CURGENVEN, J.

S. K. Samsuvava Rowther and another
—Plaintiffs—Appellants.

v.

Sayyad Muhammad Rowther and others
—Defendants—Respondents.

Second Appeal No. 19 of 1929, Decided on 1st December 1932, against decree of Sub-Judge, Sivaganga, D/- 19th October 1928.

Madras Estates Land Act (1 of 1908), S. 77
—Real but unregistered owner cannot upset rent sale.

The real owner of a holding, who has not been recognized by the landholder, cannot upset a rent sale under a decree obtained by a landholder against the pattadar in a suit under S. 77: 5 *Mad* 371 and 26 *Mad* 230, *Ref.* [P 495 C 1]

V. Ramaswami Ayyar — for Appellants.

C. S. Venkatachariar — for Respondents.

Judgment.—The substantial question which this second appeal raises is whether the real owner of a holding, who has not been recognized by the landholder, can upset a rent sale under a decree obtained by the landholder against the pattadar in a suit under S. 77, Madras Estates Land Act. I think it is perfectly clear that the learned Subordinate Judge is right in answering that question in the negative. The whole policy of the Act is to enable the landholder to deal with the registered holder or pattadar of a holding, where such exists, to the exclusion of other persons interested in the holding who as such do not hold a recognizable position under the Act. This is the principle which has been embodied in S. 146 of the Act which enables a transferee to obtain recognition from the landholder. Unless he obtains such recognition the landholder is at liberty to deal with the transferring pattadar, i. e., as though the transfer had not taken place. It must follow, I think, a fortiori that, where a claim adverse to the pattadar is put forward, and is still sub judice in civil proceedings the same principle must apply. Mr. Ramaswami Ayyar for the appellant has conceded that the more summary procedure which is permitted by Ss. 111 and 112 of the Act is to be taken against the "defaulter" and that there is authority in the *Midnapore Zamindari Co. v. Muthappudayan* (1) that in such

a case, to use the language of Sadasiva Ayyar, J., the expression denotes only the man who is the registered pattadar or the heir of the registered pattadar or the persons whom the landholder has become bound to recognize by reason of the provisions of S. 146. S. 111 et seq. only provide one way for the realization of rent and another way is provided by a suit such as is in question now. It would certainly be anomalous that according as the landholder chooses to follow one way or the other the party against whom he could legally proceed with regard to the sale of the holding should be different. I think it is quite clear that inasmuch as the pattadar was a party to the rent proceedings which resulted in the sale, the appellants are not competent to challenge the validity of the sale merely on the ground that in separate proceedings in a civil suit they have established their title to the property.

The principle upon which the rent sale is held in this manner is that the rent is by S. 5 of the Act made a first charge upon the property. The legal position has been discussed in *Munisami v. Dakshinamurthi* (2), which, although a judgment based upon the old Act and perhaps not therefore correct with regard to its assumption that the rent was a first charge, is, I think, a correct exposition of the legal position created by S. 5 of the present Act. *Mathura Prasad v. Dasai Sahu* (3) which held that a revenue sale was subject to the doctrine of lis pendens, was decided on the footing that the sale, although for arrears of revenue, was not free of all encumbrances i. e., that the revenue was not a first charge upon the property. In *Kadir Moideen Maracair v. Muthukrishna Aiyar* (4), it has been held that in the case of a purchaser at a revenue sale for arrears of revenue the doctrine of lis pendens will not apply, the reason being that the revenue sale is in enforcement of the right of the Crown paramount to the right sought to be enforced by the decree of the civil Court and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income-tax. For these reasons, I think that the learned Subordinate Judge has

2. (1882) 5 *Mad* 371.

3. AIR 1922 Pat 542=1 Pat 297=65 I C 325.

4. (1903) 26 *Mad* 230=12 M L J 368.

1. AIR 1921 *Mad* 195=44 *Mad* 534=62 I C 337.

reached the correct conclusion. I dismiss the second appeal with costs.

P.R.S./M.N.

Appeal dismissed.

A. I. R. 1933 Madras 496

PANDALAI, J.

Eastern Distilleries and Sugar Factories, Ltd.—Plaintiffs—Petitioners.

v.

The Municipal Council, Negapatam—Defendant—Opposite Party.

Civil Revn. Petn. No. 1194 of 1929. Decided on 5th October 1932, from decree of Sub-Judge, Negapatam, in A. S. No. 77 of 1928.

(a) Madras District Municipalities Act (1920), Sch. 4, R. 20—Decision on what amounts to office is revisable—Civil P. C. (1908), S. 115.

The decision on a question whether a particular company which carried on its business within the municipal limits had or had not an office within the meaning of R. 16 is revisable. [P 496 C 1, 2]

(b) Madras District Municipalities Act (1920), Sch. 4, R. 16—Office is different from shop—Depot where goods manufactured elsewhere are sold without any office work being done is not office.

The office referred to in R. 16 is the office of a company and the office must be something which falls within the category of an head office, principal office or branch office of a company. It is a different thing from a shop of the company. [P 497 C 1]

Where a company has its depot where it did nothing except distribute and sell goods which it produced as manufacturers elsewhere and no office work of the company in the proper sense is done there at all, the depot cannot be called an office. [P 497 C 2]

King and Partridge—for Petitioners.

T.M. Krishnaswamy Ayyar—for Opposite Party.

Judgment.—The petitioner, a limited company, the Eastern Distilleries and Sugar Factories, Ltd., brought this suit to recover Rs. 350, being the excess of assessment to Companies' tax for the half years ending 30th September 1925 and 31st March 1926 which, it alleged, the respondent, the Municipal Council of Negapatam had illegally levied on it and which it paid under protest. The ground of suit was that the company should have been assessed on the gross income under the proviso to R. 16, Sch. 4, District Municipalities Act of 1920, whereas it was in fact assessed on its paid-up capital under the main part of that rule. The respondent maintained that the assessment was proper. The question turned upon the point whether the petitioner had or had not an office, that is,

head office or principal office or branch office within the municipal limits. If it had, the assessment was right. If not, it was illegal.

The District Munsif has stated the facts correctly and both parties have accepted them. The company which is incorporated in England and carries on business in India through Messrs. Parry & Co. at Madras has an agency at Cuddalore and a sub-agency at Tanjore. In all the three places, Madras, Cuddalore and Tanjore, the company is assessed to company's tax on its paid-up capital which is more than Rs. 10,00,000. At Negapatam, the place now in question, the company has a rented building where it stocks arrack in bulk and also sugar and some other products which it manufactures elsewhere. It has there a servant called depot agent paid Rs. 50 and a small commission on sales whose business it is to sell the arrack at prices which are fixed to contractors who buy it for sale elsewhere. The sugar is sold by the depot agent only on sanction by the officer at Madras. The conditions of sale of the other products have not been specifically mentioned, but are not material. The depot agent pays all collections into the local branch of the Imperial Bank and maintains accounts which are checked from time to time by the supervising agencies at Cuddalore and Tanjore. He cannot sell on credit at all.

On these facts the District Munsif held that the company had not an office within the municipal limits although the depot was a place where it sold its goods. He accordingly gave a decree as prayed. On appeal the learned Subordinate Judge of Negapatam reversed that decree holding on the same facts that the company was really maintaining a branch office at Negapatam. Whether he was right on this point is the question in this petition. It was objected by the respondent's learned advocate that there was no question of jurisdiction to enable this Court to revise this decree. But there is no doubt, if the Sub-Judge's view is wrong, that he committed an error in the exercise of jurisdiction. The question therefore has to be decided whether on the facts stated the Subordinate Judge's view is correct.

The learned Subordinate Judge based his conclusion on the explanation to

S. 92. Now that explanation is in my opinion irrelevant to the point. That is an explanation of the expression "transacting business" as to which it is well-known there has been a great deal of conflicting judicial opinion which it is not easy to reconcile and therefore as a guide to proper construction of the S. 92 the explanation says that :

"whenever a company employs a servant or agent to represent it for the purpose of transacting business in a municipality, such company shall be deemed to transact business within the municipality and such servant or agent shall be liable for the tax."

This explanation only means what it says namely that it is enough to transact business within the meaning of the section that a servant or agent is employed to represent a company for the purpose of doing business. All the explanation does, to apply it to the present case, is to make this petitioner company liable to company's tax under the section. It does not help to determine the further question how the petitioner is to be assessed, whether under the main part of R. 16 or under the proviso. This is quite a different point. The main part of the rule says that the company's tax is to be assessed on the paid-up capital. The proviso says where the company has no office within the municipality, that is, although it may be transacting business within the meaning of the explanation still it can only be assessed on the gross income. The learned Subordinate Judge having thus misconceived the basis on which he had to come to his conclusion, the question is what is the true test ?

The word "office" is of such various significance according to the context in which it is used that it is not profitable to attempt any definition of it which will be applicable to all cases. What I have to see is, what is the meaning of the word in this context. Generally it means a place for transacting business : see Oxford Concise Dictionary. In this context however the legislature is speaking of the office of a company and the office must be something which falls within the category of a head office, principal office or branch office of a company. The head office of a company is usually the place which is declared such in its memorandum of association. The petitioner's head office is not in India. It is in England. The principal office

again is not in Negapatam, but it is at Madras.

The only possible kind of office which is available is a branch office. As to that it seems to me the branch office of a company must still possess the character of the office of a company. However limited the field of activities which a particular office has undertaken or is entrusted with, it must still have a sufficient amount of direction or control of that field of activities of the company which would make it proper to talk of it as an office of the company. It seems to me an office of a company is a different thing from a shop of the company. A company carrying on manufacture may have various places where it sells its products or buys the materials necessary for its business. It cannot be said that all the places where goods are stored for manufacture or where the products of a company are sold are offices of the company. To take an illustration well-known to those who are acquainted with London, the caterers Lyons & Co., have about 500 places where refreshments are sold in London. But it would be absurd to speak of that company as having 500 offices in London. In the same way there must be a large number of companies in India who not only carry on their business in their offices properly so-called, but sell their goods in shops. The latter places cannot by reason of that alone be called offices of the company. That distinction the learned Subordinate Judge failed to realize and I think he erred in that respect.

In this particular case the facts show clearly that at Negapatam where the petitioner has the depot it did nothing except distribute the liquor and sell sugar which it produces as manufacturers elsewhere. No office work of the company in the proper sense is done there at all. The depot therefore cannot be called an office and therefore the petitioner should have been assessed only under the proviso. The decree of the lower appellate Court is reversed and that of the District Munsif restored. The petitioner will have his costs here and in the lower appellate Court.

P.R.S./M.N.

Revision allowed.

A. I. R. 1933 Madras 498

MADHAVAN NAIR AND JACKSON, JJ.

Bava Sahib Miyan—Plaintiff—Appellant.

v.

Abdul Ghani Sahib and others—Defendants—Respondents.

Appeal No. 298 of 1926, Decided on 3rd January 1933, from decree of Sub-Judge, Cuddalore, in I. A. No. 10 of 1926.

(a) Civil P. C. (1908), O. 33, R. 1—Suit filed on payment of court-fees can be continued as pauper—No change under new Code.

Under the new Code as also under the old Code the plaintiff may be allowed to continue the suit as a pauper though when he instituted it he had paid court-fee on it. The substitution of the word "instituted" in O. 33, R. 1 in place of the word "brought" in old S. 401 has not made any change in the law: *AIR 1929 Mad 828, Rel. on.* [P 498 C 1, P 499 C 2]

(b) Civil P. C. (1908), O. 7, R. 11—Order for payment of deficit court-fee within given time — Application for pauperism made within time granted is maintainable—Civil P. C. (1908), O. 33, R. 1.

A plaint was filed on payment of court-fee which was found to be insufficient. The Court ordered the plaintiff to supply the deficit before a certain date. On the last day the plaintiff applied to continue the suit as pauper. The Court held that the plaintiff not having paid the court fee as ordered, the plaint stood rejected and there was no plaint to be continued.

Held: that the application being made at a time before the plaint could be rejected was maintainable and should be considered: *AIR 1921 PC 80, Dist.* [P 499 C 2]

C. S. Venkatachariar—for Appellant.

S. Nagaraja Iyer and V. Krishnamachariar—for Respondents.

Madhavan Nair, J.—In this case the plaintiff appellant sued for the recovery of possession of certain trust properties. He valued the suit at Rs. 3,030 but objections being taken by the defendants to the valuation an issue was raised on the point and it was found that the properties were worth Rs. 14,000. When he first instituted the suit he had paid court-fee on Rs. 3,030 but when it was found that the properties were valued at Rs. 14,000 he was asked to pay additional court-fee on 18th January 1926. This order was passed on 23rd December 1925. As the appellant was not able to pay the court-fee as ordered on 18th January 1926 he put in an application asking the Court to allow him to continue the suit as pauper. This application was opposed on two grounds. It was argued that the suit having been

filed after the payment of court-fee it was not open to the appellant to continue it as pauper. It was also argued that the appellant not having paid the court-fee on 18th January 1926, as directed, the plaint should have been considered to have been rejected under O. 7, R. 11 (b and c), Civil P. C., and that there was no plaint which could be proceeded with by the appellant as a pauper. Both these arguments were accepted by the learned Subordinate Judge and his petition was rejected. In this appeal, it is contended that the lower Court is wrong on both the points.

It has been held in a series of decisions under the old Code that it is open to a party who had filed a suit paying court-fee to continue it as a pauper. In this Court it was held in *Subba Rao v. Venkataratnam* (1) following these decisions that under the new Code also the plaintiff may be allowed to continue the suit as a pauper though when he instituted he had paid court-fee on it. The appellant relies on this decision in support of his contention that the plaintiff should be allowed to prosecute the suit as pauper. On behalf of the respondent it is contended that this decision should not be accepted as laying down the correct law inasmuch as it does not appear from the judgment that the learned Judges have considered the alteration in the wording of O. 33, R. 1 of the new Code. Under the old Code in S. 401 which corresponds to O. 33, R. 1 the word used was "brought" instead of the word "instituted" used in the present Code in O. 33, R. 1, S. 401 in the old Code ran as follows:

"Subject to the following provisions any suit may be brought by a pauper."

Order 33, R. 1 says:

"Subject to the following provisions any suit may be instituted by a pauper."

It is argued that since the word "instituted" is substituted for the word "brought" the legislature intended that permission to sue as pauper must be asked for at the time when the suit was instituted and it could not be granted after the suit was filed on payment of court-fee. We do not think that the legislature intended to introduce any alteration in the law by the substitution of the word "instituted" in the place of the word "brought." The rule only

means that the pauper must have instituted the suit and not that the plaintiff should have been a pauper at the time when he filed the suit. Though the alteration in the language has not been specifically referred to in *Subba Rao v. Venkataratnam* (1) the law laid down in that decision may be accepted as the correct law. In our opinion therefore it is open to the appellant to ask the Court to allow him to continue the suit as pauper. The next point is whether the plaintiff not having paid the court-fee on 18th January 1926, as directed by the Court, the plaint should be considered to stand rejected. The learned Judge held that the plaint should be considered to be rejected on the strength of the Privy Council decision reported in *Sabitri Thakurain v. Savi* (2). But that case is clearly distinguishable from the present one having regard to its facts. In that case the appellant was asked on 18th December 1914, to give security for costs within two months from that date. Security given on 17th February 1915, being rejected as insufficient the appellant filed a petition on the same day for three months' further time; this petition came before the Court on 18th February and it was refused. Under O, 41, R. 10 (2), Civil P. C. :

"Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal."

The security not having been given the result was that the appeal stood rejected. On 22nd February the respondent filed an application for taxed costs and praying that the appeal may be dismissed. Upon this for the first time the appellant sought permission to proceed in forma pauperis and application for the same was filed on 23rd March. The question was whether the permission asked for should be granted or not. The High Court of Calcutta declined to grant the permission and this order was confirmed by the Privy Council. Now, their Lordships of the Privy Council said :

"The High Court at Calcutta rightly conceived itself precluded from entertaining the appellant's application to be allowed to continue her appeal in forma pauperis; since to grant her application at that stage would in effect have been to keep alive an appeal which they were, by reason of her default in the matters of security, bound to reject."

From these facts it is obvious that the Privy Council decision cannot be applied to the facts of the present case. The appeal had already stood rejected in *Sabitri Thakurain v. Savi* (2) when the application asking for permission to continue the suit as pauper was made by the petitioner; whereas in the present case the suit had not been rejected nor could it have been rejected before 18th January 1926, by which date the plaintiff was asked to pay additional court-fee and on the 18th he made his application for permission to sue as a pauper. We are of opinion therefore that the decision of the learned Judge on this point also cannot be upheld. This appeal was filed by the appellant as a pauper and inquiry was made by the lower Court at the instance of this Court after giving notice to the respondent and the Government pleader regarding the pauperism of the appellant, and it was found that he was a pauper and permission was therefore granted to him to prosecute the appeal as a pauper. In these circumstances we do not think it is necessary now to hold a fresh inquiry whether the appellant is a pauper or not; and further, the respondent under O. 33, R. 9 has a right to dispauper the petitioner if he thinks he can make out a case. As we differ from the opinion of the learned Judge on both the points on which he has dismissed the application we set aside the decision of the lower Court and give permission to the plaintiff to continue the suit as pauper. The case will be restored to file by the learned Subordinate Judge and he will proceed with it in due course of law. No court-fee is payable to Government. The costs of this appeal will abide the result.

Jackson, J.—I agree. The word "instituted" in O. 31, R. 1, Civil P. C., does not emphasise that the pauper must take action only at the beginning of the proceedings but rather the pauper must be the institutor or the founder of the suit.

P.R.S./M.N.

Appeal allowed.

A. I. R. 1933 Madras 500 (1)

BEASLEY, C. J. AND BARDSWELL, J.
(Kamaraja) Pandia Naicker—Appellant.

v.

S. Kamarajapandia Naicker and others—Respondents.

Appeals Nos. 281 and 312 of 1932, Decided on 28th February 1933, against order of Sub-Judge, Dindigul, D/- 11th April 1932.

Civil P. C. (1908), S. 47—Execution proceedings—Preliminary objections overruled—No final order—No appeal lies—Civil P. C. (1908), S. 105.

In execution proceedings the appellant raised, besides other objections, two legal objections namely (1) that the Court had no jurisdiction to execute the decree and (2) that the execution petition was barred by the twelve years' rule of limitation. The Court overruled the objections but no final order was passed.

Held: that there was no order which could be subject of an appeal: 14 M L J 359, *Rel on*.

[P 500 C 1]

K. Rajah Ayyar and V. Ramaswami Ayyar—for Appellant.

B. Sitarama Rao and P. N. Appuswami Ayyar—for Respondents.

Beasley, C. J.—The preliminary objection is taken in this appeal that no appeal lies. These are execution proceedings and the appellant raised, besides other objections, two legal objections namely (1) that the Court had no jurisdiction to execute the decree and (2) that the execution petition was barred by the twelve years' rule of limitation. On both these points, the learned Subordinate Judge found against the appellant. The appellant has therefore filed this appeal.

The preliminary objection is taken that no appeal lies from these findings of the learned Subordinate Judge. In my view, the preliminary objection must succeed. No final order has been passed in execution by the learned Subordinate Judge. He has merely dealt with the two legal objections which were raised in the course of the execution proceedings. By his order he has not stopped execution proceedings from going on. What he has done quite obviously is to make an order that they are to go on to a final determination. In my view, the learned Subordinate Judge has made no order as yet which can be the subject of an appeal. I am supported in this view by the judgment in *Venkatagiri Iyer v. Sadagopachariar* (1). For these reasons,

1. (1904) 14 M L J 359.

this appeal must be dismissed with costs. A. A. O. No. 312 of 1932 is also dismissed with costs.

Bardswell, J.—I agree.

P.R.S./M.N.

Appeal dismissed.

*** A. I. R. 1933 Madras 500 (2)**

BARDSWELL, J.

Karuppayya Nadar—Petitioner.

v.

Ponnuswami Nadar—Opposite Party.

Civil Misc. Petn. No. 4876 of 1932, Decided on 19th October 1932, from order of Sub-Judge, Ramnad, D/- 8th July 1932.

* Civil P. C. (1908), S. 151 and O. 39—High Court has no power to grant injunction apart from O. 39 in appeal or revision from mofussil Courts—Letters Patent (Mad.), Cl. 21.

In the light of Cl. 21 of Letters Patent, (Mad.) the High Court can only apply such law or equity and rule of good conscience as would be applied by the mofussil Court and therefore has no power to grant an injunction in a case that comes in appeal or revision from a subordinate Court in the mofussil otherwise than in accordance with O. 39. Hence it cannot grant an injunction to stay execution in lower Court pending revision in High Court: *Cases law reviewed*. [P 501 C 1]

K. S. Champakesa Ayyangar—for Petitioner.

Watrap S. Subramania Ayyar—for Opposite Party.

Judgment.—The petitioner is the defendant in O. S. No. 57 of 1931 on the file of the Principal Subordinate Judge of Ramnad at Madura. A decree was passed against the petitioner ex parte. He then applied for the setting aside of that decree and it was ordered that it should be set aside if he gave security for the suit amount and costs within three weeks. The order as to this was passed on 12th March 1932, and a draft security bond was filed on 15th March 1932. The report of the Amin as to the sufficiency of the security was not received within the three weeks' time allowed for furnishing security, and so an application (I. A. 170 of 1932) was made for extending the time but, after, notice had been given to the other side, the learned Subordinate Judge held, on 8th July 1932, that the security had not been furnished within the time allowed and that it was not competent for him to extend the time, and dismissed the application. In the meantime, according to the petitioner's affidavit, the Amin had reported that the security offered was sufficient. Against this order on

I. A. No. 170-32 the petitioner has come up on revision.

The petitioner at first filed C. M. P. No. 3428 of 1932, praying for stay of execution of the decree in O. S. No. 57 of 1931 pending the disposal of the revision petition. This petition I am dismissing because there was no appeal against, or even petition for revision of, the decree in that suit. Subsequently the present petition has been filed, praying for an injunction restraining the respondents-plaintiffs from executing the decree in the said suit pending disposal of the revision petition.

It is objected that no injunction can be granted in this case. It is not a case that falls under either R. 1 or R. 2, O. 39, Civil P. C., and it has been held by this Court, in *Varadacharyulu v. Narasimhacharyulu* (1) and *Ayyaperumal Nadar v. Muthuswami Pillai* (2) that the High Court has no power to grant an injunction under its inherent powers in cases not governed by O. 39. These decisions I have myself recently had occasion to follow in C. M. P. No. 3349 of 1932. That this is a correct view of the law, as far as it is contained in the Civil Procedure Code, is not denied by the learned Advocate for the petitioner, but he contends that, apart from the Code, this Court has extraordinary powers of granting injunctions, which powers it derives from the Supreme Court. He relies on the decision of Curgenven, J., in *Govindarajulu Naidu v. Imperial Bank of India, Vellore* (3).

In that case the learned Judge in dealing with a prayer for an injunction to restrain from the execution of a decree during the pendency of an appeal against an order of the Subordinate Judge of Vellore, held that the High Courts possess, over and above the powers which they enjoy under the Civil Procedure Code, an equitable jurisdiction, derived from the old Supreme Court to issue an injunction in appropriate cases and are not bound by the terms of the Code of issuing such injunction. For the respondents it is urged that the learned Judge has not considered the provision of the Letters Patent to which, indeed, as far as can

be seen from his decision, his attention was not drawn. Emphasis is now laid on those provisions. It is only under S. 19, Letters Patent that a Chartered High Court can administer the law and equity that would have been applied by such High Court if the Letters Patent had not been issued, and the case in which it can apply such law or equity are cases arising in the exercise of its ordinary original civil jurisdiction. By S. 20, in the exercise of its extraordinary original civil jurisdiction, it can apply to a case the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein; while under S. 21, which governs the case under notice, it has to apply to any case that comes before it in the exercise of its appellate jurisdiction, of which revisional jurisdiction forms a part, the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. Now, if a High Court cannot grant an injunction under the terms of the Civil Procedure Code otherwise than in accordance with O. 39, it is certain that neither can a mofussil Court do so; and it is also certain that no mofussil Court exercises powers derived from the Supreme Court. If, then, the High Court deals, as appellate or revisional authority, with a case coming from a mofussil Court, it can only apply such law or equity and rule of good conscience as would be applied by that mofussil Court, and from this it follows that it can only grant an injunction in respect of such a case in accordance with the provisions of O. 39.

Curgenven, J., has referred in *Govindarajulu Naidu v. Imperial Bank of India, Vellore* (3) to two Calcutta cases, *Rash Behary Dey v. Bhowani Churn Bose* (4) and *Mungal Chand v. Gopal Ram* (5) respectively. But in each of those cases the Calcutta High Court, when it held that it had powers, under its general equity jurisdiction, to grant an injunction, independently of the Code of Civil Procedure, was acting in the exercise of its ordinary original civil jurisdiction. The learned Judge has also referred to *Periakaruppan Chettiar v.*

1. A I R 1926 Mad 258=92 I C 615.

2. A I R 1927 Mad 687=102 I C 700.

3. A I R 1932 Mad 180=136 I C 346.

4. (1907) 34 Cal 97.

5. (1907) 34 Cal 101.

Ramasami Chettiar (6), which was decided by a Divisional Bench of this Court. In that case the learned Judges held that the Chartered High Courts have power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire), but they have not as far as I understand the decision, held that such power can be used in the exercise of appellate or revisional jurisdiction in cases arising from Courts in the mofussil, and they certainly did not make use of such a power. What happened was that they doubted whether such a power could be exercised by a Subordinate Court and then, dealing with the facts of the cases, which was one that came before them on an appeal from a Subordinate Judge, on the assumption that a Subordinate Court had such power, held that the Subordinate Judge was not warranted in making use of it. The result was that an injunction which the Subordinate Judge had granted was discharged, the petition praying for it being dismissed. In these circumstances I do not think that the decision is an authority for the High Court's having power to grant an injunction in a case that comes before it, on appeal or revision, from a Subordinate Court in the mofussil.

Were it such an authority, I should, of course be obliged to follow it. I would note that none of the decisions to which it has referred as to the High Court having authority, outside what is provided for in the Civil Procedure Code, to grant an injunction, has to do with cases in which the High Court was not exercising its ordinary original civil jurisdiction. Two of them are the decisions in *Rash Behary Dey v. Bhowani Churn Bose* (4) and *Mungal Chand v. Gopal Ram* (5) to which I have already referred. Another is that in *Uderam Kesaji v. Hyder Ally* (7), in which however reliance was placed not only on powers inherited from the Supreme Court but also in inherent powers, with which I am not now concerned in the face of what is the view of this High Court in that connexion. Another is *Mulchand Raichand v. Gill & Co.* (8), and another is *Tikamchand Santokchand*

v. Santokchand Singhi (9), which again is a decision of the Calcutta High Court. All these decisions have to do with cases in which a High Court was acting in the exercise of its ordinary original civil jurisdiction.

The other case referred to in *Govindarajulu v. Imperial Bank of India, Vellore* (3), in which the decision was by a single Judge but in that case the injunction was found by the learned Judge to be one that could be brought within the terms of O. 39, R. 2 and his other remarks were not necessary for the decision of the petition that was then before him. Nor has the learned Judge dealt with the provisions of the Letters Patent. My conclusions are that there is no authority of this Court on the subject now before me which I am bound to follow and that in the light of S. 21, Letters Patent, of which I find no discussion in any decision of this Court that has been brought to my notice, this is not a case in which this Court can grant an injunction. The petition is therefore, dismissed with costs.

P.R.S./K.S.

Petition dismissed.

9. AIR 1920 Cal 798=59 I C 218.

A. I. R. 1933 Madras 502

BURN, J.

Pottella Ragadu and others—Accused
—Petitioners.

v.

Poondla Lakshminarappa Reddi —
Complainant—Opposite Party.

Criminal Revn. Case No. 939 of 1932, and Criminal Revn. Petn. No. 863 of 1932, Decided on 23rd March 1933, from judgment of Sub-Divl. Mag., Kavali, in Civil Appeal No. 15 of 1932 and C. C. No. 279 of 1932.

Cattle Trespass Act (1871), S. 22—Pleader's fees cannot be awarded.

The language of S. 22 is not wide enough to enable a Magistrate to award pleader's fee to a successful complainant. [P 502 C 2]

N. S. Mani for *V. Govindarajachari*
—for Petitioners.

Ch. Raghava Rao—for Opposite Party.

K. S. Vasudevan—for the Crown.

Order.—In my opinion the language of S. 22, Cattle Trespass Act (1 of 1871) is not wide enough to enable a Magistrate to award pleader's fees to a successful complainant. The Magistrate can award "reasonable compensation

6. AIR 1928 Mad 491=109 I C 281.

7. (1909) 33 Bom 469=3 I C 990.

8. AIR 1920 Bom 296=44 Bom 283=53 I C 518.

for the loss caused by the seizure or detention" of the cattle. It is obvious that pleader's fee cannot come under this head. He can also award

"all fines paid and expenses incurred by the complainant in procuring the release of the cattle."

In this case the expenses of releasing the cattle had all been paid, and the cattle had been released, long before the complainant engaged a pleader or filed his complaint. Therefore the learned Magistrate could not award pleader's fees under this head either. This item is approximately Rupees Sixty-three (Rs. 63) and I direct that if the compensation has been collected Rupees nine (Rs. 9) be refunded to each of the Accused from whom the amount of Rupees twelve (Rs. 12) has been collected.

P.R.S./M.N. *Order accordingly.*

A. I. R. 1933 Madras 503 (1)

BURN, J.

(*Kavena Nagutha*) *Mohamed Naina Maricair*—Accused—Appellant.

v.

Ahana Bava Sahib Maracair—Complainant—Respondent.

Criminal Appeal No. 624 of 1932, Decided on 1st March 1933, from order of Dist. Mag., South Arcot, D/- 17th October 1932.

Fugitive Offenders' Act (1881), S. 19—Magistrate cannot discharge accused except on grounds enumerated — Justifiability of arrest cannot be looked into.

A Magistrate purporting to act under S. 19 cannot make an order of discharge on any other grounds than those indicated in the section. Magistrates to whom prisoners are brought under S. 14 are not entitled to decide whether the issue of the warrant for the apprehension of the prisoner was or was not justifiable on the evidence. They can only act under S. 19 if the case appears to be trivial or if the Magistrate considers the application not made bona fide, not made in the interest of public justice or for some other reason of that kind. [P 503 C 1, 2]

V. L. Ethiraj and *A. S. Sivakaminathan*—for Appellant.

M. A. T. Coelho—for Respondent.

Public Prosecutor—for the Crown.

Judgment.—With all respect I find myself unable to agree with the opinion of Wallace, J. in Criminal Appeal No. 220 of 1932 on the file of the High Court that a Magistrate purporting to act under S. 19, Fugitive Offenders' Act can make an order of discharge on any other grounds than those indicated in the section. It appears clear to me that Magistrates to whom prisoners are

brought under S. 14 are not entitled to decide whether the issue of the warrant for the apprehension of the prisoner was or was not justifiable on the evidence. They can only act under S. 19 if the case appears to be trivial or if the Magistrate considers the application not made bona fide, not made in the interest of public justice or for some other reason of that kind. In the present case it is not contended that the case is trivial. It is contended that the application is not made bona fide but to spite the appellant. I cannot say that that has been satisfactorily established.

This appeal has been argued almost wholly on the merits. I am not prepared to say that there is a strong prima facie case against the appellant but on the other hand I cannot say there is no case at all to justify the issue of process for his attendance. There is some indication of the existence of evidence to prove that he collected from the tenant of No. 310, North Bridge Road about Rs. 70 (Rupees seventy) per month more than he accounted for to his principal. Whether the tenant gave the money to the appellant for himself or for his principal is nowhere clearly alleged. If it was a *douceur* to the appellant, there can be no question of criminal misappropriation. If it was meant for the principal then there is a case of criminal breach of trust. As already remarked, I cannot say there is no case for surrender of the appellant. I dismiss this appeal.

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1933 Madras 503 (2)

WALSH, J.

Natesa Ayyar — Defendant — Appellant.

v.

Mangalathammal—Plaintiff—Respondent.

Second Appeal No. 451 of 1932, Decided on 7th March 1933, against decree of Dist. Judge, West Tanjore, D/- 26th October 1931.

(a) **Specific Relief Act (1877), S. 42 — Money deposited in Court towards decree—Suit by daughter-in-law of decree-holder merely for declaration that money was self-acquired property of her husband without consequential relief is not maintainable.**

The case of money collected by a Court executing a decree is entirely different from the case of property in the possession of a receiver and the custody of the Court is entirely on behalf of the decree-holder and there is no other

owner. A suit therefore by the daughter-in-law of the decree-holder for a mere declaration that the money really was the self-acquired property of her husband and not joint family property with decree-holder as manager without asking for consequential relief of the recovery of the money from the decree-holder is not maintainable. The mere fact that the money was in the custody of the Court cannot give her any better right to it than she possessed otherwise. The executing Court holds the money received for the decree-holder and cannot deal with the money in any other way except as the property of the decree-holder: *AIR 1919 Mad 957* and *AIR 1929 Lah 290, Rel on; 27 Mad 591; AIR 1925 Mad 427* and *AIR 1924 Pat 385, Dist.* [P505 C 1, 2]

(b) Limitation Act (1908), Art. 120—Property brought in Court—No fresh start.

A claim to something or to some sum of money which has become time barred would not revive when it has been brought into Court: *26 Mad 415; AIR 1931 PC 89, Ref.* [P 505, C 2, P 506 C 2]

K. Desikachari—for Appellant.

T. S. Venkatarama Ayyar—for Respondent.

Judgment.—The defendant in this suit is the appellant here. One Venkataramier had two sons Natesa Aiyar, the defendant, and the plaintiff's husband Viswanathier, a younger brother of the defendant. Viswanathier left the family and went away to Ammapet and set up a coffee shop. He disappeared about 1913 or 1917; it is not quite clear which year. He had in 1912 taken a mortgage bond in his favour from one Pachayappa Chetti. In 1919 his father sued the mortgagor on the ground that the bond was joint family property and that he was the family manager. Neither the mortgagee nor the present plaintiff nor her minor sons were made parties and the mortgagor raised no objection and he got a decree in his favour. Under this decree he was to receive the money after giving proper security. In 1929 certain moneys were realized towards the decree and were brought into Court. Venkataramier by that time was dead. His eldest son as his legal representative applied to draw the money. The widow of the younger son, who is the plaintiff, came forward and said that it was the separate property of her husband and that she was entitled to it. The suit was brought on 31st July 1930 impleading the only surviving son and not the mortgagor. The suit was for a bare declaration that the money belonged to her. Both the Courts found on the facts that the mortgage bond was the self-acquired property of her husband and gave her the declaration re-

quired. Against his the defendant has preferred this second appeal.

The first objection is that the suit for a mere declaration without consequential relief asking for the payment of the money is not sustainable. This objection I consider to be good. If the plaintiff had asked for the relief as against the mortgagor the suit would be barred and as against the defendant there is no privity of contract of a legally recognizable nature in the case: vide the decision in *Ramaswami Naidu v. Muthusami Pillai* (1). Sadasivaier, J. at p. 938 states:

"I shall try to illustrate what I mean by a simple example: *B* owes money to *A*; *A* dies; there is a dispute between *C* and *D*, each claiming to be the sole heir of *A*; *B* pays the money to *C*. Can *D* sustain an action for money had and received against *C* even if he establishes against *C* that he is the rightful heir and not *C*? I am clearly of opinion that he cannot do so, his only remedy being against the debtor *B*."

The case is on all fours with *Mt. Sewi Bai v. Wasu Ram, AIR 1929 Lah. 290*. In that case the husband of the plaintiff, who had separated from his father, died in 1918 leaving certain debts due to him. The father thereafter commenced disposing of these debts without the knowledge or consent of the plaintiff who alone was the legal representative of her husband and transferred inter alia a debt to his son-in-law. The plaintiff instituted the suit for the recovery of the amount against the principal debtor as well as defendant 1 who was alleged to have realized it. It was held that as regards the principal debtor the plaintiff's suit was clearly time barred and her claim against defendant 1 could not succeed in the circumstances of the case merely because the debt is alleged to have been paid to him: *Ramaswami Naidu v. Muthusami Pillai* (1) is quoted with approval where it was held that

"there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in the man who received the money or some mistake or ignorance of facts on the part of the man who paid the money or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant."

It is unnecessary to discuss whether in the present case the plaintiff could have sued to recover the money from the

1. *AIR 1919 Mad 957=48 I C 756=41 Mad 929.*

defendant on the ground that his father occupied a fiduciary position, for she has not chosen to ask for relief on this ground at all nor to recover the money from the defendant. The whole point of the objection is that she was bound to ask for the consequential relief of recovering the money from defendant 1. It seems to me clear that the mere fact that the money was in the custody of the Court cannot give her any better right to it than she possessed otherwise. The executing Court holds the money received for the decree-holder and cannot deal with the money in any other way except as the property of the decree-holder. Three cases have been quoted on behalf of the respondent to show that a suit for a bare declaration is sufficient. The first is *Vedanayaga Mudaliar v. Vedammal* (2). In that case the property in question belonged to a minor S deceased. Prior to his death proceedings had been taken for the appointment of a guardian for him under the Guardian and Wards Act. Pending these proceedings the District Court appointed plaintiff receiver and placed him in possession of the property, removing the minor's mother from the charge thereof. The High Court reversed that order and directed that possession of the property should be handed back to the defendant. This order had not been carried out to any extent at the date of the suit and the suit was by the plaintiff for a declaration of his right to property without asking that the property should be delivered to him. It was held that the suit was maintainable. The possession of the property was, at the time, neither with the defendant nor with the plaintiff, it being in custodia legis and in the hands of an officer of the Court and it being a mere accident that that officer was the plaintiff. Inasmuch as the defendant was not in possession, plaintiff could not as against her, have consequential relief and nothing more was required to be done to secure to the plaintiff all his rights than to obtain an order of the Court enabling him to retain possession in his own right. That case is entirely distinguishable as the ownership of the property was not in dispute and nothing more was required to be done than to obtain an order. Here what the

2. (1904) 27 Mad 591.

plaintiff really wants the Court to do is to say that the money which belonged to the defendant belongs to her and to recover it from the defendant, but she avoids asking for the relief which she is really seeking. The next case is *Devarajalu Naidu v. Kondammal* (3). That was a case where in proceedings taken under S. 145, Criminal P. C., the Magistrate, finding himself unable to say which party was in possession, placed the properties in the possession of a receiver pending the decision of the civil Court in favour of one or other of the parties, and one of the parties brought a suit for an adjudication that he was the person entitled to the properties, but did not pray for possession. It was held that no relief by way of recovering possession from the receiver need be asked and the suit as framed was proper and maintainable. In the case of a receiver the Court does not hold the property for any particular person but on behalf of all the parties before it and only ultimately on behalf of the party who is to be found entitled to it.

The case of money collected by a Court executing a decree is entirely different and the custody of the Court is entirely on behalf of the decree-holder and there is no other owner. The case in *Saburi Pande v. Ram Khelavan Pande* (4) is like the case in *Vedanayaga Mudaliar v. Vedammal* (2), and 'it was a suit by the heir of a lunatic for a declaration that he is entitled to the property of the lunatic which was in the custody of the manager and there was no rival claimant to the property itself from whom he wanted to recover it.' I am therefore of the opinion that the suit is not maintainable without the prayer for consequential relief. The effect of holding the suit to be maintainable would be to raise almost insoluble problems of limitation and in fact it has been quite consistently argued before me for the respondent that since the only relief which could be asked was a declaration the cause of action did not arise until that declaration could be given, i. e., until the money came into Court. Consequently Art. 120 applied and six years will run from the date when the money came into Court. This is a very startling proposition. It means

3. AIR 1925 Mad 427=80 I C 929.

4. AIR 1924 Pat 385=72 I C 495.

that the claim to something or to some sum of money which has become time-barred would revive when it has been brought into Court. There is no decision which holds such a thing. *Rajah of Venkatagiri v. Isakapalli Subbia* (5) and *Govindanarayan Singh v. Shamlal Singh* (6) do not certainly hold this view. The learned District Judge traces the starting point of limitation from the date when the plaintiff came to know of the denial of her right. This also has been argued as a secondary basis for the saving of limitation before me. On this point I would say only that the decree having been passed in 1919 it is for the plaintiff to say clearly in her plaint how her suit is not barred by limitation. The statement in para. 7 of the plaint is:

"The plaintiff now understands that the said Venkatarama Iyer filed O. S. No. 245 of 1919 on the file of the District Munsif of Tanjore, obtained a decree thereon on 30th August 1919. On obtaining a copy of the preliminary decree in the month of August 1929, this plaintiff was surprised to learn that Venkataramier has suppressed the right of the plaintiff to the mortgage, but fraudulently claimed the same in his capacity as the managing member of an undivided Hindu joint family."

She does not say here that she did not know of the institution of the suit and of the decree at the time. In para. 5 she says that she knew all about the mortgage:

"Plaintiff and her husband jointly worked in the said hotel and from out of the earnings of the hotel a sum of Rs. 300 was advanced on 4th August 1912 on a mortgage to one Pachayappa Chetty and a duly registered hypothecation deed was obtained therefor in the name of the said Viswanatha Iyer."

The plaintiff went away from the place and she has stated that she did not know of the suit filed on this mortgage and of the result of that suit, and that when she got a copy of the decree she understood that in that suit her father-in-law suppressed her right. Owning to such an extremely vague statement in the plaint it is not surprising that the defendant in his written statement is not able to put the matter of limitation more clearly than to say that "the plaintiff's husband left Ammapet in 1913 and not in 1917 as wrongly stated in the plaint and that the present claim even otherwise is barred in law."

However, as I said above, it appears to me to hold that the plaintiff can

bring a suit for a bare declaration without the consequential relief which is necessary will lead to innumerable difficulties in the matter of limitation such that she could bring the suit until six years after the money is brought into Court no matter how stale the claim itself to the money might be. In my opinion the suit is not maintainable and should have been dismissed. It was also argued for the appellant that the suit was not maintainable under the provisions of S. 214, Succession Act. It is not necessary to go into this as the original debtor is not being sued and there is no doubt that if the plaintiff had asked for the consequential relief in the first instance against defendant S. 214 would not have stood in her way: vide the decision in *Sahib Ram v. Mt. Govindi* (7). If on the other hand she had sued on the original mortgage S. 214 also would not have stood [vide *Nanchand v. Yenava* (8)] for the section only applies to a personal decree, but in point of fact as she has asked for no relief against the judgment-debtor or against the defendant the question of the applicability of the section does not arise. The second appeal is allowed with costs throughout.

P.R.S./R.K. *Appeal allowed.*

7. AIR 1921 All 155=60 I C 774=43 All 440.

8. (1904) 28 Bom 680=6 Bom L R 582.

A. I. R. 1933 Madras 506

BEASLEY, C. J. AND BARDSWELL, J.

Secy. of State—Petitioner.

v.

Raghunathan and others — Opposite Parties.

Civil Revn. Petn. No. 1260 of 1932, Decided on 14th March 1933, from order of Sub-Judge, Kumbakonam, D/- 17th November 1931.

(a) Civil P. C. (1908), S. 115—Court-fee—Decision favourable to plaintiff — Even revision application by Government does not lie—Government of India Act, S. 107—Court-fees Act (1870), S. 12.

Where a favourable decision has been given as regards court-fee to the plaintiff, the High Court has no power of revision either under S. 115, Civil P. C., or under S. 107, Government of India Act. It is immaterial whether the applicant is the defendant or the Government: *AIR 1929 Mad 191*; *AIR 1929 Mad 396* and *AIR 1925 Cal 814, Rel on*; *AIR 1928 Mad 416* and *AIR 1925 Mad 722, Expl. and Dist.*

[P 508 C 1]

(b) Civil P. C. (1908), S. 115—Government not party—Decision on court-fee favourable to plaintiff — Whether Government can

5. (1903) 23 Mad 410.

6. AIR 1931 P C 89=131 I C 753=58 I A 125=58 Cal 1187.

apply in revision — Court-fees Act (1870), S. 12—Quaere.

Where Government is not a party to the suit, it is doubtful whether a petition for revising the order as to court-fee favourable to the plaintiff can be presented by Government. [P 508 C 1]

Beasley, C. J.—The petition is against a decision of the Subordinate Judge of Kumbakonam holding that the court-fee paid on the plaint was sufficient. It is a petition presented by Government. A preliminary objection is taken as to the maintainability of this petition either under S. 115, Civil P. C., or S. 107, Government of India Act. It is argued that, where an order in regard to court-fees happens to be in favour of the plaintiff, the High Court will not interfere by way of revision; and, on the other hand, it is contended by the learned Government Pleader that, following the decision of a Bench of this High Court in *Kulandai Pandichi v. Ramasami Pandia* (1) the High Court has the power to revise such an order. Turning to that decision, it will be seen that in that case the lower Court passed an order directing the plaintiff to pay additional court-fees on an erroneous view of the court-fees payable and refused to proceed with the suit unless such sum was paid. A preliminary objection was taken as to the maintainability of the revision petition on the ground that an appeal would lie against an order dismissing the suit if the court-fee was not paid. This contention the Bench was unable to uphold being of the view that, where a Judge on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, he fails to exercise the jurisdiction as the party is entitled to have his case tried if he paid the court-fee; and *Sundalamuthu Pillai v. Soma Sundaram Pillai*, (2) a decision of Krishnan, J., was referred to with approval.

In the latter case it was held that in cases in which trial Courts wrongly order payment of court-fee over and above what was paid on the plaint, it has been the practice of the Madras High Court to interfere with the order in revision, without leaving the aggrieved party to the cumbrous remedy of filing an appeal after the plaint is

1. A I R 1928 Mad 416=108 I C 539 = 51 Mad 664.

2. A I R 1925 Mad 722=87 I C 25.

rejected for non-payment of the amount directed to be paid, the question really being one of jurisdiction as the plaint has to be rejected if the stamp duty is not paid. There are other cases of this High Court on the same point taking a similar view. The reason for interfering in revision in those cases was that it was a question of jurisdiction, that is to say, a refusal to exercise jurisdiction. Those cases are however clearly distinguishable from another decision of this High Court, namely, *Muhamad Ellaiyas v. Rahima Bee* (3). In that case the lower Court held that the court-fee paid by the plaintiff on his plaint was correct and Venkatasubba Rao, J., held that such an order as that is not revisable though an order that the court-fee paid on the plaint is wrong is revisable. As he points out at p. 304 (of 56 M. L. J.), where the order is unfavourable to the plaintiff it may result in great hardship to him and the interests of justice may demand that the High Court should at once rectify the error without waiting till the suit is finally decided and an appeal is then filed. But if the lower Court's order which is favourable to the plaintiff happens to be wrong, there is another remedy open, which is quite adequate, as the mistake can be corrected by the appellate Court under S. 12, Court-fees Act. It is quite true that in that case the petitioner was the defendant and that, as is pointed out in the judgment in that case, where an order in regard to court-fee happens to be in favour of the plaintiff it does not mean that it is against the defendant though it may operate to the detriment of the revenue. In this case, the petitioner, as already stated, is the Government and it is argued by the learned Government Pleader that this fact distinguishes this case from *A. Muhamad Ellaiyas v. Rahima Bee* (3).

I am however unable to agree that that distinction alters the position if that decision was correct which, in my view, it clearly was. It is difficult to see how this petition can be presented at all by Government, seeing that Government is not a party to the suit, and I have considerable doubt as to whether such a petition as this can be presented by Government. But, in any case, in

3. A I R 1929 Mad 191=114 I C 842=56 M L J 302.

my opinion, that is immaterial. The same view as that taken by Venkatasubba Rao, J., was taken in *Falkner v. Mirza Mohamed Syed Ali* (4). In that case it was held that, when a Court holds that the plaintiff's valuation is correct, it does not commit such an error of law as to entitle the High Court to interfere under S. 115, Civil P. C., because it cannot be said that the Court has exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction vested in it. There is another case to which reference must be made, namely, *Kattiya Pillai v. Ramasami Pillai* (5), a decision of Venkatasubba Rao and Reilly, JJ., holding that the High Court can interfere in revision against an order relating only to a question of court-fee if the order is unfavourable to the plaintiff but that it will not interfere if the order is favourable to the plaintiff. In that case there was not only a question of the court-fee but of the valuation of the suit under S. 11, Suits Valuation Act. In such a case as that the High Court has a revisional jurisdiction even though the order is favourable to the plaintiff. The reason for the distinction appearing in that case is that in the latter case it was a question of the Court's jurisdiction to entertain the suit. No case has been referred to where this High Court or any other High Court has held that, where a favourable decision has been given as regards court-fee to the plaintiff, the High Court will exercise its revisional powers. I am clearly of the opinion that in such cases the High Court has no power of revision either under S. 115, Civil P. C., or under S. 107, Government of India Act. This civil revision petition must therefore be dismissed with the costs of the respondent,

Bardswell, J.—I agree.

P.R.S./R.K. *Petition dismissed.*

4. A I R 1925 Cal 814=86 I C 858.

5. A I R 1929 Mad 396=119 I C 35.

* A. I. R. 1933 Madras 508

WALSH, J.

Rathnammal—Petitioner.

v.

Sundaram Achari and others—Opposite Parties.

Civil Revn. Petn. No. 1096 of 1932, Decided on 3rd January 1933, against order of Dist. Judge, Madura, D/- 1st March 1932.

* (a) Civil P. C. (1908), S. 50—Suit against defendants 1 to 6 alleging to be in possession of deceased's property—Deceased by will giving life interest to defendant 2 and vested remainder to defendant 4—Defendants 4 to 6 exonerated before trial—After decree defendant 2 dying—Execution taken against property coming to defendant 4—Defendant 4 not being judgment-debtor or his legal representative, property in her hands cannot be proceeded against—Non-appearance by her to application for transfer of decree cannot create constructive *res judicata*—Civil P. C. (1908), S. 11—Execution.

A suit was brought against defendants 1 to 6 for the value of paddy received by one G deceased whose assets were said to be in the hands of the defendants. Defendants 4 to 6 were exonerated before trial. A decree was passed against defendants 1 and 2. Deceased had by his will granted a life interest in the property sought to be proceeded against to his widow, defendant 2, with vested remainder to defendant 4. After the decree, defendant 2 died and the plaintiffs sought to proceed in execution against this property which had come into the possession of defendant 4 on her death :

Held : that as defendant 4 was neither a judgment-debtor nor a legal representative of the judgment-debtor, and as the decree did not affect her the property of the deceased in her hands could not be proceeded against : 33 Mad. 75 and *Mad L P A* 290 of 1927, *Rel on* ; *A I R* 1926 Mad 487; 31 I C 920 and *A I R* 1914 Mad 668, *Expl and Dist.* [P 509 C 2]

Held further : the non-appearance against a petition to transfer a decree with which defendant 4 had no connexion, could not create any constructive *res judicata* that the property of the testator in her hands was liable to be proceeded against. [P 509 C 2]

(b) Civil P. C. (1908), S. 115—Plaintiffs representing temple knowing rights of parties—Party exonerated cannot be allowed to be proceeded against—Execution.

To allow a party against whom no proceedings can be taken in execution to be proceeded against, merely because the plaintiffs, who represent a temple knowing the exact rights of the parties and of everyone concerned, made a mistake in exonerating her in the suit, would be subversive of all ideas of legal procedure and cannot be permitted on any ground of alleged moral right of the temple property, and the order in execution should be interfered in revision. [P 510 C 1]

C. A. Seshagiri Sastriar for *Watrap S. Subramania Iyer*—for Petitioner.

R. Gopalasamy Iyengar—for Opposite Parties.

Order.—A suit, S. C. No. 1709 of 1921 on the file of the Sub-Judge, Madura was brought against defendants 1 to 6 for the value of paddy received by one Ganapathi Achari, deceased whose assets were said to be in the hands of the defendants. Defendants 4 to 6 were exonerated before trial. A decree was passed against defendants 1 and 2. De-

ceased had by his will granted a life interest in the property now sought to be proceeded against to his widow defendant 2 with vested remainder to defendant 4. After the decree defendant 2 died and the plaintiffs sought to proceed in execution against this property which had come into the possession of defendant 4 on her death.

The latter objected as she had been exonerated in the suit, but both the lower Courts found that the property was liable. She files this revision petition. The view of the lower Courts with regard to the said property of the deceased in her hands being liable for the decree is I consider clearly wrong. She was exonerated before filing any written statement, by the plaintiffs themselves, so that estoppel cannot be and is not pleaded against her in respect of anything that happened in the suit. There can be no decree simply against the assets of a deceased person. S. 50, Civil P. C., talks of "judgment-debtor." The recent judgment of Jackson, J., and myself in L. P. A. 290/1927 may be referred to, but it is too obvious to require elaboration that a decree must always be for assets in the hands of some person: vide *Kaliappan Servaikaran v. Varadarajulu* (1). It is no answer to say as the learned District Judge does that the object of the decree was to fasten the liability for the debt on all the assets of the deceased debtor. That may have been the object of the suit, but the decree will not bind anyone but the judgment-debtors and their legal representatives. So also it is not true that defendant 4 when she was exonerated had no saleable interest in the property.

The learned pleader for the respondents attempts to argue that because defendant 2 was in physical possession of the property after the testator's death she must be treated as having been in entire possession for the purpose of the suit. No authority is quoted for such a strange proposition. Its fallacy is clear if we consider what would have happened had she not died and had plaintiffs proceeded to execute their decree against her. They could only have sold her life interest in the suit property; therefore they cannot be in any better position after her death. The cases

quoted for the plaintiffs are not in point: *Mallappa v. N. G. Kare* (2) only decided that where in a suit filed by creditors of a deceased person against his heirs and against certain persons impleaded as being in possession of his assets those in possession colluded with the plaintiffs in allowing a decree to be passed, the decree was not binding on the real heirs. That has nothing in common with the present case, but a remark is relied on:

"Where a decree is obtained without fraud or collusion against persons in possession of the deceased debtor's estate it will be binding on his heirs."

This does not state that a part legatee remains anything, but a part legatee simply because he is in actual possession. *Gnanambal Ammal v. Veerasami Chetty* (3) has also no application. In that case there was a genuine mistake of fact. There was no mistake of fact here. The plaintiffs knew the terms of the will and exactly what defendants 2 and 4 respectively took under it as legatees, and in fact originally impleaded defendant 4, but chose to exonerate her: *Kasthuri Ranga Iyer v. Venkatarama Iyer* (4), has also no application. Defendant 4 is not being proceeded against as the legal representative of defendant 2 and she is not her legal representative. As defendant 4 is therefore neither a judgment-debtor nor a legal representative of the judgment-debtor, and as the decree does not affect her, it is unnecessary to consider whether the plea of limitation which she took in the first Court was rightly or wrongly decided against her.

The learned District Judge however mentions at the end of his judgment that the non-contesting of Execution Application No. 711/1928 by the petitioner made the matter *res judicata*. The point was not raised in the executing Court and constructive *res judicata* in the matter of execution petition has to be very cautiously applied. Now the execution application in question was merely one to transfer the decree to the Melur District Munsif's Court for execution. Assuming, purely for the sake of argument, that from the fact that transfer was ordered we may presume proper service on defendant 4,

2. A I R 1928 Mad 487=93 I C 625.

3. (1915) 31 I C 920.

4. A I R 1914 Mad 668=24 I C 280.

1. (1910) 33 Mad 75=3 I C 737.

the non-appearance against a petition to transfer a decree with which defendant 4 had no connexion, can obviously not create any constructive res judicata that the property of the testator in her hands is liable to be proceeded against. The simple answer is that she had no locus standi to oppose any such transfer application because she had been exonerated from the decree. The last argument addressed for the plaintiffs to me is that I should not interfere in revision where no substantial injustice has been done because the plaintiffs, who represent a temple, are morally entitled to the property.

To allow a party against whom no proceedings can be taken in execution to be proceeded against, merely because the plaintiffs knowing the exact rights of the party and of everyone concerned made a mistake in exonerating her in the suit, would be subversive of all ideas of legal procedure and cannot be permitted on any ground of alleged moral right of the temple to the property. The revision petition is therefore allowed with costs throughout and the execution application against defendant 4 must stand dismissed.

P.R.S./R.K.

Petition allowed.

A. I. R. 1933 Madras 510

ANANTAKRISHNA AYYAR, J.

Nalabolu Ramireddi — Defendant —
Petitioner.

v.

Thunga Chinna Venku Reddi and others—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 1760 of 1932,
Decided on 20th January 1933, from
order of Dist. Munsif, Kavali, D/- 7th
November 1932.

Practice—Judgment—Miscellaneous application contested—Pleaders heard—Merits of controversy must be determined—Petition is "struck off" is not legal disposal.

When a matter is contested and when the Court has heard pleaders for both sides, simply to say that the petition is "struck off," is entirely unwarranted and extremely undesirable. To say that "the petition is struck off" is surely not a proper and legal mode of disposal of an important contested application; there must be judicial determination on the merits of the controversy: 10 Cal 416 and 6 All 269 (P C), *Rel. on.* [P 510 O 2; P 511 C 1]

B. Somayya—for Petitioner.

K. Umamahewaram — for Opposite Parties.

Order.—In O. S. No. 471 of 1932 on the file of the District Munsif of Kavali, defendant 1 filed an application under O. 7, R. 14, O. 11, R. 15 and S. 151, Civil P. C., for directing the plaintiff to produce in Court the documents as per list, or give inspection of the same to defendant 1 alleging that "it was not possible for defendant 1 to file his written statement without inspecting those documents."

The matter was contested. The learned District Munsif, after hearing the pleaders of the parties, disposed of that application in these words: "The petition is struck off." In connexion with execution applications, this phrase "struck off" was once a very favourite phrase which often found acceptance with Courts, with the result that a lot of difficulties arose in subsequent proceedings in execution in construing what exactly was meant by the phrase "struck off" in such orders. It is not necessary to refer to the legal history of the expression "struck off" with reference to its use in connexion with execution applications. In *Biswas Sonan Chunder v. Binanda Chunder* (1), Field, J., who delivered the judgment of the Court observed at p. 422 as follows:

"It would be very desirable that Courts in the mofussil should abandon the practice of 'striking cases off.' There is no provision in the Civil Procedure Code for striking off a case. The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear, is to dismiss it."

It would still seem to be necessary to impress upon mofussil Courts the importance of the above observations. If the only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, even when the parties do not appear, is to dismiss it, it would surely seem to follow that when matter is contested and when the Court heard pleaders for both sides simply to say that the petition is "struck off," is entirely unwarranted and extremely undesirable. (The note attached to Civil Rules of Practice, Vol. 1, R. 144, refers apparently to special circumstances in connexion with execution petitions, where no further relief can be granted at the time, and I am not concerned with such execution petitions at present.) In *Ram Kirpal v. Rup Kuari* (2) Sir Barnes Peacock in delivering the judg-

1. (1884) 10 Cal 416.

2. (1884) 6 All 269=11 I A 87 (P C).

ment of the Privy Council observed at p. 275 as follows :

" In the course of those proceedings the case was for various reasons several times 'struck off,' that is to say struck off the file of the business pending in the Court of the Subordinate Judge."

It is not necessary at this time of the day to refer to the various decisions in which Courts had to complain about the loose practice that obtained in some Courts of directing execution applications to be "struck off." A case struck off the file of the business pending in the Court is not necessarily dismissed or finally disposed of. Such an order, made evidently for the purpose of showing the Court's statistical returns that a case is no longer pending, is illegal ; the rights of the parties are not affected thereby and the application must be regarded as pending notwithstanding its apparent removal from the file. As the order is not based on the judicial adjudication on the merits of the controversy, it would *prima facie* be no bar to a fresh application.

But litigants in Courts are entitled to have a judicial determination on the merits of the controversy, instead of having the mere apparent satisfaction of having the legal right to file a fresh application, no one knowing whether that would end with better results. The use of the expression "struck off" in connexion with miscellaneous applications where substantial relief is prayed for is even more inappropriate and undesirable than its use with reference to execution applications. It is now understood that the expression has in practice now ceased to be used by Courts in connexion with orders passed even on execution applications. But the order passed by the learned District Munsif in this case would seem to indicate that that expression though now not used with reference to execution applications still lingers and finds favour in other, though contentious, proceedings. To say that "the petition is struck off" is surely not a proper and legal mode of disposal of any important contested application, like the one before the lower Court, if it be a legal mode of disposal of any proceeding before the Court at all. There is no indication in the order in question as to what was passing through the mind of the learned District Munsif when he proposed to "strike off" the

application, after hearing pleaders of the parties.

The position of defendant 1-petitioner—is surely embarrassing. He has to file a written statement in the suit. Before filing his written statement, he thought he should be allowed to inspect certain documents referred to in the plaint. Whether he was entitled to it or not is not the matter for consideration by me at present. When he applied to the learned District Munsif for orders, he surely had a right to be told whether he was to have such inspection or not, so that he might busy himself with his written statement accordingly. The order passed by the learned District Munsif striking off the petition leads to nowhere. Is the petition still pending, so that the defendant need not file his written statement before final and other orders are passed on his application? Or, is the petition taken to have been dismissed ; if so, for what reason ? I am obliged to remark that the learned District Munsif would seem to have not applied his mind at all to the question before him. I do not think it necessary to say anything more about the order passed by the learned District Munsif on the present occasion. The order as it stands could not be sustained. I reverse the order of the learned District Munsif, dated 7th November 1932, and remand I. A. No. 1022/32 for fresh disposal according to law. The costs in the High Court will abide and follow the final order to be passed on the application.

P.R.S./R.K.

Order accordingly.

* * A. I. R. 1933 Madras 511

BEASLEY, C. J. AND BARDSWELL, J.
Bajinath Karnani—Appellant.

v.

Vallabhdas Damani—Respondent.

Appeal No. 15 of 1932, Decided on 15th March 1933, from judgment of Stone, J., D/- 17th November 1931.

* * (a) Limitation Act (1908), Art. 117—
Foreign judgment—Appeal dismissed—
"Judgment in that suit" is appellate and not original judgment—Civil P. C. (1908), S. 13.

Where in a foreign state there is a suit and in that suit a judgment is given and from that judgment appeal is made, which appeal is dismissed, the "judgment in that suit" is not judgment of the Court of first instance but the judgment of the appellate Court for the purpose of Limitation Act. The test is that the foreign judgment must be final and conclusive between

the parties: *A I R 1918 P C 151 (P C), Dist; Case law discussed.* [P 512 C 1,2]

(b) Limitation Act (1908), Art. 117—Judgment.

In Art. 117 judgment means decree. [P 512 C 1]

T. R. Venkatarama Sastri for *V. Varadaraja Mudaliar*—for Appellant.

S. Duraiswamy Iyer and *N. J. Shamma*—for Respondent.

Beasley, C. J.—This is an appeal from a judgment of *Stone, J.*, and the point to be decided is: Where in a foreign state there is a suit and in that suit a judgment is given and from that judgment appeal is made, which appeal is dismissed, is the "judgment in that suit" the judgment of the Court of first instance or is it the judgment of the Appellate Court for the purposes of the Limitation Act?

The suit under appeal is brought to enforce a judgment given in the state of Bikanir. The first Court's decree there was appealed from and the appeal was dismissed by the appellate Court. If the appellant here, the plaintiff in the suit, is to take as the date for his cause of action the date of the decree in the Court of first instance, then this suit is barred by limitation. If he is to take the date as that of the appellate Court's decree then his suit is not barred by limitation. This is a very interesting point and, as *Stone, J.*, remarks, it is strange that there are no direct decisions upon this point although it must have arisen in India many times before *Stone, J.*, has rightly, in my opinion, held that in Art. 117, Lim. Act, judgment means decree. He has taken the view that the starting point of limitation was the decree in the first Court and accordingly dismissed the suit as being barred by limitation. It is contended here that he was wrong. In this case we are dealing with a judgment given in the state of Bikanir where it is conceded that all the provisions of the Civil Procedure Code are applied and the decisions of the Indian High Courts followed; and in my view, the difficult question before us is made more simple on that account. It is conceded that a foreign judgment and a Municipal judgment are upon an entirely different basis. A foreign judgment cannot be executed and it is merely a cause of action and the judgment is regarded as creating a debt between the parties to it and it is said that the debt so created

is a simple contract debt, the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment. There is no merger of the original cause of action and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based; and it is argued on behalf of the respondent that, as a foreign judgment is a mere cause of action or a right gained by the plaintiff by reason of his decree, the starting point of limitation is the date upon which he obtains that right and that this cannot be affected by reason of the pendency either of an appeal or the supervention of a decree of an appellate Court confirming the lower Court's decree; and in aid of this argument, amongst other things, it is pointed out that when a decree has been obtained steps to execute the decree may be taken and execution of it had during the pendency of an appeal unless those steps are stayed. In my opinion, the latter test, although there is a great deal to be said for the argument which adopts it, is not the real test. What has got to be found is, what is the final decree which has been obtained by the plaintiff in the suit; and it is quite clear that in order to enforce the judgment of a foreign Court that judgment must be a final one; and indeed that is conceded by the learned counsel for the appellant and the respondent. In *Nauvion v. Freeman* (1) which was an action brought upon a foreign judgment for the recovery of a debt it was held that if the judgment does not finally and conclusively (subject to an appeal to a higher Court) settle the existence of the debt so as to become *res judicata* between the parties, such an action cannot be brought. In that case their Lordships had before them what was described as a "remate" judgment of a Spanish Court and in accordance with the laws of Spain this "remate" judgment when it was "executive" or summary, as it was could not be regarded as *res judicata* and their Lordships accordingly held that since such a judgment as that does not finally and conclusively establish the debt, no suit upon it could be brought in England. Lord Herschell in dealing with the finality and con-

1. (1890) 15 A C 1=59 L J Ch 397=38 W R 587=62 L T 189.

clusive nature of the judgment upon which an action may be maintained in the English Courts when such judgment is pronounced by a foreign Court at p. 9 says:

"My Lords, I think that in order to establish that such a judgment has been pronounced it must be shown that in the Court by which it was pronounced it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties"

Lord Watson on p. 13 says:

"In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."

This case, it is urged on the respondent's behalf, shows that when once a decree has been obtained even though that decree may be the subject of an appeal, a suit may be brought upon it in a foreign Court to enforce it. For the appellant however it is argued that it does not necessarily follow that, where an appeal has been presented which results in a decree of the appellate Court dismissing the appeal, a fresh starting point of limitation is not given thereby, it being conceded that the foreign judgment sued upon must be final and conclusive. Since this question, in my view, has got to be decided upon a consideration of the cases which lay down the law as to finality of a decree in this country, I propose to refer to some of those quoted in the course of the arguments; and I will first of all deal with those decisions which consider the effect of the passing of an appellate decree. The first of these is *Luchmun Persad Singh v. Kishun Persad Singh* (2) a Full Bench decision. There it was held that although an order of the Privy Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and that any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. The next case is *Noor Ali Chowduri v. Koni Meah* (3) where it was held that the only decree of which execution could be taken was the appellate decree and not the original decree. In the judgment in

that case a Madras decision is referred to, namely *Arunachalla Thudayan v. Veludayan* (4), in which Scotland, C. J., said:

"Whether that decree be in affirmance or reversal or modification of the decree appealed from it becomes the final decree in the suit, and therefore the decree enforceable by execution."

In *Kailash Chandar Bose v. Girija Sundari Debi* (5), it was held that the appellate decree supersedes the original decree. At p. 929, Jenkins, C. J., says:

"The decree in that suit was in the Court of first instance against the widow, and it may be that this decree, had there been no appeal, would have been binding as against the reversioner, even though the mortgage was created by the lady herself. That is a point on which I express no opinion at this stage, because I do not think it is necessary, and I reserve my opinion until occasion arises for its decision. But whatever may have been the effect of that decree, had it stood by itself, it was superseded by the decree passed on appeal. The decree of the Court of first instance could not in the circumstances be pleaded as res judicata."

He relied on *Noor Ali Chowduri v. Koni Meah* (3) as showing that, where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had and that the appellate decree superseded the original decree. He further points out that, where an appellate Court dismisses an appeal under the provisions of the Code, the proper course is, as is provided by the Code, to confirm, vary or reverse the decree against which the appeal is made and not merely to dismiss the appeal. In Dicey's *Conflict of Laws*, Edn. 4, p. 454, it is stated that the test of finality is the treatment of the judgment by the foreign tribunal as res judicata. In India and in Bikanir a decree of the first Court which is taken on appeal to an appellate Court is not res judicata. In *Sheo Sagar Singh v. Sitarama Singh* (6), a decision of the Privy Council, at p. 626 Lord Macnaghten states;

"To support a plea of res judicata it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal."

4. (1869-70) 5 M H C R 215.

5. (1912) 39 Cal 925=14 I C 299.

6. (1897) 24 Cal 616=24 I A 50=7 Sar 124 (P C).

2. (1882) 8 Cal 218=10 C L R 425 (FB).

3. (1886) 13 Cal 13.

This decision, in my view, affords the strongest support to the appellant's contention before us. The first Court's decision was superseded by the judgment of the appellate Court and its finality destroyed by the appeal. It seems to me that the judgment sued upon cannot be the judgment the finality of which has been destroyed by the appeal and which has been superseded by the judgment of an appellate Court and that it is only the latter judgment which is sued upon (see also *Abdullah Ashgar Ali Khan v. Ganesh Dass* (7) another decision of the Privy Council). In *Chengalvala Gurraju v. Madapathy Venkateswar Rao* (8) it was held that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as res judicata. *Balkishan v. Kishan Lal* (9) is to the same effect. Another decision of the Privy Council is *Annamalai Chetty v. Thornhill* (10), where it was held that a decree from which an appeal lies and has in fact been taken, is not final between the parties so as to form res judicata. The judgment of Cozens-Hardy, L. J., in *Marchioness of Huntley v. Gaskell* (11) is relied upon by the respondent. At p. 667 he says:

"It is urged that the judgment of the Scotch Court of Session is not a final judgment; but when the word 'final' is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal but merely 'final' as opposed to 'interlocutory.' A judgment is, in my opinion, not the less an estoppel between the parties to the action because it may be reversed on appeal to the House of Lords."

I have already expressed the view that this question falls to be decided not by the English decisions upon this question but by the decisions of the Indian Courts and of the Privy Council; and no case in this Court or the Privy Council has been referred to by Mr. Doraiswami Ayyar in the course of his able argument on behalf of the respondent which, in my opinion, supports his argument. *Juscurn Boid v. Pirthichand Lal Chou-*

7. A I R 1917 P C 201=45 Cal 442=42 I C 959=44 I A 213 (P C).

8. (1916) 30 M L J 379=33 I C 9

9. (1889) 11 All 148=(1889) A W N 42.

10. A I R 1931 P C 263=184 I C 331 (P C.)

11. (1905) 2 Ch D 656=75 L J Ch 66=54 W R 164=93 L T 785.

dry (12), a decision of the Privy Council relied upon by him, is clearly distinguishable from the cases on the other side by reason of the fact that the article of the Limitation Act there in question was Art. 97, "for money paid upon an existing consideration which afterwards fails."

A period of three years is given from the date of the failure. The lower Court held that there had been a failure of consideration. This order was confirmed on appeal and nevertheless it was held that time commenced to run from the date of the lower Court's decree because it was upon that date that consideration failed. This case is of no force when Art. 117 comes to be considered. In my view, applying the test of res judicata and the decisions referred to in support of the appellant's argument, Stone J.'s judgment was erroneous and it follows that the decree must be set aside and the appeal allowed with costs both here and in the trial Court.

Bardswell, J.—The suit under appeal was brought by the plaintiff for a decree for the enforcement of a foreign judgment in his favour against the defendant for the sum of Rs. 7,858-10-3 with interest and costs. The foreign judgment was that of the State of Bikanir. A judgment and decree in favour of the plaintiff for Rupees 7284-14-3 were passed by the High Court of Bikanir in exercise of its original jurisdiction on 9th July 1924 and confirmed by an appellate Bench of the same High Court on 24th March 1925. The suit under appeal was filed in this Court on 12th March 1931, the principal amount sued for being made up of the amount for which the High Court of Bikanir had given the decree and Rs. 573-12-0 which had been allowed for costs. One objection taken before Stone, J., who tried the suit, was that the High Court of Bikanir had no jurisdiction, but this objection, which is said to have been only faintly argued, was overruled and that decision has not been challenged. The defendant however has succeeded on another point that was taken on his behalf and that is that the suit claim was barred by limitation except for the sum of Rs. 573-12-0 allowed for costs, the claim to which was admitted. Stone, J., has held that the word "judg-

12. A I R 1918 P C 151=46 Cal 670=50 I C 444=46 I A 52 (P C.)

ment" in the expression "foreign judgment" in S. 2 (6), Civil P. C., means the decree of the foreign Court and this view, which is in accordance with common sense and with what is the English law on the subject, has not been contested. It is therefore Art. 117, Lim. Act, that has to be considered. Under that article the time allowed for bringing a suit upon a foreign judgment is six years from the date of the judgment. What has been held is that by "date of the judgment" is meant the date of the original judgment and that, as the date of the original judgment at Bikanir was more than six years before the filing of the suit in this Court, the suit was barred by limitation. For the plaintiff, who is now the appellant, it is argued that time has to run from the date of the appellate judgment. If that view is correct the suit will have been brought in time.

To enable a foreign judgment to be enforced it must be one that is final and conclusive between the parties and it may be final and conclusive though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given. The law on the subject is thus set out in R. 114, of Dicey's Conflict of Laws on which Mr. Doraisami Iyer lays stress in his arguments on behalf of the respondent. But the same learned authority in his commentary on this rule gives as the test of finality the treatment of the judgment by the foreign tribunal as *res judicata*. He quotes from the judgment of Lord Herschell in *Nouvin v. Freeman* (1) :

"In order to establish that a (final and conclusive) judgment has been pronounced it must be shown that in the Court by which it was pronounced, it conclusively, finally and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country so as to make it *res judicata* between the parties."

The same extract is also given in Smith's Leading Cases as the test of what is a conclusive judgment. In the case of some foreign Courts the decision of the Court of first instance may act as *res judicata*. Such a state of things is contemplated in *Nouvin v. Freeman* (1) at p. 13 and, when it exists, the first Court's judgment, as stated in that decision, will only be enforced subject to conditions which will save the inter-

ests of those who have the right of appeal. But what we have to consider is what is the position as regards *res judicata* of a decree passed by a Court of first instance in accordance with the provisions of the Code of Civil Procedure of British India when that decree has been appealed against, even if the result of the appeal is for it to be confirmed. It is common ground that the law of the Bikanir State is on all relevant matters the same as that of British India.

By O. 31, R. 32, Civil P. C., the appellate judgment may be for confirming, varying or reversing the decree from which the appeal is preferred and in *Kailash Chandra Bose v. Girija Sundari Debi* (5), Jenkins, C. J., has called special attention to this rule (then S. 577), and has held that, where there is a decree on appeal which confirms the decree against which the appeal is made, the appellate decree supersedes the original decree. In *Sheo Sagar Singh v. Sitaram Singh* (6) the Privy Council have held that :

"to support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of appeal."

This decision has been followed by a later Privy Council decision in *Abdullah Ashgar Ali Khan v. Ganesh Dass* (6) while in *Annamalai Chetty v. Thornhill* (10) their Lordships have held that

"where an appeal lies the finality of the decree on such appeal being taken is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the same parties."

In *Chengalvala Gurraju v. Madapathy Venkateswar Rao* (8) it has been held by a Bench of this Court that a judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata*. It is unnecessary to discuss this decision here, in so far as it extends the principle to a judgment not yet appealed against while the time for appeal has not yet expired, as in the case under notice there has been an appeal and the decisions of the Privy Council are conclusive as to a case of that kind. Great stress has been laid for the respondent on the Privy Council

decision in *Juscurn Boid v. Pirthichand* (12). In that case it was held that failure of consideration dated from the first Court's decree setting aside a sale for arrears of rent and not from the date of the appellate decree by which it was confirmed, and it was pointed out that under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. A subsequent suit that was brought for the recovery of money was therefore held to be time barred under Art. 97, Lim. Act. This decision has been considered by a Bench of this Court in *Venkayya v. Sathiraju* (13) and it is pointed out there what was held was that consideration had failed when the sale was set aside in the first Court and that it did not fail afresh when the order setting aside the same was affirmed by the appellate Court. It was held in this Madras case that the remarks of the Privy Council in *Juscurn Boid v. Pirthichand* (12) did not apply to questions arising under Arts. 181 and 182, Lim. Act, and that, even though by Art. 182 the appellate decree is expressly made a fresh starting point for purposes of execution, whereas there is no corresponding provision to Art. 181, yet even an application under the latter article for a decree absolute could be made within three years from the passing of the preliminary decree by the appellate Court. And that this view as to Art. 181 is correct is shown by the Privy Council decision *Jowad Hussain v. Gendan Singh* (14). Therein is cited with approval a remark of Banerji, J., in *Gajadhar Singh v. Kishan Jiwan Leal* (15) (Full Bench) :

"It seems to me that this rule, the rule regulating applications for final decrees in mortgage actions, contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the marking of a final decree is the existence of a preliminary decree which has become conclusive between the parties. Where an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

There appears to be no authority directly bearing on the question of from the date of which judgment or decree, in the

13. AIR 1921 Mad 414=44 Mad 714=64 IC 470.

14. AIR 1926 P C 93=98 IC 499=6 Pat 24=53 IA 197 (P C).

15. (1917) 39 All 641=42 IC 93 (F B).

case of there being an original decree and an appellate decree confirming it, time should run for the purposes of Art. 117; but it seems to me that the decision in *Jowad Hussain v. Gendan Singh* (14) is an authority that gives better guidance as to how that article should be interpreted than is *Juscurn v. Pirthichand* (12). In the latter case what had to be looked to for the purposes of Art. 97 was not so much the decree itself as what had been decided by the decree. For the purposes of Art. 117 as for those of Art. 181 the existence of a decree is essential as the basis of the action and that decree has to be one that is final and conclusive between the parties so as to operate as res judicata. Now in the present instance there was no final and conclusive decree between the parties such as could so operate till the decree of confirmation had been passed on the appeal. In these circumstances it is from the date of that decree and not from the date of the original decree that limitation began to run against the plaintiff as, when there had been an appeal, it was not till the appeal had been decided that the plaintiff had obtained a decree of the necessary finality and conclusiveness for him to take action upon it in British India. I would therefore allow this appeal and grant a decree for the full amount sued for with interest at 6 per cent per annum from date of suit to date of realisation and costs both on the appeal and on the first hearing.

P.R.S./R.K.

Appeal allowed.

A. I. R. 1933 Madras 516

WALSH, J.

K. P. Ganapathy Iyer—Defendant—Appellant.

v.

K. P. Subramania Iyer and others—Plaintiffs—Respondents.

Appeal No. 116 of 1929, Decided on 23rd February 1933, against appellate order of Dist. Judge, South Malabar, D/- 2nd November 1928.

(a) Partition—Consent decree—Preliminary decree is not obligatory—Parties by execution application treating decree as final cannot subsequently resale.

In a consent decree no preliminary decree is obligatory in a partition suit, and where the parties have by means of an execution petition treated it as a final decree, it is not open to

either of them to object that it is only a preliminary decree : 11 *Bom* 153 and 36 *Cal* 193, *Ref.* [P 517 C 2]

(b) Deed—Construction—“ Veedham ” explained—Words and phrases.

The Malayalam word “ veedham ” has not the exclusive mathematical connotation which “ proportion ” or “ ratio ” has in English. It is not confined to the sense of “ ratio ” or “ proportion.” “ Rate ” would be a better word. The best course would be simply to consider the Malayalam word “ veedham.” [P 518 C 1]

(c) Evidence Act (1872), S. 92—Consent decree.

It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity : *A I R* 1927 *Mad* 911, *Ref.* [P 518 C 1]

P. S. Narayanasami Ayyar—for Appellant.

S. S. Ramachandra Ayyar, A. Sivamirutham and M. V. Harihara Ayyar—for Respondents.

Judgment.—The appellant is the judgment-debtor in this case and the matter arises in the execution of a compromise decree. Plaintiff 1 and defendant 1 are brothers and in a suit for partition a decree was drawn up in accordance with the compromise between them. The suit turns upon the construction of para. 3 of this compromise decree relating to the properties in Kottekkad. The paragraph has been translated as follows :

“ It has been settled that out of the above-mentioned properties the house at Kumara-puram gramom should be taken for the share No. 1 out of us, that the properties in Kollengode and Mangalam areas should be partitioned by both the persons equally, and that the revenue and michavaroms in respect of the said properties should be borne equally; and since the obsequies of our grandmother deceased Subbammal Ammal were conducted by No. 2, No. 1 has of his own free will, agreed and settled that in respect of the Sradhams (death anniversaries), etc., of the said grandmother and of grandfather deceased Venkatasubba Ayyar, 100 paras of paddy should be credited to No. 2 from the share of 285 paras of paddy belonging to No. 1 out of 570 paras of paddy that is left as balance after deducting 130 paras of paddy for ushappooja and nivedia vazhipad, at the Venkatachopathi temple at Kumarapuram gramom, from the pattom (rent) of about 700 paras of paddy which the properties in Kottekkad amsom now fetch; and so, the abovesaid 100 paras of paddy has been set apart for the share of No. 2 from the share of 285 paras of paddy belonging to No. 1. It has also been settled that the properties at Kottekkad should be partitioned in the said proportion.”

The question at issue is whether the properties at Kottekkad are to be divided into two equal portions out of which the defendant-appellant is to pay 100 paras of paddy per annum to the plain-

tiff for performing the Sradha of their maternal grandfather and grandmother or whether the properties are to be divided in the ratio of 385 to 185 which represents the final numbers of paras of paddy which each side will have for its own use when another 130 paras of paddy have been deducted for the temple which is to be paid by each party in equal shares of 65 paras a piece. The learned District Munsif held that the properties should be divided equally and that defendant 1 is liable under the Razi to pay 100 paras of paddy every year to plaintiff 1 for performing the Sradhas till his death after which the Sradhas would cease to be performed. The learned District Judge took the other view that the Kottekkad land was to be divided in the proportion of 385 to 185, and against his decision this second appeal has been filed.

It is unnecessary to deal with the question, which has been raised whether the compromise was a preliminary or a final decree because both the parties have treated it as a final decree. In a consent decree no preliminary decree is obligatory in a partition suit, and the parties having by means of an execution petition treated it as a final decree, it is not open to either of them now to object that it is only a preliminary decree: *Vishnu Sakharam v. Krishna Rao Malhar* (1) followed in *Gurudeo Singh v. Chandrikah Singh* (2) (at p. 207). I therefore come to the main point as to which view of the compromise is right. And in this matter I wish to say at once that I understand Malayalam is the mother tongue of the learned District Munsif whereas the learned District Judge was a European. I would also put in the forefront of this discussion the fact that in the crucial phrase :

“ It has been settled that the properties at Kottekkad should be partitioned in the said proportion,”

the use of the word “ proportion ” in the translation is unfortunate and really begs the question. The Malayalam word is “ veedham ” and that word has not the exclusive mathematical connotation which “ proportion ” or “ ratio ” has in English. The word “ veedham ” is certainly not confined to the sense of “ ratio ” or “ proportion.” Bailey's

1. (1887) 11 *Bom* 153.

2. (1909) 36 *Cal* 193=1 *I C* 913.

Malayalam and English Dictionary gives its meaning as "portion or share, rate, rule." Zacharias English-Malayalam Dictionary gives "veedham" as translation both for "rate" and "ratio." Therefore "rate" would appear to me to be a better word to use than "proportion." The best course would be simply to consider the Malayalam word "veedham." I observe that the learned District Munsif, whose mother tongue is Malayalam notes that the argument on behalf of the petitioner-respondent is that the properties are to be divided in this proportion and that emphasis is laid on phrase *in this proportion* to show that the intention of the parties was that after setting apart 130 paras for the temple expenses, the balance 570 paras of yielding properties are to be divided in the proportion of 385 to 185. In spite of this argument addressed to him the learned District Munsif has held that the meaning is that the properties are to be divided equally. The learned District Judge has put this word "proportion" in the forefront of his argument. He says in para. 4 :

"The agreement is certainly not easy to interpret. . . . In my opinion, it is only by taking this view that effect can be given to the last sentence of the paragraph 'it has been settled to divide and take the Kottekkad properties in this proportion.' What else can this mean but that the Kottekkad properties are to be divided in the proportion of 385 to 185. This comes out very clearly if the Malayalam is read."

With this latter observation I disagree. The use of the Malayalam word "veedham" greatly detracts from any argument which might be put forward founded on the English word "proportion." The learned District Judge says further on :

"then there is the final sentence that the Kottekkad properties shall be divided in this proportion."

In my opinion it is quite unsafe to base any argument on the use of the English word "proportion" in the translation. We must substitute for it the Malayalam word "veedham" which has a much wider and more indefinite meaning. I feel some doubt whether evidence was admissible in this case to explain the ambiguity. In *Venkatalingama v. Venkadri Rao* (3), (at p. 907 of 50 Mad.), it was held that S. 92 is a bar also in respect of a decree to the admission of

such oral evidence. Assuming however that it is admissible as evidence of surrounding circumstances, I do not think it takes very far. It is urged that the reason for not dividing Kottekkad in equal portions and for giving the plaintiff such an obvious advantage was that he had agreed to divide equally with the defendant certain properties which he had been given by the Dewan of Mysore. The fact is mentioned in para. 4 of the Razi but it is not asserted in para. 3 as the reason for any of the arrangements entered into that paragraph. No doubt, as stated by the learned District Judge, it has not been explained why para. 4 was inserted. On the other hand it is objected that if this was the real reason for the plaintiff being given a larger share in Kottekkad this explanation would have found a place in para. 3. The objection that instead of saying that the properties at Kottekkad should be partitioned in the said proportion the parties would have said that they would be partitioned equally, which is emphasised by the learned District Judge, largely vanishes when we remember that it cannot be stated that "veedham" means "proportion" and it may mean only "rate."

Looking at the clause itself there is one strong argument against its being interpreted in the sense in which the learned District Judge has done. The 130 paras to the temple are to be contributed equally at 65 paras by each and yet this land is not set aside for the temple which would be the course to follow if the land was being assigned according to the paras of paddy payable by each brother. An argument was attempted for the first time before me that the consideration for the larger share given to the plaintiff was that he had conducted the obsequies of the deceased grandmother Subbammal. I think, it is quite clear that what the sentence means is that since he had conducted the obsequies he should conduct in the future the Shradhams as a matter of convenience. It is certain that if his having conducted the obsequies of the deceased grandmother Subbammal was really one of the considerations for the plaintiff being given a larger extent of Kottekkad properties, the parties must have known about it, and it would have been mentioned before either the Court of first in-

stance or the lower appellate Court. The learned District Judge himself says that there is force in the argument that since the purpose (shradham) was only temporary it is unlikely that land yielding 100 paras was given permanently to Subramania Ayyar. There is one matter pointed out to me in appeal which I consider almost conclusive in favour of the view taken by the Court of first instance. One of the items of Kottekkad property is forest. This was quite obviously divided up equally between the brothers in accordance with the compromise as will be seen from the objections on behalf of defendant 1 in E. P. No. 1907 of 1927. He says in para. 3 :

"Subsequent to the preliminary decree the forest in Kottekkad has been sold for Rs. 570. Out of the said amount the one-half share belonging to me is with Venkatachala Ayyar's son Lakshminarayana Ayyar of Putiyankam gramom."

This part of the decree about the forest has not been appealed against and has evidently been acted upon by both parties so that from any point of view the decree of the learned District Judge is incorrect. The only change he has made in the decree is

"that plaintiff 1 should get that portion of Kottekkad land which would yield 450 paras of paddy a year and that defendant 1 should get the remaining portion which would yield 250 paras of paddy a year;"

whereas if the interpretation of the compromise contended for by the plaintiff is correct and forest land should also be divided up in the same proportion of 450 to 250. This fact seems to me plainly conclusive that the meaning of the compromise is that the lands in Kottekkad are to be equally partitioned and that 100 paras of paddy are payable annually for the performance of the Shradha by defendant 1 to the plaintiff out of his share which he gets. The learned District Munsif has perhaps gone further than anything which needs to be decided at present in saying that this is only to be paid until the death of the plaintiff. I express no opinion on the matter and there is no express statement about it in the compromise decree. It may well, I think, be left open for future consideration when a contingency arises, unless either party meanwhile wishes by separate application to have the matter settled. In the result the appeal is allowed with costs and the order of the District Munsif is restored

excepting with regard to what is to happen after the death of the plaintiff about the 100 paras of paddy payable for the shradha, which is left open.

P.R.S./R.K.

Appeal allowed.

* A. I. R. 1933 Madras 519

BEASLEY, C. J. AND BARDSWELL, J.
Thirupuraneni Narayana Rao—Appellant.

v.

Soorapaneni Veerayya and others—Respondents.

Letters Patent Appeal No. 96 of 1932, Decided on 24th February 1933, from order of Burn, J., D/- 8th November 1932.

* (a) Civil P. C. (1908), O. 44, R. 1—**Before leave to appeal as pauper is granted it is incumbent upon pauper—Appellant to satisfy Court that judgment is erroneous.**

Order 44, R. 1 does contemplate that, before granting leave to appeal in forma pauperis, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust. As a matter of fact there is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the appellate stage is reached a more severe test has to be applied. Therefore when the pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous: *A I R 1931 Mad 198, Diss from*; *28 Bom 451*; *A I R 1925 Pat 442* and *A I R 1925 Rang 249, Foll.* [P 520 C 1, 2]

* (b) Civil P. C. (1908), O. 25, R. 1—**Absence of prima facie good case on appeal by pauper is good ground for security.**

That the appellant has not prima facie a good case, is sufficient for ordering the appellant to furnish security for costs even though he be a pauper. The fact that a person is a pauper is not alone a reason for not ordering him to give security for costs: *In re Carroll, (1931) K B D 104, Foll.* [P 521 C 1]

J. Sambasiva Rao—for Appellant.

A. Lakshmayya—for Respondents.

Beasley, C. J.—This is a Letters Patent appeal from an order of Burn, J., ordering the appellant to give security for the costs of this appeal. The appellant here has been given leave to appeal in forma pauperis. Burn, J., ordered the appellant to furnish security for Rs. 1,000 and it is contended on behalf of the appellant that the order of Burn, J., being based merely upon the poverty of the appellant and nothing more, is wrong. It is quite true that our learned brother Burn, J., has given no other reason for ordering the appellant to furnish secu-

rity, but it is quite open to us to see whether good reasons exist for such an order being made. It is contended here that security for costs can only be ordered to be given by a pauper appellant in special circumstances: *Seshayangar v. Jainulavadin* (1), *Srinivasa Sastrial v. Subramania Aiyar* (2) and *Subbiah Thevar v. Balasubramania* (3).

I agree that ordinarily where an appellant has been allowed to appeal as a pauper there should be reasons other than poverty justifying an order being made upon him to furnish security and the fact that leave has been granted to him to appeal in forma pauperis should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. Unfortunately, following what is stated to be the practice of this High Court, leave to appeal in forma pauperis has been granted frequently on the ground that the appeal raised a substantial question of law or that prima facie the appellant had a good case or an arguable point; and there is one reported decision of this High Court, *In re Chennama* (4), by Venkatasubba Rao and Madhavan Nair, JJ., where it was held that O. 44, R. 1, Civil P. C., does not contemplate that, before granting leave to appeal in forma pauperis, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust, that it is enough if the applicant shows, that he has prima facie a good case and that if he does so, leave to appeal should be granted. With great respect to the learned Judges who have decided that case, I am unable to see that O. 44, R. 1, Civil P. C., contemplates anything else, but what it so definitely states. The proviso is perfectly clear, namely

"that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust."

The order is mandatory and only contemplates a perusal of the application, the judgment and the decree and noth-

ing else; and unless in the opinion of the Court the decree is contrary to law or otherwise erroneous or unjust the Court is bound to dismiss the application. O. 44, R. 1, Civil P. C., does not say that the Court shall reject the application unless the appeal raises a substantial question of law or unless the appellant has prima facie a good case. I am unable to agree with the decision in *In re Chennama* (4) and in my opinion this Bench should not follow it. It is certainly in conflict with the view of Jenkins, C. J., in *Sakubai v. Ganpat* (5) and also *Rajendra Prasad Bose v. Gopal Prasad Bose* (6) and *Maung Tha Din v. Daw Paw* (7). Upon perusing the judgment in this case it is very difficult to understand how leave to appeal in forma pauperis was ever granted at all. The learned Judge who granted the application has not given his reason for doing so; and I may here state that I think that, when such leave is given, the reasons of the Court for granting such leave should be briefly stated. I am quite unable, after a careful perusal of the judgment under appeal, to say that on the face of it, it is contrary to law or otherwise erroneous or unjust. It certainly raises no substantial question of law and therefore does not even satisfy the test applied in *In re Chennama* (4); nor, in my opinion, does the appellant show even a prima facie good case, and, as I have already stated, no reasons have been given by the Court for allowing the application. What appears to me to have been overlooked in *In re Chennama* (4) is the difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper.

In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the appellate stage is reached, a more severe test has to be applied. The defendant has been successful in the lower Court and he has been put to great cost in successfully defending the suit and in most cases he has not been able to recover one anna from the plaintiff towards his costs. Therefore it is that when the pauper

1. (1880) 3 Mad 66.

2. (1907) 17 M L J 583.

3. (1931) M W N 1157.

4. A I R 1931 Mad 198=122 I C 337=53 Mad 245.

5. (1904) 28 Bom 451=6 Bom L R 442.

6. A I R 1925 Pat 442=94 I C 814=4 Pat 67.

7. A I R 1925 Rang 249=88 I C 988.

litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous. This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree. On the question as to security for costs being ordered where leave to appeal has been granted, I think that it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs. In my opinion, the chance of the appellant's success is such a circumstance. In the present case, taking the view that I do that the appellant has not *prima facie* a good case, I am satisfied that this is a case for ordering the appellant to furnish security for costs even though he be a pauper. The fact that a person is a pauper is not alone a reason for not ordering him to give security for costs and this is the view taken by Scrutton, L. J., in *In re Carroll* (8). He there states :

"On the question of ordering security for costs I desire to say this: the mere fact that a person is in poor circumstances does not justify security being ordered where that person is making his first effort to obtain a decision. A perfectly impecunious person may commence proceedings by the issue of a writ which may involve the defendant in a large sum for costs because the plaintiff, who, I will assume, is unsuccessful, has no funds. As I have sometimes expressed it, the Courts allow an impecunious person to get one bite of the cherry, but will not allow him a second bite unless he, as appellant, is able to provide security for the costs of the appeal."

Although Burn, J., has given no reason other than the poverty of the appellant for making his order, for the reasons I have already stated, his order must be upheld and this Letters Patent appeal dismissed with cost. One month for finding security ordered.

Bardswell, J.—I agree. As to O. 44, R. 1, I cannot see why it should be taken to mean something less than what appears from its plain language.

P.R.S./V.V. Order accordingly.

8. (1931) K B D 104=47 T L R 20.

A. I. R. 1933 Madras 521

SUNDARAM CHETTY, J.

Venkatadri Apparao Bahadur—Petitioner—Appellant.

v.

Adivicolany Chakrapani Rao and others—Counter-Petitioners—Respondents.

Second Appeal No. 238 of 1928, Decided on 13th September 1932, against decree of Dist. Judge, Kistna, in A. S. No. 317 of 1924.

Madras Estates Land Act (1908), Ss. 45, 163, 211 and Sch. B, Art. 7—Unauthorized occupation begun more than year—S. 45 cannot be invoked—No fresh start every year—Remedy of landlord is under S. 163—Limitation Act (1908), Ss. 23 and 29.

The date of occupation mentioned in Art. 7, Sch. B to the Act is the date on which the unauthorized occupation began. If the unauthorized occupation began more than a year before the date of the application under S. 45, the bar of limitation under Art. 7 cannot be got over. In order to interpret Art. 7, Part B, in the schedule to the Act, S. 23, Lim. Act, cannot be invoked in aid; No doubt S. 211 overrides the general provisions of the Limitation Act in S. 29 and it may be possible in a suitable case to apply the principle of S. 23, Lim. Act, but in an application under S. 45, when the date of occupation mentioned in Art. 7 has to be understood only as the date on which the occupation was begun, S. 23, Lim. Act, can be of no avail. If the application under S. 45 is not promptly made within one year from the date of the first occupation, this particular remedy cannot be had by the landholder and he has only to sue the occupant under S. 163 for possession of the land treating him as a trespasser. [P 522 C 2; P 523 C 1]

G. Lakshmanna, B. T. M. Raghavachari, D. Venkataratnam and Y. Govindarajulu—for Appellants.

V. Suryanarayana—for Respondents.

Judgment.—In this second appeal, the main point for consideration is whether the application under S. 45, Madras Estates Land Act, put in by the appellant is not barred by limitation under Art. 7, Part B, Sch. B to that Act. That article provides for an application for determining the sum payable by a person occupying land otherwise than by inheritance or legal transfer, one year's time from the date of the occupation. S. 45 itself states that

"a person who without the consent of the landholder occupies for agricultural purposes raiyati land which he has not acquired by inheritance or legal transfer shall be liable to pay for each revenue year or portion thereof"

a sum fixed as damages for such unauthorized occupation. The first Court held that this application was barred by limitation, inasmuch as it was not filed

within one year from the date of the occupation of the land by the respondents. It is perfectly clear that if the date on which the occupation itself commenced should be taken to be the starting point of limitation, this application is out of time. The possession of the respondents appears to have commenced several years before the date of this application and continued down to the date on which this application was filed. In order to get over the Bar of limitation, it is argued by the learned counsel for the appellant that Art. 7 referred to above should be construed in the light of the wording of S. 45, Madras Estates Land Act. The section deals with a liability to pay for each revenue year or a portion thereof. If the starting point of limitation should be taken to be the date on which the unauthorized occupation commenced, there can be only one application under S. 45 for the recovery of the sum as damages for the year of occupation or a portion thereof. A similar application under S. 45 for the next revenue year would be barred by limitation, if the starting point be taken as the date of the first occupation. It is therefore argued that such a result would not have been contemplated in S. 45.

As observed by the learned District Judge the object of the legislature in enacting S. 45 is only to enable the landholder to resort to a speedy and summary remedy. If he wants to avail himself of that remedy, he must apply to the Revenue Court within one year and get this amount of damages fixed. Suppose the unauthorized occupation continues for two years and more without any break, is it open to the landholder to put in an application under S. 45 in each of those years and get an award of compensation in respect of that year? If the interpretation contended for by the appellant is accepted, the result would be that in each revenue year during the whole period of occupation the occupant must be deemed to have occupied the land for the first time. The remedy under S. 45 would be resorted to in the case of unauthorized occupation by squatting on the land for purposes of agriculture in a particular fasli and quitting the land after reaping the crops, and squatting on it again in another revenue year in order to enjoy

the crops raised. If it is shown that the occupation of the land began in any particular year, the application under S. 45 can be made within one year of such occupation.

The only limitation for the number of such applications is what is provided for in the explanation to S. 6, Cl. (2) of the Act. According to that explanation, if the landholder has received or recovered any payment under S. 45, he shall be deemed to have admitted the occupant to possession, unless within two years from the date of the receipt or recovery of the payment or first of such payments, if more than one, he files a suit before the Collector for ejecting such person. By reason of this explanation, it is clear that resort to S. 45 can only be had twice and not more than that. That being so the remedy under S. 45 is a special and temporary one. It does not contemplate the recovery of compensation by the landholder in respect of every year of occupation, though such occupation continues for a number of years falling short of 12 years' enjoyment which would debar the landholder even from filing a suit in ejectment. The date of occupation mentioned in Art. 7, Sch. B to the Act seems to my mind to be the date on which the unauthorized occupation began. If in a particular case the unauthorized occupation began more than a year before the date of the application, the bar of limitation under Art. 7 cannot be got over unless a fiction is introduced to the effect that the landholder can choose any date during the period of occupation within one year prior to his application as the starting point for limitation. Such a construction would be doing violence to the language of Art. 7 and if such an interpretation be accepted, there would be nothing wrong in treating the date of the admission to the land mentioned in Art. 4 in respect of an application under S. 25 of the Act as any date during the period of occupation on admission to the land. It is rightly conceded by the learned advocate for the appellant, that with respect to Art. 4 the date of admission to the land means the date on which the tenant was admitted to possession.

There can be no hardship if effect is given to the plain meaning of the expression "the date of occupation" according to the scheme of the Act. If an

application under S. 45 is not promptly made within one year from the date of the first occupation, this particular remedy cannot be had by the landholder and he has only to sue the occupant under S. 163 for possession of the land treating him as a trespasser.

In order to interpret Art. 7, Part B in the schedule to the Act, S. 23, Lim. Act, cannot be invoked in aid. If regard be had to S. 29, Lim. Act, it would appear that where any special or local law prescribes for any application a special period of limitation, some of the provisions of the Limitation Act would not apply and S. 23 of the Act is one of such provisions. But it is argued with reference to S. 211, Estates Land Act, that S. 23, Lim. Act, is not one of the sections expressly excluded. Under S. 211 some specific sections of the Limitation Act are declared to be not applicable to the suits and applications mentioned in S. 210. The other provisions of the Limitation Act would apply subject to the provisions of Ch. 16, Estates Land Act. S. 211, Estates Land Act, is not quite consistent with S. 29, Lim. Act, for we find S. 9, Lim. Act, not applicable to suits and applications under the Estates Land Act, whereas under S. 29, Lim. Act, it is one of the sections made applicable even to special Acts. But we must take S. 211 to override the general provisions of the Limitation Act in S. 29. It may be possible in a suitable case to apply the principle of S. 23, Lim. Act, but in this case when the date of occupation mentioned in Art. 7 has to be understood only as the date on which the occupation was begun, I should hold that S. 23, Lim. Act, could be of no avail. When the legislature has expressly chosen to fix a particular point of time as the starting point, there is no use in stretching the operation of that article beyond its scope. I therefore agree with the view taken by the lower appellate Court that this application under S. 45 is barred by limitation. The result therefore is that this second appeal is dismissed with costs.

P.R.S./R.K.

Appeal dismissed.

A. I. R. 1933 Madras 523

WALSH, J.

N. M. Kadir Meera Saheb Taraganar
—Appellant.

v.

N. M. Pir Md. Taraganar and others
—Respondents.

Appeals Nos. 244, 245, 246 and 247 of 1931, Decided on 20th January 1933, from appellate order of Dist. Judge, Tinnevely, D/- 13th July 1931.

Civil P. C. (1908), O. 21, Rr. 2 and 16 and S. 47—Decree-holder asking Court to record satisfaction—Court cannot in execution consider whether satisfaction was intended to defraud alleged assignee of decree—Separate suit is only remedy.

As regards the satisfaction of the decree which the decree-holder asks the Court to record, it is not open to the Court to go into the question whether the satisfaction was intended to defraud or defeat the rights of some third party who is not before it as a party to the suit to whom the decree-holder is alleged to have assigned his interest under the decree. That matter must be agitated not in execution, but in a separate suit.

[P 524 C 2]

C. S. Venkatachariar—for Appellants.

N. M. Pir Md. Taraganar and K. V. Sesha Iyengar—for Respondents.

Judgment.—One Pir Mahomed Tharaganar executed a power-of-attorney in favour of one N. K. Mahomed Moideen Tharaganar to conduct certain suits for him and realize the money. As the latter had advanced him money, and moneys realized by the agent were made a sort of charge for payment of the debt, and the power-of-attorney was not to be cancelled until the dues had been settled, the agent brought suits on the two mortgage deeds on behalf of the principal and obtained decrees. Pending proceedings for sale of the mortgaged properties, the decree-holder put in applications stating that the decree amounts had been paid in full and satisfaction might be entered. His applications to enter up satisfaction were put in on 18th March 1930. On 27th March 1930 the agent assigned the decrees to one Kadir Meera Sahib, the appellant in these proceedings. The appellant put in an application under O. 21, R. 16 to permit him, after recognizing his assignments, to oppose the applications to enter up satisfaction as they were collusive documents. These two petitions filed under O. 21, R. 16 were dismissed both by the original and appellate Courts and the petitions to record satisfaction of the decrees was

allowed by both Courts. Against these orders the present appeals are filed.

The learned District Judge held that neither the question whether the appellant was the assignee decree-holder nor the question whether the entering up of satisfaction of the decrees was collusive or not could be gone into by the executing Court, because it was not a matter between the parties to the suit. On the first point there seems to be a conflict of authorities. I do not think, in the view which I take on the second point, that there is any necessity to discuss it, because I am perfectly clear that the application to execute the decrees cannot be granted because satisfaction of the decrees has been recorded. The argument raised for the appellant is that the judgment-debtor knew of the assignments of the decrees by the decree-holder under power-of-attorney to the agent and that he was therefore not entitled to make any payment to the decree-holder. I may note in passing that there is no clear statement in the power-of-attorney that the agent has power to transfer decrees. However as the learned District Judge has stated in his judgment that it was not controverted that full power was given to the agent to assign decrees, I will discuss the matter on the assumption that the agent had this power. O. 21, R. 1 states only three ways in which the judgment-debtor may make payment. It is expressly stated that it shall be in one of these three ways: (a) into the Court whose duty it is to execute the decree, or (b) out of Court to the decree-holder, or (c) otherwise as the Court which makes the decree directs.

There is absolutely no provision here for the judgment-debtor paying a third party merely because he happens to know of the assignment of the decree in the latter's favour by the decree-holder; and it is perfectly clear that if he were to make such payment he would run the risk of having to pay money over again to the decree-holder. He cannot be asked to involve himself in disputes between the decree-holder and somebody to whom the former has assigned the decree. O. 21, R. 16 definitely provides that the judgment-debtor shall have notice before the assignee decree-holder is permitted by the Court to execute the decree, and he is entitled to raise objec-

tions. On the view urged by the appellant he will be shut out of his right completely.

The decree-holder has only got to send a notice that he has assigned the decree, and even if apparently he has already satisfied the decree, the judgment-debtor is bound to pay the assignee and not the decree-holder. He cannot object to the assignment because he has no locus standi until the decree-holder applies under O. 21, R. 16 for permission to execute the decree. This means that the judgment-debtor either has to make payment to a person not authorized by the Court or to refrain from discharging the decree at all until the assignee decree-holder asks for permission to execute the decree. It is needless to say that there is absolutely no authority for this proposition. As regards the satisfaction of the decree which the decree-holder asks the Court to record, it is not open to the Court to go into the question whether this satisfaction was intended to defraud or defeat the rights of some third party who is not before it as a party to the suit, to whom the decree-holder is alleged to have assigned his interest under the decree. That matter must obviously be agitated in a separate suit. In the result the orders of the lower Court are confirmed and all the appeals should be dismissed with costs in Appeal No. 246 of 1931 and no costs in other appeals.

P.R.S./R.K.

Appeals dismissed.

* A. I. R. 1933 Madras 524

MADHAVAN NAIR AND JACKSON, JJ.

District Board of Ramnad—Plaintiffs—Appellants.

v.

D K. Mahomed Ibrahim Sahib and another—Defendants—Respondents.

Appeal No. 24 of 1927, Decided on 4th January 1933, against decree of Sub-Judge, Ramnad, in O. S. No. 50 of 1925.

* (a) **Limitation Act (1908), Art. 62 — Scope.**

Article 62 cannot be appropriately applied to a case where the plaintiff is not entitled to the money when it was received by the defendant: *AIR 1930 Rang 197, Foll.* [P 525 C 1]

* (b) **Contract Act (1872), S. 37 — Voluntary subscription is payable only when work is commenced on its basis — Right of suit—Contract.**

A promise to pay a subscription becomes enforceable as soon as any definite steps have been

taken in furtherance of the object and on the faith of the promised subscription: 14 Cal 64 and AIR 1918 Mad 311, *Foll.* [P 525 C 1]

P. Venkataramana Rao — for Appellant.

M. Subbaroya Aiyar — for Respondents.

Madhavan Nair, J.—The plaintiff, the District Board of Ramnad through its President, is the appellant. The question in this appeal is whether the appellant's claim to recover from the defendant Rs. 1,031 subscription collected by him for the purpose of constructing a bridge over the Paralyar river is barred by limitation. A sum of Rs. 5,000 was promised by the defendant as personal contribution for the purpose of constructing the bridge and a sum of Rs. 1,031 was collected by him for the same purpose. The river was bridged at a cost of Rs. 29,000 odd and was completed on 12th July 1924. In the suit out of which this appeal arises the President of the District Board claims both the sums from the defendant. The lower Court gave a decree for Rs. 5,000 but held that the claim for Rs. 1,031 was barred by limitation applying Art. 62, Lim. Act.

Article 62 prescribed three years for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and the period begins to run from the date when the money is received. It is clear to us that Art. 62 will not apply to cases of this kind, for it has been held that that article contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received: see *Ma. Kyin Ain v. A. R. M. A. L. A. Chettiar Firm* (1). Art. 62 cannot be appropriately applied to a case where the plaintiff is not entitled to the money when it was received by the defendant. In this case it is clear that the amount does not become payable to the plaintiff as soon as it is collected. The plaintiff can claim the amount only after the work has been begun and some steps have been taken towards the construction of the bridge. It follows from the decision of the Calcutta High Court in *Kedarnath Bhattacharji v. Gurie Mahomed* (2) that a promise to pay a subscription becomes enforceable as soon as any

definite steps have been taken in furtherance of the object and on the faith of the promised subscription. This decision has been followed by this Court in *Perumal Mudaliar v. Sendanatha Mudaliar* (3). The evidence in this case shows that the construction work of the bridge could not have been begun earlier than 1923. The suit was instituted on 5th September 1925. If Art. 62 does not apply, then the only article applicable is Art. 120. The suit is therefore clearly within time and it cannot be held to be barred by limitation.

The decree of the lower Court in so far as it relates to Rs. 1,031 is set aside and the plaintiff will be given a decree for this amount also with the costs here and in Court below.

P.R.S./V.V. *Decree modified.*
3: AIR 1918 Mad 311=44 I C 479.

A. I. R. 1933 Madras 525

JACKSON, J.

Arulananda Nadar and others — Defendants—Appellants.

v.

Janaki Bai Ammal—Plaintiff — Respondent.

Second Appeal No. 723 of 1928, Decided on 12th November 1931, against decree of Sub-Judge, Tuticorin, in A. S. No. 35 of 1927.

(a) Madras Estates Land Act (1908), S. 151 — Suit by zamindar against occupancy raiyat for declaration that he is entitled to stones and rocks on the holding does not fall under S. 151.

A suit by a zamindar for a declaration that only he is entitled, as landowner, to the stones and rocks on the holding of the occupancy raiyats, that they cannot remove them without his leave and also for permanent injunction and damages is not a suit under S. 151, Estates Land Act, or any other section. [P 526 C 2^r]

(b) Madras Estates Land Act (1908), Ss. 7 and 11 — Zamindar cannot interfere with raiyat clearing stones and boulders from land — He is only entitled to customary fee or to compensation for damages if any.

Land not being defined in the Act, must be taken in its ordinary sense of the solid part of the earth's surface as opposed to water; rock is in this sense just as much land as sand or earth are. The zamindar cannot therefore interfere with a raiyat if he clears the stones and boulders away from his land. All that the zamindar can legitimately demand is his customary fee, if any, for the removal of the stones and compensation

1. AIR 1930 Rang 197=127 I C 477.
2. (1886) 14 Cal 64.

for such damage as may accrue, in case the stones are removed without his permission. The question, only assumes a new aspect if the raiyat proceeds to quarry a stone of recognized commercial value. In that case the zamindar can reserve his mining rights under S. 7. [P 526 C 1, 2]

(c) Madras Estates Land Act (1908), S. 153—Inference from.

Nothing can be inferred from S. 153 in favour of occupancy raiyat. [P 526 C 2]

V. K. John and C. M. Kurivilla — for Appellants.

S. Varadachariar and K. R. Rama Ayyar—for Respondents.

Judgment.—The plaintiff, a zamindari, sues the defendants, who are occupancy raiyats, for a declaration that only she is entitled, as landowner, to the stones and rocks on the defendants' holding, that they cannot remove them without her leave, also for a permanent injunction and damages for Rs. 150. The lower Courts have decreed that plaintiff is entitled to rocks, stones and minerals on the plaint land, that the defendants cannot remove the same without the plaintiff's consent, and have also decreed Rs. 24 by way of damages and costs. The defendant's appeal. There is no force in the plea that the lower Courts had no jurisdiction by virtue of the Estates Land Act. It is not a suit under S. 151 of that Act, or any other section. A Commissioner has reported in Ex. C-1, that the plaint land is a sandy tract covered with palmyras. A certain amount of rock had been roughly sized into slabs $3 \times 1\frac{1}{2} \times \frac{1}{2}$ feet, and there were 25 cart loads of rough building stones. The Commissioner is not a witness, and it is not easy to say in what degree this amounts to clearing the land of stone or to regular quarrying.

The manager, P. W. 1, says, without explaining why, that the removal of rock is detrimental to agriculture; ordinarily one would expect the removal to be beneficial. Under S. 11, Estates Land Act, a raiyat may use the land in his holding in any manner which does not impair its value. Land is not defined, and must be taken in its ordinary sense of the solid part of the earth's surface, as opposed to water. Rock in this sense is just as much land as sand or earth are. No one would think of interfering with a raiyat if he cleared the stones and boulders away from his land, and the question only as-

sumes a new aspect if he proceeds to quarry a stone of recognized commercial value, such as coal. Under the Act the landlord can reserve his mining rights on admitting any person to the possession of raiyati land (S. 7), and a landlord claiming mining rights would presumably be careful to reserve them in the patta of old tenants; but it is a stretch of language to describe the out crop of granite in these sandy tracts far remote from towns as a valuable mineral deposit. This seems to have been recognized by the estate. The manager, P. W. 1, says that there is a mamul for tenants to get permission if they want to take stones from the land, and the permission is ordinarily granted on payment of a complimentary present or "nazar" to the zamin, for which no formal receipt was given. Judging from Ex. A-2 and A, the fee ranges from Re. 1 to Rs. 2. Evidently the fee bears no proportion to the amount of stones extracted. It is not a royalty.

Therefore all that the plaintiff can legitimately demand is her customary fee, and compensation for such damage as has accrued by these stones being taken with her permission. It is not apparent that any damage has been caused. The Commissioner reports that the trees are not faded, as was alleged in the plaint. So long as the pits are not filled up the holdings' agricultural value will be unaffected, for a palmyra can neither grow on a rock nor in a pit; but in this sandy tract the holes will be filled up in the course of time, even if the raiyat does not accelerate the process for his own benefit. The lower Courts have gone entirely wrong on this question of damage by reading the Commissioner's "not faded" as "faded" (District Munsif's judgment para. 12, confirmed by Subordinate Judge in para. 6). In this view of the facts it is unnecessary to discuss what would be the law in the matter if the raiyat was claiming valuable minerals instead of clearing practically valueless stones (for it must be remembered that the value of these stones is almost entirely the labour put into them—they are worth about as much in their natural state as potter's common clay.) Probably these stones belong to the raiyat no more than the rest of the land belongs to the raiyat (nothing can be inferred from S. 153 in favour of occupancy

raiyats); but it would be absurd to insist that he must never diminish the quality of earth on his holding in the course of his operations, and it is almost as absurd to bother about the stones.

The plaintiff's predecessors seem to have shown a very wise and just appreciation of the matter by confining their right to that of granting permission on the receipt of a nazar, and there is no reason why they should obtain more in this suit. It does not appear from the evidence that the zamindar's license expired at the end of the fasli, or any other period. Apparently a raiyat would announce that he was going to take stones and then obtain permission on payment of the nazar. Therefore I should confirm the finding of the lower appellate Court at the end of para. 5, and confirm the decree except that for Rs. 24 damages, I should say Rs. 2 for nazar. The appellants and respondents can have proportionate costs in this appeal.

P.R.S./R.M. Order accordingly.

* A. I. R. 1933 Madras 527

WALSH, J.

Official Receiver, West Godavari,
Ellore—Petitioner—Appellant.

v.

Sagiraju Subbayya and another—
Counter-Petitioners—Respondents.

Appeal No. 126 of 1929, Decided on 3rd January 1933, from Appellate Order of Sub-Judge, Ellore, D/- 24th September 1928.

* Provincial Insolvency Act (1920), S. 4—
Ss. 53 and 54 are only rules of evidence—
Even voidable transfers can be set aside—
Transfer of Property Act (1882), S. 53.

The insolvency Court has power to go into the question whether a transfer is voidable under S. 53, T. P. Act. Ss. 53 and 54, Insolvency Act, are only rules of evidence; even if the transaction is only regarded as voidable the insolvency Court has jurisdiction to entertain the application: *AIR 1926 All 415, not Foll.*; *AIR 1929 All 105*; *AIR 1923 Mad 641*; *AIR 1921 Mad 204* and *AIR 1927 Cal 474, Foll.*; *AIR 1926 Mad 363, Appr.* [P 528 C 1]

V. Suryanarayana—for Appellant.

Ch. Raghava Rao and S. Raja Raman—for Respondents.

Judgment.—This is an appeal from an appellate order dismissing an application by the Official Receiver in I. P. No. 145 of 1925 to have two gift deeds

executed by the insolvent in favour of two counter-petitioners, declared fraudulent. The adjudication was on 6th January 1926, on a petition dated 1st December 1925. The two gift deeds are dated respectively 8th September 1922 and 22nd March 1922. The donees are the two wives of the insolvent. Admittedly the deeds are dated more than two years before the date of adjudication. Consequently S. 53, Provincial Insolvency Act, does not apply, and the question is whether the petition under S. 53, T. P. Act is cognizable under S. 4, Provincial Insolvency Act. The learned District Munsif held that the petition was barred by S. 53, Provincial Insolvency Act. There is no discussion of the matter in his judgment, but the principal Subordinate Judge has written a fairly long judgment agreeing with the view taken by the Court of first instance. The main ground on which he decides the matter is, that while the petition might have been cognizable if the original transfer of the property was a nullity, the Insolvency Act does not apply when it is only voidable. I am unable in the light of the decisions of this Court to agree with his view.

The first case to be considered is *Sriramulu v. Ponakavira Reddi* (1). This was under Act 3 of 1907 which did not contain the present S. 4. The alienations there were more than two years old and the question was whether they were within the cognizance of the insolvency Court. It was there held that the allegations in the petition were sufficient to make the application one to set aside documents as void even though the word "voidable" was used. Applying this view as to void and voidable in the present case the allegations in the petition of the Official Receiver amount, I consider, to a statement that the deeds are void. He says in para 6:

"In spite of the said gift deeds the insolvent continues to be in possession of the properties in the schedule."

He says in paras 7 and 8 as follows:

"The counter-petitioners being the wives of the insolvent, and the gift deeds having been executed with the object of keeping back the properties from being available for creditors and thus defeating the claims of the creditors, the gifts are fraudulent and collusive and are therefore voidable as against the Official Receiver.

The said alienations, though made more than two years before the date of the presentation of

1. *AIR 1923 Mad 641=72 IC 805.*

the insolvency petition, are not valid under S. 53, T. P. Act, and can therefore be annulled by this Court, under S. 4. Provincial Insolvency Act."

In spite of the use of the word "voidable" he has really said everything that can be said which would show that the deeds were sham and void. If that view is correct, all the authorities are agreed that the Court could take cognizance of the matter. The question has been however argued on the ground that on the view taken by the learned Subordinate Judge that the Official Receiver only treats the deeds as voidable yet the insolvency Court has jurisdiction. In the case quoted above, *Sriramulu v. Ponakavira Reddi* (1), Venkatasubba Rao, J., said that on a review of the decisions it appeared that the preponderance of authority was in favour of holding that under Act 3 of 1907 the Court in the exercise of its insolvency jurisdiction cannot decide questions relating to adverse claims by or against third parties. In that particular case, the learned Judges held the matter was cognizable because the third party was a creditor and that the Court was entitled to go into the question as to whether his debt was a genuine one under S. 24 of the Act. There are however, in that case certain remarks about Ss. 53 and 54 which are of great importance in settling the matter now in issue seeing that we have now S. 4 of the Act which did not then exist. The learned Judges there state that Ss. 53 and 54 only lay down rules of evidence and are not exhaustive. The learned Subordinate Judge relies on a decision in *Pirthiraj Singh v. Rukaman Kunwar* (2), but there has been a more important Full Bench decision of the same Court subsequently, *Anwar Khan v. Muhammad Khan* (3), where by a majority of two to one the Full Bench held that the insolvency Court has power to go into the question whether a transfer is voidable under S. 53, T. P. Act. They approve of the opinion expressed in *Sriramulu v. Ponakavira Reddi* (1), that Ss. 53 and 54, Insolvency Act are only rules of evidence. With regard to the dissenting judgment in that case, which practically contains the arguments addressed to me on behalf of the respondents, I

2. AIR 1926 All 415=95 IC 343.

3. AIR 1929 All 105=113 IC 819=51 All 550 (FB).

may note that Sen, J., refused to follow the dictum of this Court approved of by the other Judges with regard to Ss. 53 and 54. Since the reasoning of the majority of the Full Bench in *Anwar Khan v. Muhammad Khan* (3) follows the view taken by this Court as regards the scope of Ss. 53 and 54, while the dissenting judgment refuses to follow it, there is no reason for my preferring the dissenting judgment.

The view that Ss. 36 and 37 now Ss. 53 and 54, merely deal with evidence had already been taken by this Court in *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (4). Then we have another Madras case, *Chittammal v. Ponnuswami Naicker* (5), in which it was held that acting under S. 56, Provincial Insolvency Act, the Court cannot direct any person to deliver up any property in his possession to the Official Receiver, unless the insolvent is entitled, on the date of the application under the section, to the immediate possession of the property, if a title, however flimsy, is set up by the person in possession, the Court cannot act under S. 56. But it is open to the Court, on a proper application being made under S. 4 of the Act to try the issue whether the insolvent is entitled to the property or not. That case is an authority for the appellant's contention. See also in *Fool Kumari Dasi v. Khirud Chandra* (6), where it was held that the Insolvency Court has jurisdiction to decide questions of title, as between an Official Assignee and a stranger with reference to property which is claimed by the Official Assignee as the insolvent's and which, on the other hand, is claimed by the stranger as his. Their Lordships say that the words of the statute seem to be perfectly plain, and where that is the case, it is not permissible to speculate. I would therefore hold that even if the transaction is only regarded as voidable, the Insolvency Court has jurisdiction to entertain the application. The appeal must therefore be allowed with costs and the petition restored for disposal according to law.

P.R.S./V.V.

Appeal allowed.

4. AIR 1921 Mad 204=62 IC 495=14 Mad 524.

5. AIR 1926 Mad 363=92 IC 573=19 Mad 762.

6. AIR 1927 Cal 474=102 IC 115.

A. I. R. 1933 Madras 529

REILLY AND CORNISH, JJ.

V. Thirumala Chariar — Plaintiff — Appellant.

v.

Athimoola Karyalayar and others — Defendants—Respondents.

Appeal No. 29 of 1927, Decided on 23rd November 1932, against decree of Sub-Judge, Tinnevely, in O. S. No. 120 of 1921.

Civil P. C. (1908), O. 41, R. 33 — Ex parte decree against some defendants restored by High Court—Against rest ex parte decree set aside—Suit tried by another Sub-Judge and dismissed as based on false document — Plaintiff alone appealing—Appeal dismissed — High Court can set aside the ex parte decree against the defendants who had not appealed.

A suit based on a document was decreed ex parte against several defendants. Some of them applied to have the ex parte decree set aside and it was set aside against all the defendants. The plaintiff went up to High Court in revision which restored the ex parte decree against the non-applying defendants. The case then came before a successor of the Judge who had passed the ex parte decree and it was dismissed on the finding that the document sued upon was false. The plaintiff alone appealed to the High Court which agreed with the trial Court's finding. The question arose if the High Court could dismiss the suit also against the defendants against whom the ex parte decree stood and who had not appealed or were no parties to plaintiff's appeal :

Held : that the previous restoration by the High Court of the ex parte decree could not now come in its way of setting it aside under O. 41, R. 33. When the appeal came before the Court the whole suit was under the appellate Court's control and as the basis of the suit was found to be false, the non-appealing defendants could be relieved from the ex parte decree and neither the provisions of S. 107 nor the fact that the ex parte decree was passed by a Judge different from one whose decree was under appeal, was a bar to the exercise of the very wide discretionary powers under O. 41, R. 33 : *A I R 1930 Mad 801 (F B)* and *A I R 1915 Mad 227, Rel on.* ; *Case law discussed.* [P 533 C 1, 2]

K. S. Krishnaswamy Ayyangar for *S. Rajagopalachariar*—for Appellant.*S. Varadachariar* for *S. Ramaswamy Ayyar*—for Respondents.

Reilly, J.—The plaintiff in this case has sued to enforce an agreement embodied in Ex. A, dated 7th October 1916, to convey to him 1 acre and 68 cents of wet land, which document he alleges was executed by Nambi Kone, the deceased husband of defendant 1 and father of defendant 7. The Subordinate Judge has found that Ex. A is not genuine and has dismissed the suit. Against that dismissal the plaintiff appeals.

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It appears that Nambi Kone in 1907 instituted a suit for partition against his nephews, Defendant 2 and the father of defendants 4 to 6, in the Tinnevely Subordinate Judge's Court. That suit came on appeal to this Court and altogether had a long history. In the end Nambi Kone got a decree for a half-share of the property in question, and his share was delivered to him in execution in May 1916. It is admitted that Nambi Kone employed the plaintiff to assist him in that suit by attending Court for him both in Tinnevely and Madras and that the employment went on throughout the history of the suit, Nambi Kone paying the plaintiff travelling allowance and batta when he was away from his village for the purpose of the suit. The plaintiff's case is that in 1907, before Nambi Kone first employed him in that way, Nambi Kone promised him "proper remuneration" for his services at the end of the litigation. In October 1916 according to the plaintiff, Nambi Kone told him that he had decided to transfer to him 1 kotta of wet land, that is 1 acre and 68 cents, but, as he had to sell some of the land which he had obtained in partition in order to clear off his own debts, he would make the transfer after three years; the plaintiffs agreed to that, and then Nambi Kone, two or three days later, executed Ex. A to the effect that he would transfer 1 kotta of wet land out of the wet land which he had got in a certain village to the plaintiff within three years and in default would pay the plaintiff Rs. 5,500 with interest at 6 per cent from the date of default. Ex. A was not presented for registration by Nambi Kone. On 8th January 1917 it was presented for registration by the plaintiff, who says that he did that on hearing rumours that Nambi Kone was not going to carry out the agreement.

When the plaintiff presented Ex. A for compulsory registration, the Sub-Registrar sent a notice to Nambi Kone, who appeared at the Sub-Registrar's Office on 15th January 1917 and denied that he ever executed that document. On that the Sub-Registrar refused registration and the matter was taken to the District Registrar, who held an inquiry and in October 1917 ordered the document to be registered as a genuine document. Meanwhile unfortunately Nambi

Kone died in June 1917. I have mentioned that the learned Subordinate Judge has found that Ex. A is not a genuine document. * * * In my opinion this case is not entirely free from doubt. But, taking all the evidence and the circumstances into consideration, I do not think we should be justified in differing from the finding of the learned Subordinate Judge that Ex. A has not been proved to be a genuine document executed by Nambi Kone. In my opinion therefore this appeal should be dismissed with costs, as on that finding it is unnecessary to go into other questions which have been raised in the case.

Cornish, J.—I entirely agree. [The case having been set down for being spoken to this day, the following judgment was delivered by]

Reilly, J. — Yesterday in this appeal we upheld the finding of the learned Subordinate Judge that Nambi Kone did not execute Ex. A, and we confirmed the dismissal of the suit as against defendants 2 to 6. But the plaintiff has got a decree also against defendants 1 and 7, and that decree he is trying to execute. The question before us now is whether we should exercise such powers as are given to us by R. 33, O. 41, Civil P. C., to dismiss the suit against defendants 1 and 7 also. In the first instance, when this suit came before Mr. Natesa Iyer as Subordinate Judge of Tinnevely, he made an ex parte decree against all the defendants. Defendants 2 to 6 afterwards applied to him to set aside that ex parte decree and restore the suit so far as it was against them; and the Subordinate Judge who dealt with that application set aside the whole decree against all the defendants, although for some reason defendants 1 and 7, who are women, had not put in any application that the decree, so far as it was against them, should be set aside. Against that order the plaintiff preferred Civil Revision Petition No. 539 of 1924 to this Court. Odgers, J., who heard that petition, dismissed it in respect of defendants 2 to 6; but in respect of defendants 1 and 7 he was of opinion that the Subordinate Judge should not have set aside the ex parte decree, and therefore he restored the decree against those defendants. So far as the suit was against defendants 2 to 6, it was re-tried by an-

other Subordinate Judge Mr. Qureishi. He found that Ex. A, on which the suit as against all the defendants was primarily based, had not been executed by Nambi Kone and was not a genuine document. Consequently, he dismissed the suit as against defendants 2 to 6, and his dismissal has been upheld by us in appeal.

Mr. Krishnaswami Ayyangar for the plaintiff does not suggest that there would not be something on the face of it inconsistent and anomalous if a decree remained in force against defendants 1 and 7 based upon Ex. A, which has been found to be a false document. But he contends that in the circumstances we have no jurisdiction under R. 33, O. 41, Civil P. C., to interfere with the decree which has been made in favour of the plaintiff against defendants 1 and 7. First, he objects that the matter is concluded by Odgers, J's order. I do not think that is so. Odgers, J., did not deal with the merits of the suit in any way, and, as he rightly saw, it was not a suit in which the failure of the plaintiff, if he did fail against defendants 2 to 6, would necessarily entail failure against defendants 1 and 7. The basis of the suit, Ex. A, is the common ground against all of them; but the case was not the same against all the defendants in other respects. Odgers, J's view was that defendants 1 and 7 had shown no ground under R. 13, O. 9, why the ex parte decree made against them should be set aside and therefore to set it aside in the circumstances of the case, so far as they were before him, was not correct. But his restoration of that decree, so far as I can see, has not given it any greater validity for our present purpose than if it had never been set aside by the Subordinate Judge. Odgers, J., restored the position of defendants 1 and 7 to what it was before the Subordinate Judge set aside that decree. He added by his order no force or validity to that decree which was not in it before. That objection of Mr. Krishnaswami Ayyangar, in my opinion, clearly fails.

In regard to R. 33, O. 41, generally Mr. Krishnaswami Ayyangar admits that its language is very wide; but he urges that it must be understood with certain limitations. He has quoted cases before us to show limitations which have been recognised in other Courts; for instance

the view taken in some cases that it is only when the appellate Court interferes with the decree appealed against so far as one party is concerned and that interference appears to make it just that there should be further interference in regard to another party, who has not appealed or who is not a party to the appeal, that the appellate Court should exercise its powers under the rule. But it is not necessary for us to consider those cases now. We are guided by the decision of a Full Bench of this Court in *Subramania Chettiar v. Sinnammal* (1), There it was decided that there was no such limitation as that on the powers given to the Court by R. 33, but that the powers were very wide, though to be used with great discretion. In the particular case before the Full Bench the plaintiff had succeeded in the original Court to a certain extent: he was not satisfied with his success, and he appealed with the object of obtaining a further success: the defendant against whom the decree has been made did not appeal at all; the appellate Judge disappointed the plaintiff by not giving him what he wanted and disappointed him still further by dismissing the whole suit, though the defendant had not prayed for that by any appeal or memorandum of objections. The Full Bench held that it was an instance of appropriate use of the power given by R. 33, O. 41. As Mr. Varadachari has urged, the reason of the matter appears to be that when a suit comes before a Court upon appeal, even though the appellant chooses to raise questions touching only a part of the suit, the whole suit is before the appellate Court and is within its control. That is the principle on which *Kristnamachariar v. Mangammal* (2), *Panchco Bania v. Anand Thakur* (3) and *Somar Singh v. Mt. Premdei* (4) were decided though they were cases concerned with the Limitation Act. Mr. Varadachari has drawn our attention to several cases of this Court illustrating how that principle has been applied.

In *Krishnaswami Naik v. Anjappa Naik* (5) a suit was decreed against one

of the defendants ex parte and against the other defendants after contest. One of the contesting defendants appealed, and the appellate Court dismissed the suit against all the defendants, including the defendant who had allowed the decree to be made against him ex parte. The learned Judges of this Court held that that was a proper use of R. 33, O. 41, and Seshagiri Ayyar, J., pointed out that one of the objects of the rule was that, if it was found on appeal that a suit was based upon a false claim, then the whole suit could be dismissed even as against those who had not appealed or had not contested the suit. In *Subbarayalu Naidu v. Papammal* (6) and *Mukku Venkatramayya v. Mukka Chinniah* (7), on appeal the suits were dismissed against the defendants who did not appeal and who were not even made parties to the appeals, and it was held that that too was a proper use of the rule. In *Somasundaram Chettiar v. Vaithialinga Mudaliar* (8), the suit was by reversioners to recover property after setting aside a number of alienations in favour of different alienees. The plaintiffs got a decree; some of the alienees appealed in separate appeals; other alienees did not appeal at all.

But the suit was dismissed as against all the alienees including those who had not appealed. That perhaps is a more extreme application of R. 33, O. 41, because it will be seen that the suit, though the plaintiff according to our usual procedure was allowed to bring his suit against a number of alienees was in essence a bundle of suits, and yet when the basis of those suits was found to fail, the appellate Court gave the benefit of that decision to the alienees who had not appealed and who were in strict view of the position defendants in different suits from those in which the appeals came before the Court. In *Jawahar Bani v. Shujaat Hussain* (9), a decree was made in the trial Court against three defendants. Two of them appealed, and one did not. The appeals of the two appellants who preferred appeals were dismissed; but the suit as against the other defendant, who had

1. AIR 1930 Mad 801=127 I C 624=53 Mad 881 (F B).

2. (1903) 26 Mad 91 (F B).

3. AIR 1924 Pat 160=77 I C 357=2 Pat 712.

4. AIR 1925 Pat 40=79 I C 794=3 Pat 327.

5. AIR 1915 Mad 227=24 I C 924.

6. (1915) 29 I C 579.

7. AIR 1919 Mad 196=53 I C 201.

8. (1917) 40 Mad 846=41 I C 546.

9. AIR 1921 All 367=58 I C 114=43 All 85.

not troubled to appeal and who was not a party to the appeals, was, perhaps to his surprise, dismissed. Those are instances to show the extent of the powers of an appellate Court under R. 33, O. 41, powers to be exercised on the principle that, when an appeal comes before the Court, the whole suit out of which the appeal arises is within the control of the Court.

But Mr. Krishnaswami Ayyangar has raised a further objection. He has urged that, however wide the powers under R. 33, O. 41 may be, they must be controlled by S. 107 of the Code, under which an appellate Code is to exercise, so far as may be, the same powers as the trial Court. He urges that in the present case the Subordinate Judge, Mr. Quraishi, who tried the suit as against defendants 2 to 6 after the ex parte decree against them had been set aside, could certainly not have interfered with the ex parte decree made by his predecessor against defendants 1 and 7. To the proceedings before Mr. Quraishi, as Mr. Krishnaswami Ayyangar urges, defendants 1 and 7 were not parties; they could not have appealed to this Court against any decision that Mr. Quraishi might have made in that trial; they are not parties to this appeal before us. Mr. Krishnaswami Ayyangar contends that, if we were to interfere with the decree which has been made against defendants 1 and 7, we should be doing something which Mr. Quraishi, the Judge of the original Court, could never have done, and we should thereby be transgressing the provisions of S. 107 of the Code. As he urges, the ex parte decree against defendants 1 to 7 is a different decree from that which has come before us on appeal, made by a different Subordinate Judge on a different judgment.

As he points out, there appears to be no reported case in which R. 33, O. 41 has been applied in those circumstances. But does the fact that one Subordinate Judge made an ex parte decree at one stage of this suit against defendants 1 and 7 and another Subordinate Judge at a later stage of the same suit dismissed the plaintiff's claim as against defendant's 2 to 6 really affect the matter? As Bhashyam Ayyangar, J., pointed out in *Krishnamachariar v. Mangammal* (2), when an appeal is

brought against only part of a decree of a trial Court, the suit is not split into two parts by that: the suit remains one suit, the whole of which is before the appellate Court. In my opinion, it would be a strange thing to say that, because two decrees were made in this suit at different stages, therefore the suit had somehow got split into two, so that, when the appeal of the plaintiff in regard to defendants 2 to 6 came before us it could only be a part of the suit which was before us and not the whole. Mr. Krishnaswami Ayyangar has tried to put an interpretation assisting him upon the words of R. 33 itself, which empowers the appellate Court "to pass or make such further or other decree or order as the case may require." He suggests that "case" in that sentence does not mean the whole suit, where the appeal is on part of a suit and that within the meaning of that rule the proceedings before the Subordinate Judge who made the ex parte decree against defendants 1 and 7 were one case, disposed of by one judgment, and the proceedings before Mr. Quraishi after restoration against defendants 2 to 6 were another case. I do not think that there is any justification for so interpreting the rule. Here we have different decrees made by the same Subordinate Judge's Court at different stages, but made in the same suit. If we are now to dismiss the suit as against defendants 1 to 7, we shall be doing nothing which the Subordinate Judge's Court could not have done as a trial Court, and, in my opinion, we shall be offending in no way against the provisions of S. 107, Civil P. C.

If we have therefore jurisdiction to use R. 33, O. 41, in this case, the application of it is not very difficult. If a number of defendants are sued upon an alleged common liability, and some of them allow an ex parte decree to be made against them, but against others a decree is made after contest, and the contesting defendants appeal, it may well not be in any way necessary or appropriate that the decree against those defendants who did not contest the matter should be set aside merely because the contesting defendants have succeeded on appeal. But here the whole suit against all the defendants is based upon Ex. A, whatever may be the variations in the plaintiff's case against in-

dividual defendants. If Ex. A is not a genuine document, the plaintiff has no true case against any of the defendants. After a full trial it has been found by the Subordinate Judge that Ex. A is not a genuine document, and that finding we have upheld on appeal. In those circumstances it would surely be illogical and unjust that, while the suit has been dismissed against defendants 2 to 6, the decree against defendants 1 and 7 should be allowed to stand. That decree can stand only on a finding that Nambi Kone executed Ex. A. That is the necessary foundation of the decree. But that foundation has now been destroyed. If the decree against defendants 1 and 7 is still to stand, then it must stand upon a foundation which is no longer there. In my opinion in the circumstances it is necessary in the ends of justice that we should exercise our powers under R. 33, O. 41 and dismiss the plaintiff's suit against defendants 1 and 7 also.

Cornish, J.—I am of the same opinion. It is unnecessary to look beyond the Full Bench ruling in *Subramania Chettiar v. Sinnammal* (11) to see what is the extent of the Court's power under O. 41, R. 33. That ruling has established that in a proper case the appellate Court has ample discretion to make any decree or order to prevent the ends of justice from being defeated. It is conceded that the present would be a proper case for the Court to act under R. 33 if it has the power. R. 33 imposes no conditions. The Court may exercise its power in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. If the word "parties" means only persons who were parties to the decree or part of a decree from which the appeal is made, there might be some force in the contention that plaintiff's appeal being against the decree in so far as it is in favour of defendants 2 to 6, therefore defendants 1 and 7, not being affected by that part of the decree, would not be entitled to the benefit of the Court's interference under R. 33. But there is no apparent reason why the word "party" should not be given its ordinary significance, namely, as meaning a party to the suit. Defendants 1 and 7 were undoubtedly parties to the suit in which the decree

under appeal was made, and they were still parties to the suit notwithstanding the ex parte decree against them and their neglect to have that decree set aside. Their inability to appear and file objections in the appeal could clearly not, under the terms of the rule, debar them from having the benefit of R. 33. With regard to the argument based on S. 107, Civil P. C., I am of opinion that the section does not cut down the appellate Court's discretionary power under O. 41, R. 33. There is the direct authority of *Krishnaswami Naik v. Anjappa Naik* (5) that the appellate Court can exercise its power in favour of a defendant who was ex parte at the trial; and, following that precedent, I think we are at liberty to exercise the power in favour of defendants 1 and 7 in the present suit.

P.R.S./M.N.

Order accordingly.

* A. I. R. 1933 Madras 533

MADHAVAN NAIR AND JACKSON, JJ.

Arumugam Pillai and another — Defendants—Appellants.

v.

Mohideen Sheriff Sahib and another — Plaintiffs—Respondents.

Appeals Nos. 75 and 76 of 1927, Decided on 1st February 1933, against decree of Dist. Judge, Salem, in O. S. No. 2 of 1924.

(a) Limitation Act (1908), Art. 134 — Possession not taken by transferee — Art. 134 does not apply.

Article 134 does not apply to a transfer from a trustee or a mortgagee under which possession is not taken by the transferee: 40 *Mad* 1040 (*FB*), *Foll.* [P 534 C 2]

(b) Civil P. C. (1908), S. 92—Suit against person having beneficial interest in property can be brought.

Suits under S. 92, Civil P. C., can be instituted against person having beneficial interest in the properties of the religious institution: *AIR* 1927 *Mad* 614, *Rel on.* [P 536 C 1]

* (c) Limitation Act (1908), Art. 134—Trustee having beneficial interest transferring trust property — Suit to set aside alienation within 12 years of death or removal of transferring trustee is not barred—Art. 134 does not apply — Limitation Act (1908), Art. 144.

A sale or lease by a trustee of a mosque having a beneficial interest in its properties is valid during the lifetime of the vendor or lessor, and a suit by the succeeding trustee on the death or removal of the transferring trustee for a declaration that the sale or lease is invalid and for recovery of possession of the property sold for the mosque is in time, if instituted within 12 years from the date of the death or removal of the trustee who

transferred the property. Art. 134 does not apply to such a suit: *AIR 1930 Mad 582* and *AIR 1922 P C 122, Rel on.*; *AIR 1928 Mad 614 & AIR 1932 Mad 328, Expl and Dist.*; *Case law referred.*

[P 536 C 2; P 537 C 1, 2]

E. Vinayaka Rao, L. A. Govinda Raghava Ayyar and L. S. Veeraraghava Ayyar—for Appellants.

S. Varadachariar and S. S. Ramachandra Ayyar—for Respondents.

Madhavan Nair, J.—Both these appeals arise out of O. S. No. 2 of 1924 instituted by the plaintiffs, described as the mullas or trustees of a Mahomedan mosque at Paramathi. The suit is for the recovery of two items of property said to have been improperly alienated by the previous trustees. Appeal No. 75 in which defendant 1 is the appellant, relates to item 1, the alienation of which was effected in his favour under three sale deeds, Exs D, D (1) and D (2) dated 17th February 1901, 19th April 1901 and 3rd May 1901 respectively. Item 2 was alienated in favour of defendant 2, the appellant in A. S. No. 76, under two documents Exs. E and E (1) dated 7th October 1900 and 19th April 1901 respectively. The present suit was instituted on 9th January 1924. The main question in these appeals is whether the suit is barred by limitation under Art. 134 or Art. 144, Lim. Act. Art. 134 specifies 12 years as the period of limitation for a suit

“to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration”

and the limitation period commences from the “date of the transfer.” Art. 144 specifies 12 years as the period of limitation “for possession of immovable property or any interest therein not hereby otherwise specially provided for” and the period commences from the date “when the possession of the defendant becomes adverse to the plaintiff.” The learned Judge held that the suit is not barred by limitation and decreed the plaintiff's suit. The question of limitation is common to both the appeals. In appeal No. 76 some subsidiary points also arise for consideration. We will therefore deal with these appeals separately.

A. S. No. 75 of 1927.—In considering which of the two articles mentioned above applies to suits of this nature, it will be necessary, as may be seen from decided cases, first to consider the essen-

tial nature of the trust. But in this appeal the question of limitation may be disposed of on another consideration, though the nature of the trust will have to be inquired into, in the connected appeal, and what is stated in it on that question will well apply to this appeal also. Though the sales under Exs. D and D (1) took place in 1901, according to the documents, it is admitted that the portions of item 1 dealt with under the documents were under prior encumbrances, and possession of the items was obtained by defendant 1 only in 1914. It has been held by a Full Bench of this Court in *Setti Kutti v. Kunhi Pathumma* (1) that Art. 134, Lim. Act, does not apply to a transfer from a trustee or mortgagee under which possession is not taken by the transferee. It follows therefore with respect to these alienations that the suit cannot be said to be barred either under Art. 134 or under Art. 144 also as it has been instituted before the expiry of 12 years from 1914. With regard to the alienation under Ex. D (2), the learned Advocate-General says that possession was transferred on the date of the deed, 3rd May 1901. The respondents contends that in the case of this alienation also possession was not transferred on the date of the sale deed but was transferred only in 1914 as in the case of the other alienations. (His Lordships after considering the evidence on this point concluded). In our opinion it is established by the evidence that he did not obtain possession of the item before 1914. On this finding the suit is not barred with respect to this item also as in the case of the other portions of item 1 sold under Exs. D and D (1). Even if possession was obtained on the date of the deed it will be seen from the reasoning of our judgment in the connected appeal No. 76 of 1927 which will equally apply to this case also, that the plaintiffs' suit is not barred. This appeal is therefore dismissed with costs.

A. S. No. 76 of 1927.—In this appeal defendant 2 is the appellant. Item 2 of the suit property had been alienated in his favour under two sale deeds Exs. E and E (1) dated 7th October 1900 and 19th April 1901 respectively. It is not disputed that the appellant got possession of the property on these dates. It

1. (1917) 40 Mad 1040=43 I C 31 (F B).

is argued on his behalf that the institution to which this property belongs is a bare trust, that therefore Art. 134 applies to the case and that in any event the suit is barred by Art. 144 inasmuch as it has been admittedly instituted beyond 12 years from the date of the alienation. The respondents argue that having regard to the real nature of the trust Art. 134 does not apply to the case, and that the suit having been admittedly brought before the expiry of 12 years from the removal of the previous trustees, i.e., the trustees who made the alienation, the suit is not barred. In this connexion a very large number of cases, amongst which the following seem to be the most important, was brought to our notice: *Vidya Varuthi v. Balusami Ayyar* (2); *Subbaiya Pandaram v. Muhamad Mustapha Marcayar* (3); *Ranga Dasan v. Letchuma Dasan* (4); *Rama Reddy v. Ranga Dasan* (5); *Vellachami Naicker v. Alagarsami Naicker* (6); *Venkatasubbarayudu v. Silar Sahib* (7); *Vadlamudi Sastrulu v. Venkatasubbayya* (8); *Periyannan Chetty v. Govind Rao* (9); *Badri Narayan Singh v. Kailash Gir* (10); *Debendra v. Naharmal*, A. I. R. 1930 Cal. 673; *Naurangi Lal v. Ram Charan*, A. I. R. 1930 Pat. 455; *Sarabdeo Bharti v. Ram Bali*, A. I. R. 1933 All 19 and *Administrator-General of Bengal v. Balkissen Misser* (11). We have considered each one of these cases, but having regard to the trend of the decisions of this Court it will not be necessary to examine all of them in detail.

In considering whether Art. 134 applies or not, we have to examine whether the Mahomedan mosque to which the suit property belongs is a bare trust or whether the trustees have a beneficial interest in the trust. This distinction has been emphasized as a result of the decision of the Privy Council in *Vidya Varuthi v. Balusami Ayyar* (2) as understood in some of the subsequent decisions of this Court. In *Vidya*

Varuthi v. Balusami Ayyar (2) it was held that Art. 134, Lim. Act, does not apply where the head of the mutt, having a beneficial interest in the mutt property, granted a permanent lease over a part of the mutt property not proved to be subject to a specific trust. It was also held in that case that except for unavoidable necessity the head of a mutt cannot create any interest in the mutt property to enure beyond his life, that a lessee however has not adverse possession under Art. 144, Lim. Act, during the life of the head who granted the lease, and that if the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him and that there is no adverse possession until his death. On this ground it was held that the suit in that case was not barred under Art. 144 also. It is also clear from this decision that the rules enunciated in it apply to the endowments of Mahomedan religious institutions and to alienations made by Sajjadanshins or Muttawallis. The respondents argue that the case before us falls exactly within the scope of this decision, while the appellant contends that the present case is one of a bare trust in which the trustees have no beneficial interest and that the alienation in the present case being a sale and not a lease as in the Privy Council case that decision is inapplicable and that the suit is barred by Art. 144, Lim. Act.

The first question for us to consider is, what is the nature of the trust in the present case? Is it one in which the property is endowed absolutely for the mosque or is it one in which the trustees have some beneficial interest? The evidence on the point is somewhat meagre, but such as it is, we think, it supports the respondents' contention that the trustees of the mosque have a beneficial interest in the mosque property. In para. 4 of Ex. 1, the plaint in the scheme suit, it is stated that

"these properties were granted rent free by one of the former kings of Mysore during the latter part of 18th century to one Khazi Muhammad Mohidin Sahib for the performance of the Khazi service and for offering and reciting prayers five times a day in the musjid, etc."

In para. 5 it is stated that

"after the death of the original grantee all his sons succeeded to the office of Khazi of the musjid and were discharging the duties appertaining to

2. AIR 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
3. AIR 1923 P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).
4. AIR 1925 Mad 822=86 I C 231.
5. AIR 1926 Mad 769=96 I C 371=49 Mad 543.
6. AIR 1927 Mad 1163=104 I C 355.
7. AIR 1930 Mad 582=125 I C 79.
8. AIR 1923 Mad 614=110 I C 884.
9. AIR 1932 Mad 328=137 I C 487.
10. AIR 1926 Pat 239=93 I C 303=5 Pat 341.
11. AIR 1925 Cal 140=84 I C 91=51 Cal 953.

the office enjoying the endowments of the masjid."

It is clear from these statements that the grantee of these properties and his family after meeting the expenses involved in the performance of their duties enjoyed the balance of the income from the properties for themselves. The grant of the property was made in the name of Mohidin Sahib and the property is held in various shares by the various muttawallis. The evidence of P. W. 2 throws important light on this question. He says:

"Before the sales the lands were in the possession of the trustees on behalf of the mosque. They were receiving the rent for themselves and looking after the mosque. They were getting 10 podies from item 1, 3 podies from item 2 and Rs. 25 from item 3. To my knowledge they were getting the income from the lands for 60 years."

This witness filed the inam title deeds and other documents in the prior suit. He conducted the appeal in the High Court. In his cross-examination he says,

"I have seen the produce divided and the mullas taking their share home. It was the descendants of Kaji Muhammad Mohidin who were enjoying the produce. They told me in what shares they divided it."

We think the evidence of this witness supports the respondents' contention that the profits accruing from the suit property after meeting the expenses of the services were being enjoyed by the trustees and that they have therefore a beneficial interest in the property. The plaintiffs alleged that the property belonged to them, but abandoned this contention in the course of the suit. This does not by any means show that they have no beneficial interest in the property, an interest which is quite distinct from the absolute ownership claimed by them. The fact that a scheme suit under S. 92, Civil P. C., was brought in connexion with this mosque to remove the trustees does not necessarily show that the trust is a bare trust. The decision in *Nelliappa Achari v. Punnaivanam Achari* (12) shows that suits under S. 92, Civil P. C., can be instituted against Matadhipathies who admittedly have a beneficial interest in the mutt property. On the evidence before us we think we must accept the respondents' contention that the trustees of the mosque in this case have a beneficial interest in the endowed property. On this conclusion

12. A I R 1927 Mad 614=101 I C 420=50 Mad 567.

it must be held, following the Privy Council decision in *Vidya Varuthi v. Balusami Ayyar* (2), that Art. 134 will not apply to this case.

The next question is whether the suit is barred by Art. 144, Lim. Act. If no distinction is to be drawn between the grant of a lease and a sale, then the present case will clearly fall within the scope of the decision in *Vidya Varuthi v. Balusami Ayyar* (2). In that case the alienation was a lease, whereas in the present case the alienations are sales. The learned Advocate-General has drawn our attention to two recent decisions of this Court, *Vadlamudi Sastrulu v. Venkatasubbayya* (8) and *Periyannan Chetty v. Govinda Rao* (9), where observations occur in support of his contention that if the alienations are sales, then a suit brought after the expiry of 12 years from the date of the alienations would be barred under Art. 144. But these observations can only be treated as mere obiter dicta having regard to the fact that the alienations in those cases related to leases (and not to sales) and the properties belonged to temples, the dharmakarthas having no beneficial interest in them. It is also a matter for observation that in those cases the suits were barred even if time is calculated from the death of the alienor. For instance, in the *Periyannan Chetty v. Govinda Rao* (9) case the lease was in 1865 and after the alienation three or four Pandarasannadhies accepted rent and the suit was therefore clearly barred. The following observation of the learned Judges makes this point clear:

"Whether the proper date from which adverse possession generally runs in cases of permanent lease by dharmakarthas be taken as the date of the alienation or some subsequent date as the death of the dharmakartha or his resignation or removal from office, we have no doubt that on the facts of this case adverse possession began from before 1902 and that the suits for possession were therefore barred under Art. 144."

In all these cases what was attempted to be argued was that on the death of a trustee a fresh cause of action to institute the suit accrues in favour of the succeeding trustee. This argument no doubt was rightly disallowed. But what is argued by Mr. Varadachari is not that each succeeding trustee gets a fresh cause of action to institute the suit to set aside the alienation at the time of his accession to the office, but that the

alienor-trustee being disabled from questioning the validity of his own alienations, his successor is not so estopped and that he can before the expiry of 12 years from his accession to the office question the validity of the alienations. This seems to be the basis of the decision in *Vidya Varuthi v. Balusami Ayyar* (2) which held that the suit was not barred by Art. 144 in that case. It is not alleged in this case that the present suit has not been brought before the expiry of 12 years after the removal of the trustees who alienated the property. It appears to us that the present case both with regard to the application of Art. 134 and Art. 144, Limitation Act, falls within the scope of the decision of the Privy Council in *Vidya Varuthi v. Balusami Ayyar* (2). It has been conceded by the learned Advocate-General that if we hold that the muttawallis have a beneficial interest in the suit properties, then he cannot distinguish the present case from the decision in *Vidya Varuthi v. Balusami Ayyar* (2). In the view that we have indicated above it is clear that no distinction can be made between a lease and a sale with regard to the application of Art. 144 to cases like the present one.

The argument that the decision in *Vidya Varuthi v. Balusami Ayyar* (2) should be confined to leases and not be extended to sales was attempted in *Ranga Dasan v. Latchuma Dasan* (4), but that argument was disallowed and this decision was confirmed in appeal in *Rama Reddy v. Rangadasan* (5). No doubt the latter case has been dissented from in some respects in *Periyannan Chetty v. Govinda Rao* (9), but we have already pointed out that the observations in that case on the point under consideration are merely obiter. In *Venkatasubbarayudu v. Silar Sahib* (7) it was held that a sale by the muttawalli of wakf property, where the wakf provides for the private benefit of the family of the grantee as well as for the public benefit of a mosque, is valid during the lifetime of the vendor; and a suit by the succeeding muttawalli for a declaration that the sale is invalid and for recovery of possession of the property sold for the mosque is in time, if instituted within 12 years from the date of the death of the muttawalli who sold the property. This decision followed the decision in

Vidya Varuthi v. Balusami Ayyar (2) and specifically disallowed the distinction that was sought to be drawn between a lease and a sale of property by the muttawalli with reference to Art. 144. The case before us, having regard to our finding that the muttawallis have a beneficial interest in the endowed property, is on all fours with this case. It is true that the Courts in other Presidencies have taken a view different from the Madras view and have held that a distinction should be made between leases and sales in applying Art. 144, Lim. Act, to alienations made by trustees.

As the present case falls within the scope of the Privy Council decision in *Vidya Varuthi v. Balusami Ayyar* (2) and is covered directly by the decision of this Court in *Venkatasubbarayudu v. Silar Sahib* (7), we do not think it is necessary to discuss any further the contention that Art. 144 should be applied to this case as the alienation we are concerned with is a sale and not a lease. We would therefore for the above reasons hold that the plaintiffs' suit is not barred under Art. 144. We will state that what we have said in this appeal with regard to Art. 144 will apply to the other appeal also even if we assume in that appeal that the alienees obtained possession of the various items on the dates of sale. (His Lordship after deciding the questions of fact regarding improvements, mesne profits and delivery of possession, and upholding the decision of the lower Court, concluded). In the result the appeal is dismissed with costs.

P.R.S./M.N. Appeals dismissed.

* A. I. R. 1933 Madras 537

VENKATASUBBA RAO, J.

Duraiswami Thevan — Defendant — Appellant.

v.

K. N. K. L. Lakshmanan Chettiar — Plaintiff—Respondent.

Second Appeal No. 1693 of 1928, Decided on 11th November 1932, against decree of Sub-Judge, Sivaganga, in A. S. No. 59 of 1927.

*(a) Tort—Defamation—Absolute privilege applies to statements before tribunal exercising judicial functions — Officer acting under S. 75 is such tribunal—Madras Estates Land Act (1 of 1908), S. 75.

The doctrine of absolute privilege is not confined to statements made before judicial tri-

tribunals strictly so called but applies to statements made before a "tribunal (which word covers a commission or inquiry) recognized by law, which though not a Court in the ordinary sense of the word, exercises judicial functions, that is to say, acts in a manner similar to that in which a Court of justice acts in respect of an inquiry before it. Hence as the proceedings before an officer under S. 75, Madras Estates Land Act, are quasi judicial proceedings, the statements made before such officer are privileged: *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, (1892) 1 Q B 431, *Dist.* [P 533 C 2]

(b) Madras Estates Land Act (1 of 1908), S. 74—Defendant stating that no melvaram is due and applicant had murdered defendants' predecessor and filed application out of spite—Statements being relative to the inquiry are privileged—Tort—Defamation.

The statement, on which the privilege is conferred, need not necessarily be relevant in the narrow sense of that word; the statement should be made with reference to the subject of the inquiry or should be relative to the matter in hand: *Seaman v. Netherclift*, (1877) 2 C P D 53, *Rel on*; 6 I C 309, *Ref.* [P 539 C 2]

Thus where a defendant in answer to an application under S. 74, Madras Estates Land Act, states that no melvaram was due but the application was made out of spite after plaintiff had murdered the defendant's predecessor in title and gives the relations between the parties, such statement is absolutely privileged.

[P 539 C 2]

M. A. Thirunarayana Chari and S. T. Krishnamachari—for Appellant.

A. Srinivasa Ayyangar—for Respondent.

Judgment.—The point raised by the appeal is, whether the alleged defamatory statement made by the defendant is absolutely privileged. Under the sections of the Madras Estates Land Act relating to the appraisement and division of the produce, the landholder (the plaintiff in the case) presented an application, and under S. 75 an officer was deputed to carry out the functions specified in that section. In the inquiry that followed, the defendant (who was a raiyat under the plaintiff) gave a long oral statement, and in the course of it, made the allegation (said to amount to slander) that the plaintiff had murdered his (defendant's) father-in-law. One of the pleas raised by the defendant in this connexion is, that he did not make the allegation imputed to him; but this point is concluded by the concurrent finding against him of the two Courts below.

The question of law is, as I have said, whether the statement is absolutely privileged. Mr. A. Srinivasa Ayyangar for the plaintiff (respondent) has stren-

uously urged that the proceeding before the officer deputed under S. 75 is not a judicial proceeding and that the rule of absolute privilege has no application. But the doctrine of absolute privilege is not confined to statements made before judicial tribunals strictly so called but has been carried further, and has been held to apply to statements made before a

"tribunal (which word covers a commission or inquiry) recognized by law, which, though not a Court in the ordinary sense of the word, exercises judicial functions, that is to say, acts in a manner similar to that in which a Court of justice acts in respect of an inquiry before it." *Gatley on Libel and Slander*, Ch. 11, p. 182, 1924 Edn.

"So long as the substantial elements of natural justice are observed, an absolute privilege attaches to the proceedings. The substantial elements of natural justice must be found to have been present at the inquiry:" (p. 183).

The learned author points out that it is often a difficult question to determine, whether a particular tribunal exercises judicial functions so as to confer an absolute privilege on statements made in the course of its proceedings. In every case, he observes, it is necessary to examine somewhat narrowly the constitution, the functions and procedure of the tribunal. According to Folkard: absolute immunity exists in respect of statements made "in the ordinary course of the administration of justice" or "in the usual and regular course of legal procedure," provided the statements made are "relative to the matter in hand:" *Folkard's Slander and Libel*, Edn. 7, p. 100. Accordingly it has been held that a military Court of inquiry, though not coming within the ordinary definition of a Court of justice, is nevertheless a tribunal exercising judicial functions, so as to confer an absolute privilege on statements made before it. The General Medical Council, the Committee of the Law Society, a commission appointed by the bishop of a diocese, have similarly been held to be judicial tribunals within the meaning of the rule: *Gatley*: pp. 183 and 184.

It is therefore unnecessary to decide whether the officer deputed under S. 75 performs strictly judicial functions or not, for there can be no doubt that the proceedings before him are at any rate quasi-judicial proceedings, and the law casts upon him the duty of acting in a manner similar to that in which Courts

of justice generally act. For the plaintiff it is contended that the officer's duty, if objections of a certain kind are taken, is merely to record them, and therefore he is not a judicial tribunal. This clearly is not the true effect of the sections, for while it is laid down that he shall record the objections, he is required nevertheless to carry out the appraisal or division as the case may be. Cases occur where objections are taken, such as, that rent is not payable in kind but in cash, and the officer deputed cannot deal judicially with such questions; but the intention of the legislature is that the proceeding should not be delayed until the objections have been disposed of. In a certain event, in regard to matters which are within the province of the officer, finality attaches to his decision, S. 75 (7), and it is futile to contend that his duty is merely ministerial. The case relied on for the plaintiff, *The Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1) only lays down that the doctrine of absolute immunity does not extend further than to Courts of justice and tribunals having similar attributes. The question arose, whether a meeting of the London County Council for granting music and dancing licenses, was a Court within the meaning of the rule by which defamatory statements made in the course of proceedings before a judicial tribunal are absolutely privileged. Lord Esher, M. R., observes that the duties performed by the council are administrative, their action being consultative for the purpose of administration, and not judicial. This case has no analogy to the present, and I reject the plaintiff's contention founded on the nature and character of the proceeding in question.

It is next contended for the plaintiff that the absolute privilege, protecting the party from action, does not apply, as the statement in question was irrelevant to the inquiry then being held. The defendant's case in that inquiry was that no melvaram was due to the plaintiff and that the latter filed the application under S. 74 needlessly and out of spite. While stating that the melvaram had been already paid, he recounts the history of the relations

between himself and the plaintiff. The lands had originally belonged to his father-in-law, who presented a "harvest petition" against the plaintiff, and before the passing of the award, the latter murdered his father-in-law. Then the defendant goes on to say that on his father-in-law's death, his share devolved upon him and his wife, which the plaintiff was anxious to purchase, but he would not accede to his request. Displeased with him on that account, the plaintiff unnecessarily filed the application in question. This is the gist of what the defendant stated before the Revenue Officer. The law is not that the statement, on which the privilege is conferred, must be relevant in the narrow sense of that word; the statement must be made with reference to the subject of the inquiry or must be relative to the matter in hand: this is what the authorities lay down. In the judgment of Bramwell, J. A., in *Seaman v. Netherclift* (2), this point has been dealt with very tersely and clearly. Says Bramwell, J. A.:

"As to the first proposition I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Chief Baron and the Lord Chancellor in *Dawkins v. Lord Rokeby* (3) would seem to be preferable "having reference" or "made with reference to the inquiry."

Then he shows by giving an example what is meant by a statement which has no reference to the inquiry at all. Suppose while a witness is in the box, a man were to come in at the door and the witness were to exclaim, "That man picked my pocket," that is not the kind of statement in respect of which the witness would enjoy immunity. Bramwell, J. A., goes on to say that the words "having reference to the inquiry" ought to have a very wide and comprehensive application and ought to extend to a statement which a witness might naturally and reasonably make when giving evidence with reference to the matter in hand. Cockburn, C. J., makes similar observations, and referring to statements de hors the matter in hand, gives the following instance:

"If a man, when in the witness-box, were asked: 'Were you at York on a certain day?' and he were to answer: 'Yes, and A B picked my pocket there,'"

2. (1877) 2 C P D 53=46 L J C P 128=25 W R 159=35 L T 784.

3. (1875) 7 H L 744 = 45 L J Q B 8 = 23 W R 931=33 L T 196.

1. (1892) 1 Q B 431=40 W R 450 = 61 L J Q B 409=56 J P 404=66 L T 513.

such a statement would be altogether de hors the character of witness and not within the privilege. I may also refer to *Adivaramma v. Ramachandra Reddi* (4) where Wallis, J., as he then was, took the same view. Judged by this test, absolute immunity attaches to the statement in question.

In the result, I hold that the judgment of the lower Court, which reversed that of the District Munsif, is wrong and the suit is accordingly dismissed. Although the defendant succeeds, he is not in the circumstances entitled to costs, and I therefore direct each party to bear his costs throughout. The memorandum of objections is dismissed. No costs.

P.R.S./R.K. *Appeal allowed.*
4. (1911) 6 I C 309.

A. I. R. 1933 Madras 540 (1)

MADHAVAN NAIR, J.

Muhammad Abu Bakkar Maracair and others—Defendants—Appellants.

v.

Ramakrishna Chettiar — Plaintiff—Respondent.

Misc. Second Appeal No. 178 of 1930, and Civil Misc. Petns. Nos. 1043 and 1044 of 1932, Decided on 22nd August 1932, against order of Sub-Judge, Trichinopoly, D/- 26th July 1930.

Limitation Act (1908), Art. 182 (5)—Time for considering whether application is within time starts from date of final order on last application.

A decree-holder made a second application for execution, but it was returned for correcting certain defects and was represented only along with the third petition. No final orders had been passed on the second application:

Held: that time for considering whether the third application was within the period of limitation was to be calculated from the date of the final orders on the last application, that is, the second application. As no final orders on the second application had been passed that application was still pending and hence consideration regarding limitation of the third application was in the circumstances premature. [P 540 C 2]

T. M. Krishnaswami Aiyar and R. Somasundaram—for Appellants.

K. S. Narayana Aiyangar and V. K. Srinivasa Aiyangar—for Respondent.

Order.—The facts of the case are clearly stated in the appellate Judge's judgment and need not be re-stated. The question is whether the third application for execution is barred by limitation. Prior to the third application the decree-holder had made another appli-

cation, the second one in sequence of time, dated 21st June 1928. That was returned for correcting certain defects and was represented only along with the third petition filed on 19th June 1929. No final orders have been passed on the second application as yet. Time for considering whether the third application is within the period of limitation is to be calculated according to Art. 182 (5), Lim. Act, in its amended form from the date of the final orders on the last application; that will be the second application in the present case. As no final orders on the second application have been passed that application is still pending and at present no question for limitation arises: vide judgment of Jackson, J., in C. R. P. No. 5 of 1930. The lower Court will have to pass order on the second application and then, if necessary, consider whether the third application is in time. The opinion of the learned Judge that the third application is in time is in the circumstances premature.

The argument that the third application should not be considered to be a proper application because it was presented by Ramkrishna Chetty in a different capacity from the capacity in which he presented the other application has no substance and must be overruled. The two petitions are remanded to the District Munsif for disposal according to law in the light of the above observations. Each party will bear his own costs in this Court.

C. M. P. No. 1043 of 1931.—This will be dealt with by the District Munsif along with the other application.

C. M. P. No. 1044 of 1931.—No order is necessary.

P.R.S./V.S. *Order accordingly.*

* A. I. R. 1933 Madras 540 (2)

MADHAVAN NAIR AND JACKSON, JJ.

Kandaswamy Goundar — Plaintiff — Appellant.

v.

Chinnammal and others—Defendants—Respondents.

Appeal No. 268 of 1926, Decided on 9th January 1933, from decree of Dist. Judge, Salem.

* Hindu Law — Adoption — Consent of nearest sapinda given not for spiritual benefit of deceased but for his own ends and under wrong impression—Adoption to spite

nearest heirs after long delay—Adoption is invalid.

In the absence of authority by the husband to adopt, the consent of the nearest sapinda will be enough to uphold an adoption. If the consent of the sapinda was obtained under circumstances which show that he gave the consent with a view to benefit himself or if the facts show that the widow was making the adoption to defeat the interest of this or that sapinda, and not to promote the spiritual welfare of her husband then the motives of the parties are said to be "corrupt and capricious" and the adoption will be invalid for that reason: 12 *M I A* 397 (*P C*); 1 *Mad* 174 and *A I R* 1923 *Mad* 994 (*F B*), *Ref.* [P 541 C 2]

Where a widow, who never thought of making any adoption for about a year after her husband's death, quarrelled with her daughters, the next heirs, went to her husband's brother's house and adopted his son and did not consult any of the other sapindas, it may well be inferred that the adoption was made by the widow with a view to spite her daughters and not on account of any consideration for the spiritual welfare of her husband. The consent of the nearest sapinda is vitiated if it is given with a view to gain his own ends or under the impression that the widow had her husband's authority to adopt.

[P 543 C 1]

Advocate-General and *Venkatasubbiah*—for Appellant.

S. Varadachariar, *N. D. Varadachariar* and *B. Sitarama Rao*—for Respondents.

Madhavan Nair, J.—The plaintiff is the appellant. This appeal arises out of a suit instituted by the plaintiff for a declaration that he is the adopted son of one Muthu Goundan of Siluvampatti and as such is entitled to recover the suit properties from the defendants together with mesne profits. Defendant 1 is the second daughter of the deceased Muthu Goundan and defendants 2 and 3 are his other daughters. Defendant 4 is the husband of the first daughter. Defendants 5 to 7 are persons who are in possession of some of the items of the property. Muthu Goundan died in the month of March 1920, and on 11th March 1921 his widow, Kaliasammal, P. W. 1, adopted the plaintiff, the son of Muthu Goundan's brother, P. W. 2. The plaintiff alleged that Muthu Goundan, before his death, had authorized his widow to adopt and that she took the plaintiff in adoption with the consent of the sapindas. The daughters who are defendants contested the adoption and said it was brought about at the instigation of P. W. 2 and that their mother who was not on good terms with them adopted the plaintiff with a view to spite them and deprive them of their inheritance.

Defendant 1 also put forward a will by which the deceased Muthu Goundan left the properties after his death to be enjoyed by her with directions to maintain his widow, etc. The two main questions in the case are: (1) whether the adoption set up in the plaint is true and valid, and (2) whether the will set up by the defendants is true and valid (issues 1 and 2).

The factum of adoption is not disputed. It is also not disputed that though the plaintiff stated in the plaint that all the sapindas were consulted, the only sapinda who was consulted is the adopted boy's father, P. W. 2, the nearest sapinda. The learned District Judge found that the authority said to have been given by the deceased husband to adopt was not proved and that the circumstances show that the motive of P. W. 2 in consenting to the adoption was to secure advantage for himself and of the widow in making the adoption was to defeat the rights of Muthu Goundan's daughters. Holding these motives to be "capricious and corrupt" he held that the adoption was invalid in law and that the plaintiff is not entitled to recover possession of any portion of the properties. He also found that the "will" set up by defendant 1 was not proved. As the adoption was found to be invalid, the plaintiff's suit was dismissed. Against the decree dismissing the suit the plaintiff has filed this appeal and defendant 1 has filed a memorandum of cross-objections in which she contends that the will set up by the defendants is true and valid and that the order disallowing costs is wrong.

The law is well settled that in the absence of authority by the husband to adopt, the consent of the nearest sapinda will be enough to uphold an adoption. If the consent of the sapinda was obtained under circumstances which show that he gave the consent with a view to benefit himself or if the facts show that the widow was making the adoption to defeat the interest of this or that sapinda, and not to promote the spiritual welfare of her husband, then the motives of the parties are said to be "corrupt and capricious" and the adoption will be invalid for that reason. This may be said to represent the state of the law in this Presidency: see *The Collector of Madura v. Moorthoo Ramalinga Sethu-*

pathy (1), *Velanki Venkatakrishna v. Rama Lakshmi* (2) and *Krishnayya Rao v. Raja of Pittapur* (3). The question is how far the adoption in this case is vitiated by "corrupt and capricious" motives.

Exhibit D is the adoption deed. It bears the mark of Kaliammal and it has been attested by P. W. 2 and many other witnesses. It states that the deceased had authorized the widow to take a boy in adoption for him and that in addition to this authority she consulted P. W. 2 and most of the other dayadis, that with their full consent Kandaswamy Goundan has been adopted and that he shall inherit all the properties of the deceased Muthu Goundan. Though the learned Advocate-General took us through the evidence relating to the authority given by the deceased Muthu Goundan to adopt, it did not appear to me that he seriously challenged the correctness of the learned Judge's finding on the point. The evidence bearing on the question is purely oral and I do not see any reason to differ from the learned Judge's conclusion on that point.

I will now discuss the evidence in so far as it relates to the motive of the parties which are said to vitiate the adoption. The evidence on this point is meagre. But such as it is, I think it is enough to support the conclusion arrived at by the learned District Judge. Mr. Varadachariar argues that the evidence shows that the so-called consent of P. W. 2 was given under the impression that the deceased Muthu Goundan had authorized the widow to adopt a boy, that therefore there was no free and independent consent given by the sapinda for the adoption, and on that account the adoption is invalid. This argument is not without force. But as I do not find it referred to in the lower Court's judgment, I prefer to rest my conclusion on the specific grounds on which the learned District Judge has dealt with the case. Muthu Goundan died in March 1920 and the widow did not set about making an adoption until a full year after her husband's death.

This long delay requires explanation.

1. (1867-69) 12 M I A 397 (P C).
2. (1876) 1 Mad 174=4 I A 1=26 W R 21=3 Sar 669 (P C).
3. A I R 1928 Mad 994=51 Mad 893=116 I C 673 (F B).

The explanation given by her, P. W. 1, and the father of the adopted boy, P. W. 2, that this delay was due to pollution on account of Muthu Goundan's death is, as the District Judge says, a specious one and cannot for a moment be believed. It is common ground that for a long time (it is not clear from the evidence how long) the widow lived with her daughters in her husband's house and when she left it, she went to the house of P. W. 2 where the ceremony of adoption took place. It is admitted that though the daughters were invited, none of them accepted the invitation and was present at the ceremony. Though in her evidence P. W. 1, the widow, at first stated :

"there was no ill-feeling between me and my daughters before the date of the adoption," she had to admit that her daughters were not on friendly terms with her for a month before the adoption. This is clearly borne out by the documentary evidence also; for, in Ex. 4 in the statement filed by her before the First Class Magistrate in connexion with the proceedings between her and her daughters under S. 145, Criminal P. C., in the month of June 1921, she stated that last Thye (11th February 1921) her daughters and the husband of one of them came to her lands and molested her enjoyment. It is difficult to decide as to what was the exact cause for the quarrel between the mother and the daughters. It may be that the mother getting knowledge of the will set up by defendant 1 resented it or it may be that the quarrel originated over the proceeds of the sale of paddy amounting to Rs. 50 as early as October, November 1920 as stated by D. Ws. 1 and 2; but whatever might have been the true cause, it cannot be doubted that there was ill-feeling between the mother and the daughters. D. W. 1, the husband of defendant 1, says that at the end of February 1921 the widow went to P. W. 2's house for food. D. W. 2, his wife, also speaks to the same effect. Having regard to the date of the trespass mentioned in Ex. 4 and the evidence of the widow that they were not on friendly terms for a month before the adoption, the defence evidence that the widow left the house some time in February 1921 may well be true; and within a month after going to P. W. 2's house the adoption took place.

The widow who never thought of making any adoption for about a year after her husband's death quarrels with her daughters, goes to P. W. 2's house and adopts his son and she does not consult any of the other sapindas. From these circumstances it may well be inferred that the adoption was made by the widow with a view to spite her daughters and not on account of any consideration for the spiritual welfare of her husband.

It is more than probable, as suggested by the District Judge, that the idea of adoption may well have been suggested by P. W. 2 for his own ends. I have already said that the othersapindas were not consulted. D. Ws. 4 and 5, cousins of Muthu Goundan, state that they were given no notice whatever that an adoption was either contemplated or performed. In the ordinary course P. W. 2 will not become entitled to his deceased brother's properties. But if his son is given in adoption, he being young, P. W. 2 would virtually acquire control over the property and will be in a position to benefit himself. Swayed by considerations such as these, he took advantage of the ill-feeling of the widow towards her daughters and gave consent to the adoption. On 15th July 1922 the widow executed a simple bond for Rs. 2,000 in favour of her brother-in-law, P. W. 2. This was followed on 11th October 1924 by a hypothecation bond in his favour hypothecating most of her properties.

The widow's explanation that these transactions were entered into with P. W. 2 to meet the expenses incurred in connexion with the criminal case in which her husband was involved along with P. W. 2 and many others does not seem to bear the impress of truth. In these circumstances it is difficult to hold that P. W. 2 gave his consent to the adoption freely and without any desire to benefit himself. Having regard to all the circumstances, I am satisfied that the adoption in this case did not take place in consonance with Hindu law and that it must be held bad in law on account of the corrupt and capricious motives of P. W. 2, the nearest sapinda, as well as of P. W. 1, the widow. As the adoption is not proved to be valid, the plaintiff's suit was rightly dismissed by the lower Court and the appeal is

also dismissed. The appellant will pay the costs of the respondents.

Jackson, J.—I agree. The plaintiff (appellant) sues for a declaration that he is the validly adopted son of one Muthu Goundan. In the plaint he says he was adopted with the consent of sapindas, and the wife of Muthu Goundan was also authorized by her husband in his lifetime. This authorization by the husband has been found to be untrue, and the learned Advocate-General on appellant's behalf does not seriously traverse that finding of fact. He relies upon the consent of Muthu Goundan's brother who is also natural father of the plaintiff and his 2nd witness, Vellayana Goundan. But this consent has never been proved. In the deed of adoption the widow states that her brother-in-law fully consented—Ex. D—and Vellayana has attested this deed—but neither the widow nor Vellayana were questioned about their consent when they were in the box. Vellayana says "She asked me to give her the boy before the adoption took place. I consented." But from this sole sentence it cannot be inferred that she asked for his consent to the adoption and he applied his mind to the matter. Suppose she asked some stranger for the boy, and he used these words, "She asked me for my boy and I consented," would it for a moment be argued that the stranger had been consulted about, and had agreed to, the propriety of an adoption? And there is even less room for such presumption in the case of Vellayana; for he has made it abundantly obvious that he was impressed with the idea that the husband had given his consent. He not only swears so in this suit; but in the criminal Court proceedings in September 1921—Ex. 8—he swore that the widow adopted his son according to his brother's wishes. Where then was the need for his consent?

On this short point the appellant must fail, and it is a point of substance going to the root of the matter; not a mere technicality. But even assuming that there was the requisite consent, as the learned District Judge seems to have assumed, his ultimate decision that the adoption is invalid is, in my opinion, correct. The vital question in these cases is whether the adoption is made in the proper and bona fide performance

of a religious duty and neither capriciously nor from a corrupt motive.

The Judicial Committee in the Ramnad case [*Collector of Madura v. Moothoo Ramalinga* (4)] with what is sometimes overlooked a very special insistence upon the necessity of dealing with each case upon its own facts, clearly laid down this principle, adding that there should be such evidence of the assent of kinsmen as suffices to show that the act is done bona fide. In *Velanki Venkatakrishna Rao v. Rama Lakshmi* (2) this passage is cited, and it is explained that there should be support to the inference that the widow in making the adoption was actuated neither by capricious nor corrupt motives, though nice questions as to the particular motives should not be introduced. As an avowed explanation this fresh passage is not, if I may say so, as helpful to me as I could wish; but apparently it means that the question of the widow's motives is to be decided on broad lines. It certainly does not mean that the widow's motives are irrelevant; for it states in terms:

"sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives."

Now in the present case the learned Judge finds that the widow was not fulfilling a religious duty, but was acting entirely from secular motives in order to spite her daughters and their husbands, and in order to defeat their interest. As my learned brother has pointed out, there is no reason for differing from this finding and therefore the adoption must be held to be invalid. Of course if the consent of Vellayana had been proved, and if he, as representative of the reversioners, was consenting to an adoption which would defeat his and their interest, his consent would be strong support to the inference that the widow had acted bona fide. But in this case the interest of the reversioners is so remote as to be negligible; and Vellayana so far from defeating would on the contrary have advanced his own interests, since nobody denies that a father betters his position if he can persuade a well-to-do family to adopt his boy. Therefore the proof of Vellayana's consent, while it would be valuable, and indeed essential, for establishing the validity of the adoption, would in the circumstances of

1. (1867-69) 12 M I A 397 (P C).

this family, be quite insufficient to show that the widow acted bona fide.

Madhavan Nair, J.—As we have dismissed the plaintiff's suit, it is not necessary to consider whether the will set up by defendant 1 has been proved to be genuine or not. We therefore dismiss the memorandum of objections, but the appellant must pay the costs of respondent 1 on the memo. Costs only on one memo or objections.

P.R.S./M.N. *Appeal dismissed.*

* A. I. R. 1933 Madras 544

WALSH, J.

Isidore Fernando—Plaintiff — Appellant.

v.

Thomma Anton Michael Fernando—Defendant—Respondent.

Appeal No. 468 of 1931, Decided on 9th December 1932, against order of Sub-Judge, Tuticorin, D/- 16th September 1931.

* Civil P. C. (1908), S. 13 (b)—*Ex parte decree under summary procedure of Ceylon is not on merits within S. 13 (b).*

An ex parte decree obtained under the summary procedure of the Court of Ceylon is not one on the merits. Besides it is not a judgment as is required under S. 13. A suit therefore based on such ex parte decree does not satisfy the conditions of S. 13 (b) and must be dismissed: 40 *Mad* 112 (P C) and 50 *Mad* 261 (P B), *Rel on; Case law discussed.* [P 545 O 1]

M. Patanjali Sastri—for Appellant.

K. R. Rangaswami Ayyangar and *S. Rangachari*—for Respondent.

Judgment.—The plaintiff-appellant in this case instituted a suit against the defendant-respondent as the assignee of a foreign judgment passed by the District Court of Colombo on a promissory note for a sum of Rs. 1,300 with interest. The suit in Ceylon was filed under the summary procedure, Chap. 52, Ceylon Ordinance No. 2 of 1889. The defendant did not appear to obtain leave to defend that suit in time, and so an ex parte decree was passed. He then appeared, asked for the matter to be re-opened and for leave to defend the suit. The Court noted as follows:

"Defence unsatisfactory. Leave to defend will be granted on defendant giving security in Rs. 1,300 on or before 12th January 1925."

The security was not furnished and on 14th January 1925 the entry was: "Mr. Sivaprakasam moves for judgment. Allowed. Decree entered." Execution was taken out and notice served on the defendant. The plaintiff then assigned

his decree to the present plaintiff-appellant, who instituted the suit under S. 13, Civil P. C., on the foreign judgment. Defendant was then living in Tuticorin. Issue 1 was:

"Whether the foreign decree relied upon in the plaint is not a decree on the merits? If not, is the suit maintainable?"

The trial Court found the issue in favour of the plaintiff and gave a decree as prayed for with costs. But the lower appellate Court held the issue in favour of the defendant and remanded the suit for fresh disposal on the merits. Against this decree the present appeal has been filed. The precise point taken in the present appeal is whether a decree under the summary procedure of the Court of Ceylon as distinguished from an ex parte decree under the regular procedure is one on the merits, and it appears to be barren of authority. *Mahomed Kassim & Co. v. Seeni Pakir* (1) is a case in which the Full Bench overruled the decision in *Jonoo Hassan v. Mahamad Ohuthu* (2), in which a decree under the summary procedure had been held to be an ex parte decree on the merits. If we take the actual words of reference to the Full Bench in *Mahomed Kasim & Co. v. Seeni Pakir* (1):

"Does a suit lie in this country on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence,"

then the answer to that question by the Full Bench would settle the matter against the appellant. But the argument is raised that the distinction between summary procedure and regular procedure was not considered in that case which related to a decree under the regular procedure. I shall therefore set forth in some detail the arguments raised by the learned advocate for the appellant. S. 7, Ordinance 2 of 1889 of Ceylon, runs as follows:

"The procedure of an action may be either regular or summary.

Illustrations.—In actions of which the procedure is regular, the person against whom the application is made is called upon to formally state his answer to the case which is alleged against him in the application before any question of fact is entertained by the Court, or its discretion thereon is in any decree exercised. In actions of which the procedure is summary, the applicant simultaneously with preferring his application supports with proper evidence the statement of fact made therein; and if the Court in its discre-

tion considers that a prima facie case is thus made out:

"(a) Either the order sought is immediately passed against the defendant before he has been afforded an opportunity of opposing it, but subject to the expressed qualification that it will only take effect in the event of his not showing any good cause against it on a day appointed therein for the purpose; (b) or a day is appointed by the Court for entertaining the matter of the application on the evidence furnished and notice is given to the defendant that he will be heard in opposition to it on that day if he thinks proper to come before the Court for that purpose."

Section 703 of the Ordinance makes a summary procedure applicable to promissory notes and prescribes a form of summons, Form No. 19, whereas the form of summons for regular procedure is form No. 16. S. 704, 705, 706 and 707 deal with summary procedure. S. 85 deals with the default of the defendant to appear in a suit. At this point may be noted two differences between the Ceylon procedure and that under our Civil Procedure Code. The fact is that, so far as I can see, verification of the plaint required here under O. 6, R. 15, Civil P. C., is not required in Ceylon where under S. 46 every plaint presented by a proctor on behalf of a plaintiff shall be subscribed by such proctor, and there is no further requisite but if the plaintiff signs it himself the signature must be verified by an officer of the Court (S. 46). The second difference is that by both under the summary procedure and the regular procedure, if the defendant is absent the Court grants a decree without taking any further evidence, and in *P. L. S. Firm, Colombo v. Sulaiman* (3), Odgers and Wallace, JJ., held, dealing with the case of regular procedure under S. 85, that the Court had no option but to do so. Looking at the illustrations in S. 7 one other point may be mentioned under the summary procedure, that there must be an affidavit as well as the plaint. In *P. L. S. Firm, Colombo v. Sulaiman* (3), Odgers, J., noted that there was no explanation how there came to be an affidavit in that case which was one under the regular procedure. He was not prepared to rely on the affidavit to make the decree one on the merits. He says:

"Another possible explanation is that this suit though begun as a regular suit—and we know that all the defendants except two originally appeared and filed answer—was, after the dis-

1. AIR 1927 Mad 265=100 I C 555=50 Mad 261 (F B).

2. AIR 1925 Mad 155=82 I C 425=47 Mad 877.

3. AIR 1930 Mad 149=123 I C 579.

missal of the suit against them, converted into a summary suit and it will be remembered that in summary suits affidavit is required."

Although it was argued before me that a regular suit cannot be turned into a summary suit, it has to be remarked that on the copy of Ex. A, the plaint in the Ceylon Court, it is noted that the suit was instituted as a regular suit. There is no indication how it came to be turned into a summary suit, and possibly the entry "regular" is a mistake. Noting these points I proceed with the arguments of the appellant. Under S. 7 of the Ordinance, when the application is made by the plaintiff he is to support "with proper evidence the statement of fact therein": vide illustration to S. 7. This appears simply to mean an affidavit and the document (S. 705); and if the Court in its discretion considers that a *prima facie* case is thus made out:

"(a) Either the order sought is immediately passed against the defendant before he has been afforded an opportunity of opposing it, but subject to the expressed qualification that it will only take effect in the event of his not showing any good cause against it on a day appointed therein for the purpose; (b) or a day appointed by the Court for entertaining the matter of the application on the evidence furnished, and notice is given to the defendant that he will be heard in opposition to it on the day if he thinks proper to come before the Court for that purpose."

It is pointed out that the Court in a regular procedure has, under the first illustration, no discretion as to the course to be pursued, but in summary suits it has an alternative procedure. I find it somewhat difficult to be sure of the exact meaning of the first illustration. Dealing with summary procedure under S. 705 of the Ordinance the plaintiff is required,

"on presenting the plaint, to produce in the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon. If the instrument appears to the Court to be properly stamped, and not to be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the Court may in its discretion make an order for the service on the defendant of the summons above mentioned."

The first part of the illustration to S. 7 of the Ordinance which deals with regular procedure cannot surely mean that the Court must issue summons even though the document is not properly stamped, or the claim is barred *prima facie* by limitation. Therefore the illustration which in its strict terms would forbid the Court from exer-

cising any discretion on this matter seems to be too wide if read in this sense. Consequently I find it somewhat difficult to be certain of the precise degree of distinction between the discretion in regular procedure and in summary procedure in scrutinizing the plaint.

The learned advocate for the appellant, Mr. Patanjali Sastri, said that it can anyhow be gathered that the Court has to apply its mind more precisely before issuing summons in the summary procedure than in the regular procedure and that must I think be admitted. There must be an affidavit filed along with the plaint and the documents relied on which presumably constitute "proper evidence." For the respondent emphasis is laid on the difference between Forms Nos. 16 and 19. Form No. 16 says

"that in default of appearance the action will be proceeded with and heard and determined in your absence."

In Form No. 19 for summary procedure it is said:

"In default whereof the plaintiff will be entitled at any time after expiration days to obtain a decree."

Against this it is argued that in *P. L. S. Firm, Colombo v. Sulaiman* (3), speaking about the difference of these summons Wallace, J., said that

"the form of the decree nisi No. 22 affords no hint that the merits of the matter in issue in the suit have been considered."

The argument which was there sought to be advanced was that the words "in default of your so appearing the action will be proceeded with and heard in your absence" in Form No. 16 pointed to an adjudication on the merits, but Wallace, J., held that

"the decision remains a decision for default of appearance and not on the merits."

So although it was there sought to be argued that while Form No. 19 referred to a decree not on the merits; and Form No. 16 referred to one on the merits, it was held that the decision under Ss. 85, 701 and 705 was not on the merits. Here the reverse argument is sought to be raised, and it is argued that though the Form of summons No. 19 appears to refer to an *ex parte* decree, not to one on the merits, that form must be read with the actual procedure prescribed in the Ordinance: vide remarks of Wallace, J., at p. 356. On the other hand it is very strongly argued

for the respondent that to accept the argument for the appellant involves that the Court decides the suit before any notice has been issued to the defendant. Again it is strongly argued that, as observed by Wallace, J., in *P. L. S. Firm, Colombo v. Sulaiman* (3):

"When the Court has taken evidence and decides on evidence it must write a judgment: vide Ss. 184 and 189,"

and that S. 187 says:

"the judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

No doubt while there is no judgment in this case the want of a judgment was taken into account in that case to prove that the decision was not one on merits in a suit under the regular procedure. Both the arguments seem to be equally applicable to a case under the summary procedure. At this point I may notice an argument for the respondent which does not appear to have been raised in any of the previous cases, namely, that S. 13, Civil P. C., speaks of a "judgment" and S. 2 (9) defines a judgment as the statement given by the Judge of the grounds of a decree or order. It is not possible to know in all the cases referred to whether there was a judgment or not and the words "decree" and "judgment" seem to have been loosely used in those cases, but *Janoo Hassan v. Mahamad Ohathu* (2), was certainly a decree on a summary procedure, and the argument does not appear to have been raised there. On the other hand it is equally true that the argument raised before me, which seeks to show that an ex parte decree in a summary suit stands on a higher level than one under the regular procedure, was not raised either in *Janoo Hassan v. Muhamad Ohathu* (2), or in any other case, although Mr. Patanjali Sastri admits that the conclusion reached in *Janoo Hassan v. Mahamad Ohathu* (2) could have been reached by this short cut which was not thought of. In fact it was assumed in all these trials that if an ex parte decree in the regular procedure under S. 704 was not one on the merits, a fortiori one under the summary procedure was not so. To return then to the argument drawn from the absence of a judgment, is the order given by the Ceylon District Court a judgment?

I feel no doubt that it is not a judgment.

The entry dated 14th January 1925 is simply as follows: "Mr. Sivaprakasam moves for judgment. Allowed. Decree entered;" and it certainly appears from the whole scheme of the Code and the words, especially of S. 704 and Form No. 19, that no judgment is contemplated in an ex parte summary procedure, for even in an ex parte regular procedure there is no judgment as is seen from the remarks in *C. Burn v. D. T. Keymer* (4) and *P. L. S. Firm, Colombo v. Sulaiman* (3) quoted above. It was argued for the appellant that "judgment" and "decree" mean the same thing, and that the words have been indifferently used in judgments of this Court discussing such cases, but it seems to me that, while under the Ceylon Code it may be quite possible and proper to give an ex parte decree both in summary procedure and regular procedure without any judgment, this will not be of any avail against the express words of S. 13, Civil P. C., which requires "a judgment." In fact it may very well be that the reason for requiring a judgment and not merely a decree is that such a judgment will be of assistance in enabling the Court to gather whether S. 13 (b), Civil P. C., applies, and whether there has been a decision on the merits of the case or not. In any case I am bound by the clear words of the Civil Procedure Code. I shall now deal briefly with some of the cases referred to. As I said, if we regard the decision by the Full Bench in *Mahomed Kasim & Co. v. Seeni Pakir Bin Ahmed* (1), in the terms of the reference, the decision is clearly against the appellant. But if a distinction is to be drawn between a decree in a summary and in a regular suit, there is practically no authority since *Janoo Hassan v. Mahamad Ohathu* (2) which referred to a summary suit has been generally overruled by the Full Bench case: *C. Burn v. D. T. Keymer* (4), the decision of a single Judge, quoted for the appellant, must be held to have been overruled by *Abdul Rahiman v. Mahomed Ali Rowther* (5).

English cases are of very little use because as pointed out by Venkatasubba Rao, J., in *Mahomed Kasim & Co. v. Seeni Pakir Bin Ahmed* (1), Indian law

4. (1913) 7 L B R 56=20 I C 971.

5. A I R 1928 Rang 319=116 I C 405=6 Rang 552.

is more stringent than the English law and is governed strictly by S. 13 (b), Civil P. C., 1908. I do not think we can get much assistance from the general remarks in *Jones v. Stones* (6). In fact at one time English cases went much further in basing action on foreign judgments. The rule that the decision must have been on the merits is comparatively modern: *Cole v. Harper* (7), is clearly distinguishable. Except *C. Burn v. D. T. Keymer* (4) which, as I pointed out, must be held to have been overruled by *Abdul Rahiman v. Mahomed Ali Rowther* (5), there is only one decision which can be quoted for the appellant: *Ishri Prasad v. Sri Ram* (8). Even that judgment had considered a registered document in coming to the conclusion of the genuineness of the plaintiff's claim. In *Viswanatham Reddi v. Keymer* (9), reported in *Keymer v. Viswanatham Reddi* (10), it was held that when the defendant refused to answer interrogatories which the plaintiff was allowed to exhibit calling on the defendant to speak as to some of the material matters in dispute and the defence was thereupon ordered to be struck out and the defendant to be placed in the same position as if he had not defended and judgment was entered for the plaintiff, this was not a decision on the merits of the case within the meaning of S. 13 (b), Civil P. C.

It has been argued for the respondent in this case that the failure of the defendant to give necessary security and consequently his written statement not being taken into account and his not being allowed to defend the case, brings the case, under this aspect, within the ambit of the decision in *Keymer v. Viswanatham Reddi* (10). But it has been pointed out I think correctly by Mr. Patanjali Sastri for the appellant that there is a clear distinction between a defence, which the party has the right to make being struck off, and permission to defend—being a thing which he gets by special leave of the Court—being refused owing to his having failed to furnish security.

I agree therefore that this case can.

6. (1894) A C 122=63 L J P C 68=70 L T 174.
7. A I R 1919 All 228=50 I C 780=41 All 521.
8. A I R 1927 All 510=105 I C 186=50 All 270.
9. (1916) 39 Mad 95=27 I C 386.
10. A I R 1916 P C 121=33 I C 683=44 I A 6=40 Mad 112 (P C).

not be said to be directly covered by the decision of the Privy Council in *Keymer v. Viswanatham Reddi* (10), but it is indisputable, that the Privy Council based its decision in that case on very general grounds and not on technicalities. It was pointed out that the defendant had denied several allegations made by the plaintiff, but there was no single matter considered and adjudicated at all, and it appeared to their Lordships that

"no such decision as that can be regarded as a decision given on the merits of the case within the meaning of S. 13 (b), Civil P. C."

Here the defendant put in a statement denying the truth of several of the plaintiff's allegations, and had in support of it an affidavit, and, as stated by the learned Subordinate Judge not one of those matters was ever considered: vide paras. 3 and 13 of the lower appellate Court's judgment. In fact the appellant is bound on his own argument to maintain that the Judge had not, and could not have considered any of those matters at that stage because the argument is based on the fact that his decision was reached on the presentation of the plaint, and before any notice at all was given to the defendant: *Mahomed Moideen v. Chintamani Chettiar* (11) was a case of a decree on consent which acts as estoppel. *Oppenheim & Co. v. Mahomed Haneef* (12), has been dealt with in 50 Mad. and has not much bearing on the present application. The Full Bench case was followed in *Arunachalam Chettiar v. Muhammad Salihu Marakayar* (13).

Not a single decision has been quoted before me in which an ex parte decree obtained under the summary procedure has been held to be one on the merits, whereas an ex parte decree obtained on the regular procedure under S. 704 of the Ordinance has been held by the decision of the Full Bench to be not one on the merits. I am also impressed by the fact that the Privy Council in *Keymer v. Viswanatham Reddi* (10) based their decision on very broad grounds, and I am also unable to detect any flaw in the argument, which has never apparently been raised before, that our Code

11. A I R 1929 Mad 469=120 I C 751=52 Mad 503.
12. A I R 1922 P C 120=74 I C 616=49 I A 174=45 Mad 496 (P C).
13. A I R 1928 Mad 133=107 I C 810.

distinctly requires that "a judgment" and nothing less is what is required by S. 13, Civil P. C. There is no judgment in this case. After a careful consideration of the very able arguments advanced on both sides, I consider that the learned Subordinate Judge is correct. The decree is confirmed and the appeal is dismissed with costs.

Memorandum of objections to be heard on 13th December 1932.

The memorandum of objections filed by the respondent coming on for hearing on this 13th day of December 1932 the Court delivered the following judgment on the said memorandum of cross-objections.

The order of remand must be set aside. The contention that the suit can be tried on the merits is opposed to the ruling in *Arunachalam Chettiar v. Muhammad Salihu Marakayar* (13). The suit is laid on the foreign judgment and if the judgment does not satisfy the condition of S. 13 (b) it must be dismissed. The memorandum of cross-objections is allowed with costs and the suit will stand dismissed with costs.

P.R.S./R.K. Order accordingly.

A. I. R. 1933 Madras 549

CURGENVEN, J.

Medarametla Kotayya—Petitioner.

v.

Nidamanuru Yellamanda and others—Opposite Parties.

Civil Revn. Petns. Nos. 1544 of 1928 and 693 of 1930, Decided on 24th February 1933, from orders of Dist. Judge, Guntur, D/- 17th September 1929.

(a) **Madras Hindu Religious Endowments Act (1927), S. 9 (11)—Service inam held by temple servant falls within definition.**

Ordinarily speaking the word "endowment" is restricted to property the title to which vests in the institution endowed. But this definition is very wide and therefore a service inam held by a temple servant will fall within it.

[P 549 C 2]

(b) **Madras Hindu Religious Endowments Act (1927), S. 44 — Land simply forming emolument of person liable to perform service—Court cannot make order in respect of such service under S. 44.**

Under S. 44 the endowment is to be of a peculiar nature, namely, merely charge on property. Where therefore no payment to the institution has to be made at all, and the land simply forms the emoluments of the person liable to perform the service and as the phrase "merely a charge on the property" necessarily cannot note a liability to make a payment in some shape or form to the institution, and probably a payment the extent

of which is more or less fixed or ascertainable. S. 44 will not enable the Court to make an order in respect of services to a temple which are remunerated by a service inam. [P 549 C 2; P 550 C 1]

V. S. *Narasimhachariar* — for Petitioner.

S. *Narayana Rao* — for Opposite Parties.

Judgment.—In the more recent of these two petitions the question has been raised whether S. 44, Madras Hindu Religious Endowments Act, will enable the Court to make an order in respect of services to a temple which are remunerated by a service inam. In the earlier petition this point was not specifically raised, but if it has to be answered in the negative in the one, clearly I should not be justified in interfering with the learned Judge's order on the merits in the other. The facts alleged are that the respondents, who are temple pipers having service inams, refused to perform service from the year 1922 and that the trustee, who is the petitioner, was obliged to obtain and pay for the services of other pipers, and the sum so paid he wishes to recover under S. 44. The material part of S. 44 provides that where an endowment for the performance of a service connected with a temple consists merely of a charge on property and there is failure in the due performance of the service, the trustee may require the person in possession of the property to pay the expenses incurred in causing the service to be performed otherwise. With this has to be read the definition of "endowment" under S. 9 (11) of the Act. An endowment includes (I am going to quote only the relevant portion) "property given or endowed for the performance of any service connected with the temple." Ordinarily speaking the word "endowment" I think is restricted to property the title to which vests in the institution endowed. But this definition is very wide and I am not prepared to say that a service inam held by a temple servant would not fall within it. But under S. 44 the endowment is to be of a peculiar nature, namely, merely charge on property. The learned District Judge has held that the endowment in the present case consists of something else than a mere charge on property. There undoubtedly exist instances in which the endowment is

clearly in the nature of a charge and a charge only; that is to say, where otherwise ordinary land is made subject to such a charge, the proceeds of which are to be paid by the holder to the institution. In the present case no payment to the institution has to be made at all, and the land simply forms the emoluments of the person liable to perform the service. I think that the phrase "merely a charge on the property" necessarily connotes a liability to make a payment in some shape or form to the institution, and probably a payment the extent of which is more or less fixed or ascertainable. In the case of an inam land no such payment is in question, nor indeed does there exist any charge to secure it. I conclude therefore that whatever other remedies may be open to the trustee, he cannot proceed under S. 44. Hindu Religious Endowments Act. In these circumstances I cannot revise the orders of the lower Courts and I dismiss the revision petitions with costs; pleader's fee only in C. R. P. No. 693 of 1930.

P.R.S./V.S. *Petition dismissed.*

*** * A. I. R. 1933 Madras 550
Full Bench**

RAMESAM, ANANTAKRISHNA AYYAR
AND CORNISH, JJ.

Sowntharapandian Ayyangar and others—Plaintiffs—Appellants.

v.

Periaveeru Thevan and others—Defendants—Respondents.

Second Appeal No. 875 of 1929, Decided on 17th January 1933, against decree of Sub-Judge, Madura.

*** * (a) Hindu Law—Adoption—Widower adopting son after death of his wife—Wife though not present at time of adoption still becomes mother of adoptee—Adoptee inherits to relations of adoptive mother.**

The adopted son of a Hindu whose only wife had died before the adoption becomes the son of that wife so as to inherit as such to the relations in her father's family. The contention that where a boy is adopted by a male, only the wife who has then in existence and who took part in the act of adoption along with her husband can be regarded as the mother and therefore in the case of an adoption by a widower the adopted boy has no mother is not sound and hence untenable: *A I R 1926 Mad 1203, Affirmed, Case law discussed.* [P 551 C 1]

*** (b) Hindu Law—Texts—Words "prathigrahithriyamatha" in Dattaka Mimamsa are used in general sense.**

The phrase "prathigrahithri yamatha" in Dattaka Mimamsa, S. 6, verse 50, is used in the

sense of an adoptive mother and not in its etymological sense. Simply because the verse uses the word "prathigrahithri" in attempting to exclude the natural ancestors, it cannot be inferred that the receiving mother only can be the adoptive mother and no other. [P 553 C 2]

Advocate-General and N. Rajagopala Ayyangar—for Appellants.

R. Kesava Ayyangar—for Respondents.

Ramesam, J.—The facts of the case are simple. One Pandi Aiyangar died in 1890 leaving his widow Pichai Ammal and daughter Kothai Ammal. Kothai Ammal was married to one Doraiswami Iyengar. She predeceased her mother in 1900 leaving a male child who died shortly after. Pichai Ammal died in 1923. Meanwhile on 26th May 1910 Doraiswami Ayyangar adopted defendant 2, Alwar Iyengar. Defendant 2 claims to succeed to the property of Pandi Aiyangar on the death of Pichai Ammal on the ground of his being related as daughter's son to Pandi Iyengar by reason of his adoption. The plaintiffs are persons who would be reversioners to the estate of Pandi Iyengar if defendant 2 cannot claim by reason of his adoption. Both the lower Courts found in favour of the adoption and dismissed the plaintiffs' suit. When the case came on before our learned brother Sundaram Chetty, J., he referred the case to a Bench of two Judges noting that the decision in *Sundaramma v. Venkata Subbier* (1) is in favour of the respondent, but the view of Devadoss, J., in *Venkata Subbier v. Sundaramma* (2) which was reversed in that decision on Letters Patent appeal is in favour of the appellant. He also referred to *Veeranna v. Sayamma* (3) as possibly against the suggestion that the adoption will relate back to Kothai Ammal's lifetime. He referred the case to a Bench of two Judges who referred it to a Full Bench.

The decision in *Veeranna v. Sayamma* (3), in my opinion, does not give any trouble; nor is there any need to rely on any theory of the adoption relating back to Kothai Ammal's lifetime. When Pichai Ammal died in 1923 and when succession to the estate of Pandi Aiyangar opened defendant 2 was in existence.

1. *A I R 1926 Mad 1203=97 I C 145=49 Mad 941.*
2. *A I R 1925 Mad 340=85 I C 918.*
3. *A I R 1929 Mad 296=118 I C 821=52 Mad 398.*

If he can be regarded as the daughter's son of Pandi Aiyangar at that time, he can succeed to the property; if he cannot be so regarded his claim has to be negatived. I do not see any need to date the adoption back to any earlier period.

The learned Advocate-General who appears for the appellant contended that defendant 2 cannot be regarded as the daughter's son of Pandi Iyengar because he cannot be regarded as the son of Kothai Ammal. He contends that because Kothai Ammal died in 1900 and the adoption was made in 1910 Alwar cannot be regarded as the son of Kothai Ammal. His contention is that where a boy is adopted by a male, only the wife who was then in existence and who took part in the act of adoption along with her husband can be regarded as the mother. Therefore in the case of an adoption by a widower the adopted boy has no mother. Neither the predeceased wife (nor, if there were more, any one of them) nor any wife whom he marries subsequent to the adoption can be the mother of the adopted boy. This is the primary argument. He develops this primary argument by pointing out some difficulties if the opposite view is adopted. He puts the question: If the opposite view is upheld which of the predeceased wives, when there were many, should be regarded as the mother? And similarly which of the subsequently married wives if there are more than one should be regarded as the mother: In my opinion the difficulties in working out the details of the opposite view are not strictly relevant though they may be used in support of an argument showing its inconvenience. Those difficulties do not arise in the present case, for Doraiswami Iyengar had married only one wife. In my opinion therefore the appellant must succeed on the strength of his primary argument, namely, only the wife that actually participates in the adoption can be regarded as the mother and the difficulties in the acceptance of the opposite view need not at this stage be referred to. If the main argument be found to be correct, without adverting to these difficulties the appellant succeeds. But if the main argument cannot be upheld, the further possible difficulties in a case of plurality of wives do not arise in this case. I will therefore proceed to con-

sider what I describe as the main argument of the appellant. He concedes that when a widow adopts, the adoption enures to the benefit of the deceased husband. But he argues this analogy does not apply when a widower adopts and the adoption by the widower does not enure to the benefit of the deceased wife. The reason for this distinction according to him is that whereas the theory of the Hindu law and the Hindu Social system is that the husband even after his death survives in his wife, there is no such theory that the wife when she dies survives in her husband and therefore only the wife of the adopter who actually participates can be the mother.

Now, the object of adoption is to have a substitute for a natural born son. Accordingly the theory of Hindu lawyers has always been that apart from the fiction of the adoption itself the adopted son should be as complete a substitute for the natural born son in all respects as one can possibly make: vide *Nagindas Bhagwan Das v. Bachoo Harkissen Das* (4). In other respects, except for the fact of his birth, he should occupy the position of a natural born son; there should be nothing extraordinarily peculiar or unnatural about him. One of the most inevitable features about every human being is that he must have two parents, i. e., a father and a mother. Similarly every adopted son should have an adoptive father and an adoptive mother, and if there is no difficulty in pointing to an adoptive mother of the boy one ought to do so unless there is something in the texts or the decisions compelling us to hold that only the person who actually participated in the adoption can be regarded as the mother. As already mentioned, the decision in *Sundaramma v. Venkatasubbier* (1) of Phillips and Madhavan Nair, JJ., is against the appellant. But the appellant attacks the correctness of that judgment on the ground that the learned Judges have not given full weight to the verse in Dattaka Mimamsa, S. 6, Verse 50, have not properly construed the passage, and have given undue weight to S. 1, Verse 22 of the same book. I will first refer to the former passage because this furnishes the main

4. A I R 1915 P C 41=43 I A 56=40 Bom 270
32 I C 403 (P C).

ground of the appellant's argument. The verse runs thus :

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, etc."

Here the original for the word "adoptive mother" is *prathigrahithri yamatha*. Now the etymological meaning of the word "prathigraha" is undoubtedly taking or receiving. As all adoptions begin with a taking or a receiving, once the adopted boy becomes a member of the adopting family, the members of the family may be described as adoptive father, adoptive mother, adoptive grandfather and so on and all these may be described as "prathigrahithri" father, "prathigrahithri" mother and so on, such expressions being merely one method of describing the adoptive father and adoptive mother and not necessarily involving that the particular relation is the person who has taken. At present I only indicate that the etymological meaning may not be the strict construction of the term. We have to see therefore whether the phrase in the verse of Dattaka Mimamsa should be taken in the etymological sense or generally in the sense of an adoptive mother. Now it is noteworthy that this text whenever it has been translated has always been translated with the word "adoptive mother" and not "receiving mother." The first translation was by Mr. D. Sutherland who translates it in that way. His translation is to be found in Stoke's Hindu Law books. In *Uma Sankar v. Kali Komul Mozumdar* (5) a Full Bench judgment of the Calcutta High Court, Mitter, J., delivered the leading judgment. At p 260 he discusses verses 50 to 53 of Dattaka Mimamsa. S. 6, Verse 53, refers to the theory underlying the adoption, namely, that there must be a substitute for the legitimate son. Then referring to Verses 51 and 52 it was pointed out that the author says there is no difference between the adopted and the legitimate son in respect of his relationship to his adoptive father's family, etc. At p. 261 finally Mitter, J., gives Mr. Sutherland's translation of Verse 50 without any amendment of the translation as the learned Judge has previously done in the case of Verse 53.

But apart from the translation of the
5. (1881) 6 Cal 256=7 C L R 145 (F B).

particular verse, one may perhaps look at the context in which the passage occurs. The author was discussing the effects of an adoption. In the previous verses he was referring to other kinds of affiliation such as *Dwyamushyam* and *Krithrima*, etc., and he refers to the adoption strictly so-called as *Sudha Dattaka*, i. e., absolute adoption and is contrasting the effects of the other kinds of affiliation with the strict kind of adoption and he points out that the adopted boy is completely severed from his natural family. The object of the verses is to say that he is a perfect substitute for a legitimate son, that he has nothing more to do with his natural family and he becomes related to all the members of the adopting family as if he were born there. The text clearly shows that the phrase *prathigrahithri yamatha* was used in the sense of an adoptive mother and not in its etymological sense. The decision in *Uma Shankar v. Kali Komul Mozumdar* (5) which established the right of the adopted son to succeed to the other relations of the adoptive mother was affirmed by the Privy Council in *Kali Komul v. Uma Sanker* (6). In Bhatlachary's Hindu Law, Vol. 1, p. 357, this verse of Dattaka Mimamsa was quoted and after translating thus :

"only the forefathers of the mother that accepts in adoption are also the maternal grandsires of the son adopted and the rest," the learned author observes : "In the above passage, the word 'eva' (only) is meant to exclude the paternal ancestors of the natural mother."

Who the ancestors are we have to find otherwise, not certainly by the use of the word "prathigrahithri" in this verse. If a wife of the adoptor and her father can be regarded as adoptive mother and adoptive maternal grandfather, they are the only mother and maternal grandfather. That is what the verse says and the natural mother and natural maternal grandfather should be entirely forgotten. Simply because the verse uses the word "prathigrahithri" in attempting to say so, i. e., in attempting to exclude the natural ancestors, we are not to infer that the receiving mother only can be the adoptive mother and no other. But there is another way of approaching the question and of testing whether the word "prathigrahithri" must

6. (1884) 10 Cal 232=10 I A 138=4 Sar 458 (P C).

be regarded as used in its etymological sense. Even where the adoptive father is referred to in Dattaka Mimamsa he is referred to as "prathigrahithri" and one may argue that as it is not always a male that takes the boy in adoption because a widow can also adopt, the word "prathigrahithri" is not used in its etymological sense but used in a general sense of an adoptive father. But the appellant objects to this inference that according to the doctrine of Dattaka Mimamsa a widow cannot adopt at all and it is by reason of other texts accepted by custom and judicial decisions that the widow can adopt in Southern India and in some other provinces. In fact the strict view of Dattaka Mimamsa is still followed in Mithila.

I therefore turn to the Dattaka Chandrika to see if I can get a similar argument from that work. There also in S. 3, v. 17 the adopted son is referred to as the Sudha Dattaka, absolute adopted son, in contrast to other forms of affiliation and it was said that he offers oblations to the father and the other ancestors of the adoptive mother only. This passage corresponds to S. 6, v. 50, of the Dattaka Mimamsa and uses the same word *prathigrahithri yamatha*. But it cannot be said of the Chandrika that an adoption by a widow is prohibited. In S. 1, v. 31 Dattaka Chandrika, expressly quotes the text of Vasishtha: "Let not a woman either give or receive a son unless with the assent of her husband." In v. 32 he proceeds to say that where there is no prohibition the assent is implied and for this purpose he relies on the text of Yajnavalkya. This text of Yajnavalkya and this interpretation by the Dattaka Chandrika are accepted in Bombay, among the Nambudris of Southern India and so on: vide *Vasudevan v. Secretary of State* (7). Anyhow it is clear that Dattaka Chandrika expressly contemplates adoption by a widow and it always refers to an adoptive father by describing him as "prathigrahithri." It is clear that the word is not used in its etymological sense but in a general sense: vide vv. 14 to 17, S. 3. The learned Advocate-General then argues that the Privy Council have decided the

case in *Annapurni Naichiar v. Forbes* (8) in the way they did because of the word "prathigrahithri" in the texts. I will now examine this contention. Firstly I take up the judgment of the High Court in *Annapurni Nachiar v. Collector of Tinnevely* (9). At p. 281 Best, J., says:

"It is difficult to understand why he should have no direction in selecting one of his wives to join with him in making an adoption during his lifetime."

Again at p. 282:

"The fact that adoptions under the Hindu law are for the benefit of the man and can be made independently of any wife, does not appear to be a circumstance from which it can be inferred that the man is not at liberty to select one of several wives to be the receiving mother of the boy to be adopted."

At p. 283 Shephard, J., says:

"It was conceded by Mr. Bhashyam Iyengar, that the act of adoption inasmuch as it concerns the husband may be performed independently of his wife. Her consent is unnecessary. Nevertheless she, if she is the only wife, undoubtedly comes to be regarded as mother of the adopted son and her parents come to be regarded as his maternal grandparents: (Dattaka Mimamsa, S. 6, v. 50). To those parents of the adoptive mother he presents oblations. Generally, his position in the family is assimilated to that of a natural born son. In the case supposed, that of an adoptive father with one wife, the law itself designates the adoptive mother and no difficulty arises."

The whole of this passage is against the appellant's contention. The use of the word "nevertheless" shows that even where the wife has not consented she becomes the mother of the adopted son and the following sentence of the learned Judge shows she becomes the mother not because she participates which is, *ex hypothesi*, not the case but the law designates her and the law does it because he has got to be assimilated to the natural born son. The learned Judge then proceeds to discuss the cases of several wives. He then refers to the case of *Kasheeshuru Debia v. Greash Chunder* (10). The judgment in that case shows that the ground of the decision was that Kali Kant adopted the boy as son of the second wife Mon Mohini. At p. 286 the learned Judge says:

"There is no inconsistency between the recognised principles of the law with regard to adoption and the position that one of several wives may be selected as the adoptive mother. The

8. (1900) 23 Mad 1=26 I A 246=9 M L J 209=7 Sar 591 (PC).

9. (1895) 18 Mad 277=5 M L J 123.

10. (1864) W R Sup Vol. 71.

7. (1888) 11 Mad 157.

maintenance of this position does not militate against, but is rather in consonance with, the principle that the adoption is made solely for the benefit of the husband. It cannot be denied that a Hindu having two wives may confer on any one of them an authority to take a child in adoption after his death, nor can it be doubted that the selected widow would alone and to the exclusion of her co-widows have discretion in the matter: 2, Strange's Hindu Law, p. 91."

Finally at p. 237 the learned Judge says:

"Because a certain mode of designating the adoptive mother fails it does not follow that no other exists."

And he states his conclusion as follows:

"It is sufficient to hold that where the husband has associated one wife with him in adopting a child, that wife is to be deemed mother of the child."

I think all the quotations I have made from the judgments show that the basis of the High Court's judgment in favour of the successful widow in that case is not that she actually received the boy, but that the husband had associated her with himself in the act of adoption and in that manner selected her out of his wives for becoming the adoptive mother. Now when we examine the decision of the Privy Council in *Annapurni Natchiar v. Forbes* (8) the same point emerges. The facts and authorities being mentioned up to p. 8, the deciding passage is to be found at p. 9:

"Again it seems not to be doubted that a man may authorise a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother,"

thus agreeing with Shephard, J., who relies on the same analogy. Then we have:

"If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy. * * * It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself is one way."

Here again it is clear that the ratio decidendi of the judgment of the Privy Council is not that the respondent was the receiving mother, but that she was associated by the husband. There is no reference to the word "prathigrahithri" in the texts nor any reliance on that word as a reason for the conclusion. No doubt it happens to be an accident that

where the husband associates the wife with himself in the act of adoption, probably there might be some receiving by the wife also. But this is a pure accident. This is clear from the fact that in the whole ceremonial relating to adoption which is elaborately described in Baudhayana Smrithi (the whole of this part of the Smrithi being referred to by Mr. Mayne at length in the argument before the Privy Council which is fully reported in *Annapurni Natchiar v. Forbes* (8), at p. 212, we do not find any part allotted to the wife in the ceremony: vide *Annapurni Natchiar v. Forbes* (8) at pp. 212 and 213. In my opinion, nothing can be clearer for showing that the word "Prathigrahithri" in the texts is used merely in the sense of adoptive mother. In the course of the argument at p. 240 Mr. Jardine who appeared for the respondent happened to mention that the etymological meaning of the word translated by Mr. Sutherland as adopting mother was receiving mother. Lord Hobhouse immediately remarked: "I do not know whether there is any essential difference between the two." Mr. Jardine then said: "I do not wish to press it unduly." All this shows that it is not on that word, but on the fact of association, that the decision turned.

In my opinion, the decision of the Privy Council is only an authority for saying that where there are more than one wife, the fact of a wife being associated may be made a ground for choosing that wife out of the several wives; and Phillips, J., was right in saying at p. 946 of 49 *Mad.*, *Sundaramma v. Venkata Subbier* (1), that there appears to be no authority for the position that the wife does not become the adoptive mother unless she actually receives the boy. This is not the conclusion of either the High Court or the Privy Council in deciding the *Uthumalai* case. The Advocate-General relies on a decision in *Gunamani Dasi v. Debi Prosanna Roy* (11). The judgment of Shamsul Huda, J., clearly shows that the wife was living at the time of the adoption and therefore he held that she must be regarded as the adoptive mother. I do not think this decision helps the appellant. Lastly, the Advocate-General

relies on Sarkar's Law of Adoption and Hindu Law. At p. 200 of his Law of Adoption Sarkar observes:

"When the adoptor is a widower it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son."

But while repeating the same statement at p. 419-d, he seems not to quite agree with the view at p. 419-e. In his Hindu Law at p. 249, Edn. 6 (p. 234, Edn. 5), he again repeats the statement: "It might be that the deceased wife of the adoptor will be the adoptive mother, and her relations, the maternal relations of the adopted son."

But at p. 250 he discusses the question whether a wife who is living and has not consented becomes a mother. He seems to be inclined not to accept the view that she becomes the adoptive mother. It is to be noted that this has nothing to do with the case of a widower. Whatever may be the views of Mr. Sarkar Sastri these views have all been considered in *Sundaramma v. Venkata Subbier* (1) and I think Phillips, J., was justified in saying that to some extent they were contradictory. As against this I may refer to Banerjee, J's., Law of Marriage and Sridhana, p. 371, Edn. 3:

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her, or by being taken by the husband alone, the child nevertheless becoming a child of the wife according to the reason stated in the Dattaka Mimamsa in the passage quoted above or by being taken by the husband, &c."

The passage of Dattaka in the above is S. 1, V. 22. The learned author then says:

"In the first two cases, the adopted son would of course be regarded as a son of the woman. But in the last case the question arises whether the adopted son is to be regarded as a son of the woman herself or merely as the son of a co-wife."

Thus there is not the slightest doubt as to what the opinion of Banerjee, J., on this matter is and how he would construe Dattaka Mimamsa 1. 22. The learned Advocate-General would have it that the meaning of Dattaka Mimamsa, 1. 22, is that the adopted boy becomes the son of the wife though she did not participate in the adoption only in a general loose sense, i. e. in the same sense as the son by one wife may be said to be the son of a co-wife.

Whatever may be the exact meaning of the text, it has always been applied for holding that the non-assenting wife or the deceased wife would be the mother of

the boy adopted by the husband alone. I have considered all the arguments of the learned Advocate-General. There is one matter which I wanted to keep to the last. He relied on what purports to be an article in 9 *M. L. J.*, pp. 229 to 245, *Annapurni Natchiar v. Forbes* (8). This article was cited before Phillips and Madhavan Nair, JJ., and was considered by them. Phillips, J., was of opinion that this article concedes the case of a single wife. The reference to passage from Banerjee J's., Law of Marriage and Sridhana p. 242 supports the learned Judge's statement. But apart from all this I am bound to make one observation which was not known to Phillips, J. It is conceded on all hands that the author of this article was Mr. V. Bhashyam Iyengar afterwards a Judge of this Court. The article appears in the same volume which reports the Uthumalai case. The expressions in the article such as "opposite side," "our contention," etc., show that this was probably the memorandum of Mr. Bhashyam Iyengar prepared for the use of his counsel in arguing the Uthumalai case before the Privy Council and not a discussion of an abstract question of law by a jurist. I have given every weight to the argument of such an eminent lawyer as Sir V. Bhashyam Iyengar. But in the circumstances stated I am not able to give a higher weight than that, not certainly the weight due to the opinion of a great jurist which undoubtedly he was but not in this article. I am of opinion that the judgment of Phillips and Madhavan Nair, JJ., in *Sundaramma v. Venkata Subbier* (1) is correct and that the appeal ought to be dismissed with costs.

Anantakrishna Ayyar, J. — I agree. Pandi Ayyangar alias Thirumalayappa Ayyangar died in 1890 leaving behind him his widow Pichai Ammal and his daughter Kothai Ammal. Kothai Ammal was married to Duraiswami Ayyangar. Kothai Ammal died in 1900 and Pichai Ammal in 1923. Kothai Ammal was the only wife of Duraiswami, he not having married anybody else either before or after Kothai Ammal's death. In 1910 Duraiswami adopted Alwar. On the death of Pichai Ammal (the widow of Thirumalayappa) in 1923, the reversionary heirs of Pandi alias Thirumalayappa claimed to redeem a mortgage

created by Thirumalappa. Alwar, the adopted son of Duraisami, claimed that he was the heir of Thirumalappa's property and that the plaintiffs the reversionary heirs of Thirumalappa had no right to the estate of Thirumalappa, which, according to Alwar's contention, vested in Alwar on the death of Thirumalappa's widow in 1923. Alwar's contention was that when he was adopted by Duraisami in 1910, he (Alwar) became the adopted son of Duraisami's only wife Kothai Ammal—deceased—and that, as the daughter's son of Thirumalappa, he (Alwar) was entitled to succeed to Thirumalappa's estate in preference to Thirumalappa's divided distant agnates. Both the lower Courts upheld Alwar's claim, and in the second appeal preferred by the plaintiffs the question for decision is whether on adoption of Alwar by Duraisami, Alwar became the adopted son of Kothai Ammal also.

This exact question was considered by Phillips and Madhavan Nair, JJ., in the case reported in *Sundaramma v. Venkatasubbier* (1), and the learned Judges upheld the contentions of the adopted son, holding that the adopted son of a Hindu whose only wife had died before the adoption became the son of that wife so as to inherit as such to the relations in her father's family. It is argued on behalf of the plaintiffs (appellants) that that decision requires reconsideration, and that is the only point for decision in this second appeal. After hearing the arguments of the learned Advocate General who appeared for the appellants before us, I have come to the conclusion that the view taken in *Sundaramma v. Venkatasubbier* (1) is correct. Though the rights of an adopted son to succeed to the lineal heirs of the adoptive father were recognized early in course of time his rights to succeed to the collateral heirs of the adoptive father as well as the collateral heirs of the adoptive mother, though disputed at one time, have now been firmly established. The Privy Council in *Naginda Bhagwan Das v. Bachoo Harkisssn Das* (4) at p. 288 (of 40 Bom.), agreed with the statement of Hindu law made by Romesh Chunder Mitter in *Uma Sankar v. Kali Komul* (5) at pp. 259 and 260, to the following effect :

“According to Hindu law, an adopted son

occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he was born in it.”

The decision in *Uma Shankar v. Kali Komul* (5) was affirmed by the Privy Council in *Kali Komul v. Uma Sankar* (6). The learned Advocate-General did not dispute the above general proposition; but he argued that it is only that wife of the adopter who is alive at the time of the adoption and who actually receives the boy in adoption that could be said to be “the receiving mother” of the adopted son, and consequently, “the adoptive mother” of the adopted son, and that it is only with reference to the properties of the relations of such adoptive mother that the adopted son succeeds; and he laid great emphasis on the expression “*prathigrahithiiyamatha*” occurring in Dattaka Mimamsa, Part VI, verse 50. He argued that the expression has not been properly translated in some of the earlier translations, and decisions, and that the expression meant “the receiving mother.” He drew attention to the fact that in the present case Kothai Ammal had died in 1900, i. e., ten years prior to the adoption of Alwar by her husband Duraisami; that she could not therefore associate herself with her husband in the act of Alwar's adoption, and could not receive the adopted son at the time of the adoption. It was argued therefore that Kothai Ammal could not be the adoptive mother of Alwar, and consequently Alwar could have no rights to Kothai Ammal's father's (Thirumalayappa's) properties on the death of Thirumalappa's widow, Pichai Ammal. Certain decisions were also relied on in support of these arguments.

It was admitted (and it could not be disputed at this time) that the adoption of alwar by Duraisami was quite valid under Hindu law, as it has been settled that a Hindu widower having no sons could make a valid adoption. In fact it has been decided that a Hindu bachelor could make a valid adoption: see *Rangama v. Atchamma* (12) *Annapurna Nachair v. Collector of Tinnevely* (9); 12. (1846-50) 4 M I A 1 (P C).

Chandrasekharudu v. Brahmanna (13) and *Tulsi Ram v. Behari Lal* (14). If the adoption of Alwar by Duraisami was valid, then Alwar must be taken to have all the rights which an aurasa son of Duraisami would have. That would follow from the decision of the Privy Council, already quoted, in the case reported in *Nagindas Bhagwandas v. Bachoo Harkissen Das* (4). It has also been decided that a Hindu who has no son is entitled to make an adoption without associating his wife in the act of adoption; and even when his wife is against the adoption, a Hindu husband without a son is entitled to make an adoption. As observed by Mayne, in his Hindu Law:

"Adoption is a religious act which a Hindu is entitled to perform, and the text of Baudhayana describing the ceremonies relating to adoption make it clear that the wife has really no necessary part at all in the functions. Without associating his wife and even against her wishes, a Hindu could perform the ceremony of adoption and make a valid adoption."

This is also not disputed; but it is argued that though the adoption of Alwar would be valid, Alwar should be taken to have only his adoptive father (Duraisami) and relations on his (adoptive father's) side, but no adoptive mother, and consequently no relations on the adoptive mother's side. Here again, it is admitted that on a valid adoption being made, the adopted son is cut off from all relationship with his natural parents both on his natural father's side and on his nature mother's side, and that his relationship is thereafter only with reference to his adoptive father's and his adoptive mother's sides. But it was pressed before us by the learned Advocate-General that it does not follow that an adopted son should have an adoptive mother necessarily. He instanced the case of a bachelor making an adoption, in which case he pertinently pointed out that the adopted son, while losing all relationship on his natural father's and mother's sides, and that he has no adoptive mother, nor relations on the adoptive mother's side. This proposition in the case of a bachelor making an adoption not being controvertible, he asked why any surprise should be expressed for want of an adoptive mother

when adoption is made by a widower. He further re-inforced his argument by mentioning the case of a Hindu having plurality of wives living, but making an adoption only in conjunction with one of them, in which case that particular wife only is the adoptive mother, and the remaining wives of the adoptive father are only stepmothers of the adopted son: *Annapurni Nachair v. Forbes* (8). He also put the case of a widower making an adoption after, say, two of his wives had died in succession, and asked which of the deceased wives should be taken to be the adoptive mother of the boy. He also instanced the case of a widower or bachelor marrying plurality of wives after adoption, and asked which wife should be taken to be the mother of such an adopted boy. He also relied on certain observations of the Privy Council in the case reported in *Annapurni Nachair v. Forbes* (8) and on *Venkata Narasimma v. Parthasarathy* (15); *Gunamani Dasi v. Debi Prosanna Roy Chowdry* (11); *Debi Prasanna Roy v. Harendra Nath* (16); *Narain Dat v. Gopal Das* (17); *Veeranna v. Sayamma* (3) and *Tiruvengalam v. K. Butchayya* (18). He very strongly relied on the statements contained in Sarkar Sastri's book on adoption, and also on Dattaka Mimamsa.

An unsigned article in *Annapurni Nachair v. Collector of Tinnevely* (9) by a very learned and erudite lawyer of of this presidency was also read in extenso, as supporting the arguments advanced by the learned Advocate-General. On the side of the respondent, his learned advocate argued that when once the validity of Alwar's adoption was conceded, Alwar's connexion with the relations of his natural father and natural mother ceased, and Alwar became connected with the relations of Duraisami, his adoptive father, and Kothai Ammal (Duraisami's only wife); that whatever apparent difficulties there might exist in cases where the adoptive father had several wives, no such difficulty could exist when the adoptive father had only one wife. It was argued that the expression "prathigrahitri ya-

15. (1913) 37 Mad 199=23 I C 166=41 I A 51 (P C).

16. (1910) 37 Cal 863=6 I C 534.

17. (1916) 18 O C 341=33 I C 361.

18. AIR 1929 Mad 11=113 I C 347=52 Mad 373.

13. (1868) 4 M H C R 270.

14. (1890) 12 All 323.

matha " occurring in Dattaka Mimamsa does not really mean "receiving mother" in the sense of the woman who actually received the boy in adoption ; that the expression in its context only means " adoptive mother " whatever the literal meaning of the expression might be : that the context shows that the contrast there drawn is between the relations on the side of the natural father and natural mother of the boy with the relations on the side of the adoptive father and adoptive mother ; that the text only declared that the adopted son lost his relationship with the kindred of his natural father and natural mother and instead got the relationship through the adoptive father and the adoptive mother and while losing his connexion in the family in which he was born he got relationship in the family into which he was adopted ; that " receiving by the wife " of the adopter was not necessary according to Hindu law ; that an adopter's wife has no place in the performance of any religious ceremonies or in accepting the boy in adoption ; that a Hindu husband could ignore his wife in making an adoption and could make a valid adoption by himself alone and even against the wishes of his wife ; that decisions have held that even in the case of plurality of wives, the test for finding out the adoptive mother of the boy is not to see which of the wives actually received the boy in adoption but to ascertain the intentions of the husband as to which wife should be associated with him in the adoption and who should be the adoptive mother ; that the expression " prathigrahitri " has also been used in relation to the deceased husband to whom his widow makes an adoption, thus making it clear that the expression does not mean that the husband " received " the boy in adoption, since, in the case put, he was dead at the time and adoption was made after his death by his widow.

It was also argued that in cases of plurality of wives, if a husband should make an adoption without expressing any intention as to which of his wives should be the adoptive mother, there are certain principles which would enable the Court to decide which wife should be the adoptive mother, in case all the wives could not be the mothers of the adopted son, having regard to the

observations of the Privy Council in the Medur case *Venkata Narasimma v. Parthasarathy* (15). It was finally argued that whatever difficulties might exist in the other cases put by the learned Advocate-General, there could not be any doubt or difficulty in a case like the present when the widower had only one wife. It was also stated that, according to the nature of things, a boy should have both the father and a mother, and that an adopted son also should have an adoptive father and also, if possible, an adoptive mother. Because an adopted son could not have an adoptive mother in the case of an adoption by a bachelor, and there would be anomaly in that respect, it was argued that the anomaly should not be carried further to the case of a widower who had only one wife. It is now necessary to examine the arguments carefully. The strongest argument advanced on behalf of the appellants is based on the expression " prathigrahitri ya matha " literally " receiving mother " used in Dattaka Mimamsa, S. 6, placitum 50, and Dattaka Chandrika S. 3, placitum 17. I proceed to quote the same. S. 6, placitum 50 :

" The forefathers of the (prathigrahitri ya matha) adoptive mother only are also the maternal grandsires of sons given, and the rest ; for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons): " Setlur Translation.

In Dattaka Chandrika, S. 3, placitum 17 :

" But the absolutely adopted son presents oblations to the father and the other ancestors of prathigrahitri yamatha (literally, receiving mother) only."

Emphasis is laid on the expression " prathigrahitri yamatha " literally (receiving mother). But the text shows that what the author is there discussing is that, after an absolute adoption (sudda Dattaka not Dvayamushyana adoption,) the relationship of the adopted son with the relations of his natural father and natural mother ceases, and after adoption, his relationship is *only* with the relations of his adoptive mother. The word " *eva* " clearly brings out the antithesis between the two sets of relations discussed therein. This remark applies to S. 6, placitum 50, and S. 3, placitum 17, quoted above. The context also shows that the authors are not there considering what acts should be done by the wife of the adopter to bring about the

result of her being the adoptive mother of the boy. It is nowhere laid down, so far as our attention was drawn, that the wife of the adopter should actually receive the boy in order to validate the adoption. In fact S. 1, placitum 22 of Dattaka Mimamsa, is clear that an adoption is complete by the very act of adoption by the husband. It is there specifically stated that by virtue of the superiority of the husband, by his mere act of adoption the filiation is complete. The argument is put thus :

"If the case stands thus, then, the assent of the wife is requisite for the husband also; for the purpose would be the same. This, if alleged, is wrong, for in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as son of the wife is complete in the same manner as her property in any other thing accepted by the husband."

Mayne's Hindu Law, S. 150, mentions Vasishtha's text and also the texts of Saunaka and Baudhayana, containing the rituals of adoption. When an adoption is made by the husband, it is not necessary, to give validity to the adoption, that his wife or any of his wives should be present or should take part in the adoption. Adoption is primarily a religious ceremony performed with a view to save the parent from the hell called "puth." No doubt very important legal consequences also follow on adoption. No part is, by the texts, assigned to the wife when the adoption is made by the husband, though in practice a man generally associates himself with his wife or some one of his wives when making an adoption. It is not right to say that non-association of a wife with the husband when the husband makes the adoption would invalidate the adoption. In fact, Dattaka Mimamsa S. 1, placitum 22, would seem to make the matter absolutely clear, that the husband could make the adoption without associating his wife with him in the act, or even against her will.

If that be so, the meaning to be attached to the expression *prathigrahitri yamata* in placitas 50 and 17 referred to, is not its literal meaning of "receiving mother" but "adopted mother." In fact, that (adopted mother) is the rendering given by many learned translators of this expression. This would be made clear when it is noted that even with reference to an adoption made by a widow to her husband, the

husband is spoken of as "*prathigrahitru*." See Dattaka Mimamsa S. 6, placitum 49 :

"The sakha or peculiar branch of the Vedas is that of the adopter only (*Prathigrahitbureva*)."

It may be stated that Dattaka Mimamsa does not permit adoption by a widow, but similar expressions are used in Dattaka Chandrika also, which permits adoption by a widow, and the husband to whom adoption is made by a widow is called "*prathigrahitru*". The inference sought to be drawn from the use of the word *prathigrahitri yamata* by the learned Advocate-General is, in my opinion, not warranted. The expression seems only to mean "adoptive mother" and not the woman who actually "received" the boy.

The decision of the Privy Council in the *Uthumalai* case (8) does not support the extreme contention urged on behalf of the appellants that the expression in question means only the "receiving mother." The Privy Council does not give that meaning to the expression in that judgment. On the other hand, what they say is that various modes were open to the husband to indicate which of his wives was to be the adoptive mother of the boy, and they state that "to unite one wife with himself in adoption is one way". Their Lordships do not say that it is only by receiving the boy at the ceremony of adoption that the particular wife of the adopter could become adoptive mother. In fact, they approve of the decision of the Bengal High Court in the case reported in *Kasheeshuru Debi v. Greesh Chandar* (10), where it was held that

"the husband by the will and various acts was proved to have adopted Saroda as the son of his second wife Monmohni and that consequently the plaintiff's claim as mother of the adopted son was invalid."

The test proposed before us of "receiving" the boy was not laid down as the only test to be applied,—either in *Kasheeshuru Debi v. Greesh Chandar* (10) or the *Uthumalai* case (8). It was open to the husband to indicate which of his wives was to be the adoptive mother; that particular wife need not necessarily have been present at the ceremony; for various reasons she might not have been able to be present at the function. Nor is it necessary for her to actually receive the boy at the time to become his adoptive mother. Of course if a hus

band actually joins one wife with him, to the exclusion of others, in the actual act of adoption, then that is certainly one mode of indicating the adoptive mother; but certainly there could be other modes of bringing about that result, as is clear from the decision of the Privy Council

No doubt, Sarkar Sastri in his book on adoption seems to support the view put forward by the learned Advocate-General though there are other passages in his book which would seem to indicate the other way. But on the particular question before us two other learned authors have held views contrary to that of Sarkar Sastri: See Battacharya's *Hindu Law*, 2nd Edn. 151, (3rd Edn., Vol. 1, p. 357) where the learned author remarks as follows:

"There is no text to render the consent of the wife absolutely necessary for the validity of an adoption made by a male. The sanction of the husband makes the son adopted by a female the son of the husband also. Dattaka Mimamsa, S. 1, placitas 21 and 22. But in the case of an adoption by the husband, the child taken becomes, by his act, the son of his wife also, except when the ceremony is performed in conjunction with another wife.

Nanda Pandita says :

"The forefathers of the mother that accepts in adoption are also the only maternal grandsires of sons given and the rest: Dattaka Mimamsa S. 6, placitum 50. In this passage, the word *eva* (only) is meant to exclude the paternal ancestors of the natural mother. But it can be taken also to exclude the paternal ancestors of the adoptive mother's co-wives."

Dr. Gooroodass Banerjee also seems to take the same view as Battacharya: see pp. 129 and 356 of Edn. 2 of Banerjee, J.'s *Hindu Law of Marriage and Stridhana*, and at p. 371 of Edn. 3 :

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her; or by being taken by the husband alone, the child nevertheless becoming a child of the wife according to the reason stated in the Dattaka Mimamsa in the passage quoted above: S. 1 placitum 22."

The decision of this Court in the *Uthumalai* case (8) which was confirmed by the Privy Council in the case reported *Annapurni Nachier v. Forbes* (8) also supports the respondent's contention. Best, J., says as follows in the course of his judgment, at p. 281 (of 18 *Mad*) :

"The rule enunciated in Dattaka Mimamsa 6, V. 50 and Dattaka Chandrika 3, V. 17, to the effect that the 'forefathers of the adoptive mother only are also the maternal grandsires of the sons given' differentiates between the ad-

optive and natural mothers, and not between an adoptive mother who actually joins in the ceremony of adoption and her co-wives."

Shephard, J., in the course of his judgment in the same case observes at p. 283 as follows :

"It was conceded by Mr. Bhashyam Ayyangar, and there can be no doubt that the act of adoption inasmuch as it concerns the husband alone may be performed independently of his wife. Her consent is unnecessary. Nevertheless she, if she is the only wife, undoubtedly comes to be regarded as mother of the adopted son and her parents come to be regarded as his maternal grand-parents. (Dattaka Mimamsa S. 6, V. 50). To those parents of the adoptive mother he presents oblations. Generally, his position in the family is assimilated to that of a natural born son. In the case supposed, that of an adoptive father with one wife, the law itself designates the adoptive mother and no difficulty arises."

These observations help the respondent's contention. With reference to the use of the expression "adopted mother" in the texts, this is what Shephard, J., says :

"The expression 'adoptive mother' used in the verses cited above from Dattaka Chandrika and Dattaka Mimamsa is not used in reference to the case of several mothers; and evidently no distinction is intended to be drawn between the wife who has taken part in receiving the child and any other wife."

Again at p. 287 (of 18 *Mad*.) the learned Judge says :

"The institution of adoption requires that the son adopted should be deemed the son of the person who has taken him. It is only consistent with this theory that the wife of the adoptive father, if there happens to be one, should also be deemed the mother of the boy. But in the case of several wives, the theory does not require that they all should be deemed to be his mothers... We are invited to consider the case in which a husband has made an adoption independently of both his wives and to answer the question which would then arise. The case is not one which is likely to happen, and it seems to me sufficient to say that, because a certain mode of designating the adoptive mother fails, it does not follow that no other exists."

Because an adopted son could not have an adoptive mother in the case of adoption by a bachelor, it does not follow that he should have no adoptive mother when a widower who married only once makes an adoption. From what has been said above, it would seem that the only wife of the adoptor would be the mother of the adopted son rather than the adopted son should not have any mother in his adopted family. The argument based on the translation 'receiving mother', is, to say the least, inconclusive, and whatever assistance might be

derived from the circumstance that one of several wives joined with the adopter in the actual act of adoption, or received the boy in adoption, in deciding which of several co-wives should be taken to be the mother of the adopted son in such cases, no such difficulty arises in a case like the present, namely the adoption by a widower who married only once. In the case of plurality of wives, several tests have been indicated to find out the intention of the husband as to which of the wives should be the mother of the adopted son. In the absence of any indication by the husband himself, just as associating one wife with him in the act of adoption or otherwise declaring who is to be the mother, it may be that the seniormost wife, Dharmapathni might be held to be the mother. If some wives be dead but others living, other circumstances might have to be considered. We have not to decide those cases on the present occasion. But the circumstances that there may be difficulties in other cases is no ground by itself for holding that in a case like the one before us, the adopted son should have no adoptive mother at all. Then it was said that adoption itself is a fiction, opposed to facts and nature, and that the respondent's arguments would introduce "a fiction on a fiction." I am unable to agree with this contention. The question is what exactly is the fiction with reference to an adoption, its exact extent and incidence; while the exact extent of the fiction has to be considered in such cases, I do not see how "a fiction on a fiction" is introduced here. As regards the cases quoted, no case dissenting from the decision of this Court reported in *Sundaramma v. Venkata Subbier* (1) has been cited to us. In *Gunamani Dasi v. Debi Prosanna Roy* (11), Shamsul Huda, J., observed at p. 1041 (of 23 C. W. N.) as follows:

"It is not necessary in this case to consider the effect of an adoption by a husband alone without the concurrence of any of his wives. I feel no doubt that in this case, the adoption was both by Durgadass and Gunamani. At the time of the adoption Annapurnamma's mother was dead but Gunamani was alive, and it is only natural to suppose that she did take part in the adoption."

On those facts no exception could be taken to that decision. *Narain Dat v. Gopal Das* (17) refers to a case where the wife of the adopter did not consent to

the adoption, and the question was whether she could be taken to be the adoptive mother of the boy. It was admitted that the adoption was valid. The question is not discussed whether any consent on the part of the adopter's wife is necessary at all in law, to validate an adoption.

The case before us is not the case of a wife who objected to the adoption, and it is not necessary to say more about that case. Cases might arise where a person having married only once, he and his wife were anxious to have a particular boy adopted, and before effect could be given to the same, the wife died. The husband, to give effect, so to speak, to the last wishes of his wife, and also from pious motives, makes an adoption. There does not seem to be anything against the position that, in those circumstances, she should be taken to be the mother of the adopted son. I may state that in my experience I have come across instances (rare no doubt) in which a woman in the position of Kothai Ammal in the present case has been treated as the adoptive mother, and transactions entered into on that basis. I am not of course saying that that should be taken by itself in any way to be conclusive of the question of law that has to be decided in the present case.

The article in *Annapurni Nachiar v. Forbes* (8) by one who signed as "jurisprudence" but whose identity is well-known and who was a very learned and acute lawyer and afterwards a Judge of this High Court, was read in extenso by the learned Advocate-General, as explaining his line of argument in this case. The weight due to the opinion on a legal question of this kind, of such a learned lawyer, would undoubtedly be very great; but it is very probable that the case, *Annapurni Nachier v. Forbes* (8), only published in the form of an article "a memorandum of arguments" prepared by that learned lawyer for use of respondents' counsel in England in connexion with the hearing of the *Uthumalai's* case (8). The article itself contains ample indications of the occasion for preparing it. The expressions, "the opposite view," "our contention," "the question now at issue," etc., would seem to indicate the purpose for which the memorandum of arguments was prepared.

The Privy Council gave its decision in July 1899, and the memorandum was evidently published as an article in 9 *M. L. J.*, *Annapurni Nachier v. Forbes* (8), in its issue of July 1899, for the learning it discloses after the decision of the case by the Privy Council. Moreover, the article does not bear the name of the writer. These circumstances have to be kept in view in giving due weight to the positions taken up in the article. So far as theoretical arguments are concerned, weight should undoubtedly be attached to the considerations mentioned in the article. But one should not forget that there are no clear indications therein that they represent the real opinion of the learned writer on the points dealt with in the memorandum. I made these remarks because the article in *Annapurni Nachier v. Forbes* (8), was read to us in extenso as representing arguments which the learned Advocate-General wanted to advance himself in support of his position in the present case, and the article has also been referred to in the judgment in *Sundaramma v. Venkata Subbier* (1). Even in this article it is stated at p. 231 (of 9 *M. L. J.*) as follows:

"If he had an only wife and she did not join in the adoption, she no doubt, would, notwithstanding that she did not join in the act of adoption, become the mother of the adopted son and entitled to succeed as such: vide Dattataka Mimamsa, S. 1, verse 22."

This is contrary to the decision in *Debi Prasanna Roy v. Harendra Nath* (17). So far as the point for the decision in the present case is concerned, it would seem that the view expressed therein is in favour of the present respondent's contention in the case before us, and Phillips, J., took it to be so. The article is concerned mainly with cases where there are plurality of wives, and directly with a case where the adopter associated himself with one of his wives in the act of adoption as was the case in the *Uthumalai* case.

Having regard to the decisions of Courts, an adopted son should be treated as much as possible, as similar to a natural born son so far as the family in which he is adopted is concerned (subject to such distinctions with reference to quantum of share, etc., specified in Hindu law texts), and the adopted son's right to succeed both lineally and collaterally with reference to his adoptive father's

and mother's lines are concerned have been established; the difficulty to find an adoptive mother when a bachelor makes an adoption does not present itself in the case of an adoption made by a widower who married only once.

Having regard to the position of a Hindu wife with reference to an adoption by her husband, it is clear that her consent is not necessary to validate the adoption, and even in spite of her express dissent an adoption by the husband would be perfectly valid. The main arguments advanced by the appellants, based upon the meaning of the expression "*Prathigrahitriya Matha*" that receiving mother only would be the mother of the adopted son, is not, in my opinion, tenable. The context in the texts as well as other portions where the same expression occurs in the books make it reasonably clear that before the wife of an adopter could become the adoptive mother of the boy, it is not necessary that she should in fact have joined with the husband and received the boy in adoption. Whatever difficulties might arise in cases of plurality of wives, and whatever might be the tests that will have to be applied to solve the question in such cases, it seems to me that the solution is comparatively easy and more or less a natural one in the present case. Two learned Judges of this Court (Phillips and Madhavan Nair, JJ.), have decided this very question in favour of the respondent's contention, and I am not satisfied from the arguments advanced before us by the learned Advocate-General that the decision of these two learned Judges is open to question. In my opinion, the decision in *I. L. R. 49 Mad. 941* lays down the law correctly, and the second appeal should be dismissed with costs.

Cornish, J.—I agree. The appellant's case mainly rests upon the construction put by Gopal Chander Sarkar Sastri on the words in Nanda Pandita's Dattaka Mimamsa translated "adoptive mother." If that foundation is not a sound one, I think that the appellant's case must fail. Admitting that the words "adoptive mother" may equally be rendered "adopting mother", or more literally, "receiving mother", it is a wide jump therefrom to the conclusion that a wife who has not joined with her husband in the adoption cannot be deemed to be

the adoptive mother of the boy, with the consequence that he has no maternal ancestors in his adoptive family. Sarkar himself puts forward his view rather as a theory than as a definite opinion. In his Tagore Lectures on the Law of Adoption he says (p. 214) :

"Although Nanda Pandita appears to intimate that a boy so adopted (i. e., by the husband alone) becomes also a son to the wife, yet it must not be supposed that a son adopted without the concurrence, or against the will, of the wife acquires all the rights of a son to her..... In order that affiliation may be complete, it appears to be necessary that the wife should join in adopting a son."

This view, be it noted, is not stated to be in conformity with any custom or practice governing adoption or the adopted son's rights ; and no authority is cited in support of it. In *Uma Sankar Moitro v. Kali Komul* (5), Mitter, J., delivering the judgment of a Full Bench, concludes his examination of the passages in Nanda Pandita by observing :

"The author here, quite irrespective of the chapter and verse of the Rishis whom he quotes, supports his position on general grounds, and says, that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive 'father's family etc., which words evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of his adoptive mother."

The position accepted by the Full Bench, without any qualification depending on the wife's concurrence in an adoption made by her husband, was that adoption affiliates the adopted boy as completely as if he had been born in his adoptive family. It is settled, too, that an adoption by the husband without his wife's consent or concurrence is valid : see Mayne's Hindu Law, Edn. 9th, p. 146 and the judgment of Shephard, J., in *Annapurni Nachiar v. Collector of Tinnevely* (9). In these circumstances, it must, I think, be said of Sarkar's view that, while it provides counsel with valuable material for an argument, it is not shown to be so founded on principle or practice as would justify a Court in accepting it as law. If affiliation is independent of the wife's consent to the adoption there seems no more reason for saying that relationship does not exist between the adopted son and the deceased wife of his adoptive father when the adopter is a widower than for denying relationship between the adopted son and any other deceased member of

his adoptive family. It is true that only one wife of the adoptive father can fill the position of mother of the adopted son : *Narasimha v. Parthasarathy* (15). And a difficulty might possibly arise where the adoptive father has married two wives, and both have died before the adoption, in deciding which of them was the mother and which the step-mother of the adopted son. But the present case is not complicated by any question of that sort.

P.R.S./V.S.

Appeal dismissed.

A. I. R. 1933 Madras 563

WALSH, J.

R. M. P. R. M. M. Subramaniam Chettiar—Petitioner.

v.

K. S. Subbiah Ayyar—Opposite Party, Civil Revn. Petn. No. 1416 of 1932, Decided on 14th December 1932, from order of Dist. Judge, West Tanjore, D/- 21st April 1932.

Civil P. C. (1908), Ss. 148 and 151 and O. 41, R. 5 (3)—Order of stay of delivery of possession conditional on payment of kist and rent by certain date is one under S. 151 and S. 148 applies to such order.

In an execution petition an order was passed staying delivery of possession conditional on the judgment-debtor paying the kist and rent by a certain date every year. Default was made in the first year itself but the Court granted extension of time:

Held : that the order of stay was not under O. 41, R. 5 (3) but one under S. 151; that though the order was under S. 151 still it was one allowed by the Code and that S. 148 applied by which extension of time could be given : *AIR 1928 Mad 154, Pitcher v. Hinds*, (1879) 11 Ch D 905, Dist.; *AIR 1925 Pat 153; AIR 1930 Pat 279 and AIR 1929 All 266, Ref.* [P 564 C 1]

S. Ramchandra Iyer— for Petitioner.

K. S. Subbiah Ayyar— for Opposite Party.

Judgment.—This is a revision petition against an order excusing delay and continuing stay in an execution petition. The plaintiff, the mortgagee, brought the suit against the lessee of the mortgagor and obtained a decree to recover possession and mesne profits from the defendants. The defendant appealed and asked for stay of execution in I. A. No. 211 of 1931, on which the following order was passed:

"There will be a stay of delivery of possession. Further determination of mesne profits up to the date of judgment will continue. The stay granted is conditional on the appellant paying the kist and the full rent of Rs. 3,250 less the kist to the respondent by the end of February each year. The first payment to be by February 1932."

The rent was not paid by February 1932 and an extension was asked for on which the District Judge passed the following order :

"In *Amanatullah Mian v. Raghunath Prasad* (1) and *Pearcy Lal v. Sita Ram* (2) it is held that the Court has no jurisdiction to extend the time fixed in a decree. That has no reference to this petition. The time was stated as the date on which it was expected that the harvest could be disposed of. There is nothing to prevent extension of the time, and it is proper to extend it where cause is shown. The delay will be excused as the whole amount more or less, has been deposited and the stay will be continued. No costs."

The contention before me is that the Court had no power to extend the time. I agree that this order was not under O. 41, R. 5 (3) and that it must be considered as an order passed under S. 151. From this it is argued that S. 148 by which the Court can grant an extension is not applicable. *Hamidur Rahman v. Shahanand Das* (3), the decision of a single Judge, is quoted in this connexion. In that case an appeal had been filed by the judgment-debtor against an order refusing to set aside a sale under O. 21, R. 90. The Court allowed it with the following express condition :

"that the appellant do pay to the contesting opposite party respondents a sum of Rs. 50 as costs within a week; in default therein, the appeal shall stand dismissed without reference to this Court."

There is no difficulty whatever in the decision looking to the terms of the order. But with respect I am unable to agree with one of the grounds stated as follows:

"Now the doing of the act in this case, namely paying the sum of Rs. 50 to the petitioner was not the doing of an act prescribed or allowed by the Code. In the circumstances S. 148 has no application whatever."

The learned Judge had earlier expressed the opinion that it was a good and operative order. An action taken by a Court under S. 151 is no doubt correctly described as not one prescribed by the Code but to say that a good and operative order under this section is not one allowed by the Code appears to me to be a contradiction in terms. If the action of the Court is permissible under S. 151, and it is not disputed that it is so, then I am unable to understand how the Court can be said to do an act which is not

allowed. I therefore cannot accede to the argument that S. 148 has no application. Apart from this argument there is nothing to support the petitioner's contention. As observed by the learned District Judge this is not a case of altering the terms of the decree nor is the case like *Pitcher v. Hinds* (4) where one act had to be done before another could be performed. In this connexion *Collinson v. Jeffery* (5) is relied on, but it is really against the petitioner. The order there was

"in default of such lodgement within two months from the date of this order the action be dismissed with costs."

Yet Kekewich, J., said :

"It appears to me however that this action is not dead. It is comatose; it is moribund; but a final stroke is required to effect death. That final stroke has not been delivered and therefore in my opinion the application is properly made and the order asked for may be granted."

He also pointed out that :

"there is another form of order available and appropriate where the Court thinks that severe terms should be imposed, namely that on failure to do certain acts within a specified time then 'the action do stand dismissed without further order.'"

In this case no such words are in the order. That case is very much stronger than the present where there is no sort of order that the petition do stand dismissed or that execution shall proceed in default of payment. *Balkrishna Aiyar v. Parvathammal* (6) is a case where there was an express direction to give security within specified time; "otherwise the petition to stand dismissed with costs." There is a discussion there on the subject in which the Chancery case already quoted is alluded to. That whole discussion is based on the categorical terms of the order and it would have been unnecessary, if the petitioner's view is correct that the order automatically terminates in such a manner as to exclude extension although nothing of the sort appears in the order itself. The petition is dismissed with costs.

P.R.S./K.S.

Petition dismissed.

4. (1879) 11 Ch D 905.

5. (1896) 1 Ch 644=65 L J Ch 375=74 L T 78 =44 W R 311.

6. AIR 1928 Mad 154=105 I C 124.

1. AIR 1930 Pat 279=126 I C 910.

2. AIR 1929 All 266=113 I C 751.

3. AIR 1925 Pat 153=80 I C 575.

A. I. R. 1933 Madras 565(1)

LAKSHMANA RAO, J.

Sakala Rattam and others—Plaintiffs—Appellant.

v.

Pulikonda Musalayya and another—Defendants—Respondents.

Appeal No. 47 of 1929, Decided on 7th February 1933, against order of Dist. Judge, Guntur, D/- 16th April 1928.

(a) Limitation Act (1908), S. 19—Inclusion of decree debt in insolvency petition by debtor amounts to acknowledgment.The inclusion of the decree-debt in the insolvency petition which has to be signed by the insolvent amounts to an acknowledgment within the meaning of S. 19, Lim. Act: 36 I C 389, *Ref.* [P 565 C 1]**(b) Limitation Act (1908), S. 19—Mention of decree debt in statement of insolvent amounts to implied admission that debt is subsisting.**

The mention of the decree debt in a statement by the debtor insolvent in an examination for ascertaining his assets and liabilities amounts to an implied admission that the liability under the decree is subsisting even though there is no mention of any payment towards its discharge. [P 565 C 2]

Judgment.—This appeal arises out of an application for execution and the sole question for determination is whether the execution petition is barred by limitation. The decree was passed on 6th October 1920, and the petition was filed on 18th March 1926. Ordinarily therefore the petition would be barred by limitation, but the appellant relies on the inclusion of the decree debt by the judgment-debtor in his insolvency petition dated 22nd October 1921, and his statement to the Official Receivers on 13th February 1924, wherein also this debt is mentioned. The inclusion of the decree debt in the insolvency petition which has to be signed by the insolvent amounts to an acknowledgment within the meaning of S. 19, Lim. Act: vide *Kissendoss v. Khatau Makanjee Spinning, Weaving Co. Ltd.* (1), and Ex. D-1, the true copy of the petition signed by the pleader, was admitted in evidence without any objection. The original petition must have been signed by the debtor and his pleader and the identity of the decree debt mentioned therein cannot reasonably be doubted. There was thus an acknowledgment on 22nd October 1921, and the decree debt is mentioned in Ex. C, the statement of the insolvent on

1. (1916) 36 I C 389.

13th February 1924. The examination was for the purpose of ascertaining his assets and liabilities at the time and not on the date of the insolvency petition and even otherwise, the reference to the decree debt without mentioning any payment towards its discharge amounts to an implied admission that the liability under the decree was then subsisting. In this view it was not disputed that the petition would be within time as against respondent 1 and the order of the lower Courts cannot be upheld. It is therefore set aside and the petition is remanded to the Court of first instance for disposal on the merits as against respondent 1. Respondent 1 will pay the costs of the appellant in all the Courts and the appeal will stand dismissed with costs of respondent 2 against whom it was not pressed.

P.R.S./K.S.

*Appeal dismissed.***A. I. R. 1933 Madras 565 (2)**

WALSH, J.

(Vadrevu) Viswasundara Rao Bahadur—Appellant.

v.

Balantrapu Pallamaraju—Respondent.

Appeal No. 157 of 1929, Decided on 6th March 1933, from appellate order of Sub.Judge, Amalapuram, D/- 7th March 1929.

(a) Hindu Law — Joint family consisting of father and son — Self-acquired property of son—Onus of proving that it is thrown into common stock is on person who asserts it to be joint property—Admission by son in mortgage deed that such property is in possession and enjoyment as of right by both father and son shifts onus on son to prove that such property is not thrown into common stock.If in a joint family consisting of father and son, the son has got self-acquired property, the onus of proving that such property is thrown into the common stock lies on the person who alleges such property to be part of joint family property; but where the son himself admits in a mortgage deed that such property is in possession and enjoyment as of right by both himself and his father and this admission is not explained by him, the onus is shifted on to him to show that such property is not thrown into the common stock: 29 All. 244 and A I R 1917 P. C. 12, *Dist.* [P 566 C 2]**(b) Practice — Finding of fact though supported by evidence will be interfered with in second appeal if arrived at on wrong view of law.**

The High Court will not interfere in second appeal with a finding of fact for which there is evidence; but where such finding is arrived at by the lower appellate Court on a wrong view of law the High Court will interfere. [P 568 C 1]

K. Kameswara Rao—for Appellant.

K. Ramanurthi—for Respondent.

Judgment.—The appellant got a decree against the father of the respondent. During execution proceedings the father died and the respondent was brought on record as his legal representative. He is his undivided son. When the appellant sought to bring certain properties to sale the son claimed that they were his self-acquired properties and so not liable. The executing Court dismissed the claim, but it was allowed in appeal and this second appeal is preferred against that decision.

Although the appellant asserted that the property was ancestral the evidence shows, and it is not disputed before me, that it originally belonged to the maternal grandmother of the respondent who assigned it by Ex. A in 1914 to the respondent then a minor, with his father as guardian. But the appellant asserts that the property was thrown into the common stock by the respondent. The onus of proving this is, of course, on the appellant and he relies mainly on the mortgage, Ex. 1, dated 5th August 1921. By this mortgage the land in question together with ancestral property was jointly mortgaged to a third party by the respondent and his father. The respondent executed the deed as a major. He describes himself as the undivided son of his father and says that on account of "our necessity"

"We have borrowed of you a sum of Rupees 2400. We shall pay interest thereon at As. 12 per cent per mensem and we shall pay the annual interest on this date every year etc."

Then we come to the most important part, the description of the property mortgaged. First the ancestral property is described :

"We have mortgaged to you under this deed the inam land acquired by our ancestors and which is in our possession and enjoyment as of right."

Then comes the description of the property now in dispute as follows :

"and the immovable property inclusive of the water sources, wells, tanks, etc., therein specified in para. 3 hereunder and which devolved on Pallamaraju of us, through his maternal grandmother Vissapragada Atchamma Garu, and in which we have rights of enjoyment."

Later on, alluding to both sets of properties the executants say "they are in possession and enjoyment as of right without any obstruction whatever." No statements could be more explicit and

it cannot be said that there has been any confusion between the ancestral properties and those of respondent's maternal grandmother, because the document goes out of its way to describe each separately and states distinctly that in the latter also both the executants have rights of enjoyment. No explanation has been offered by the respondent in the box for these admissions, and the learned Sub-Judge has entirely overlooked the fact that, in the absence of any explanation, the onus of proof is at once shifted to the respondent. He merely says with regard to Ex. 1:

"The lower Court relied wholly on Ex. 1 and on the fact that during the appellant's minority his father managed the attached properties. But this is not sufficient to draw the inference that the appellant converted his separate property into joint family property."

That conflicts with the principle laid down by the Privy Council in *Chandra Kunwar v. Chandra Narpat Singh* (1) at 194. Their Lordships say :

"The learned Chief Justice in his judgment points out that the burden of proving that the adoption relied on took place rests on the defendant."

That is undoubtedly so, but it is difficult to conceive how she could as against Mukand Singh, *prima facie* at all events, discharge that burden more effectually than by proving his solemn statement under hand and seal that it did take place. The proof of the admission shifts the burden, because as against the party making it, as Baron Parke says in *Slat-terie v. Pooley* (2) at p. 639 :

"What a party himself admits to be true may reasonably be presumed to be so. No doubt in a case such as this where the defendant is not a party to the deeds and there is therefore no estoppel, the party making the admission may give evidence to rebut the presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established."

They quote from *Hearne v. Rogers* (3), at p. 586 the remark of Bayley, J.:

"The express admissions of a party are evidence and strong evidence against him."

The learned Sub-Judge goes on to give certain reasons to explain these admissions, reasons which are not given by the respondent himself whose duty it was to give them. He says:

"His age was given last year in his petition in the lower Court as 25 years and in his descrip-

1. (1907) 29 All 184 = 34 I A 27 = 4 A L J 102 (P C).

2. (1840) 6 M & W 664 = 1 H & W 16 = 10 L J Ex 8 = 4 Jur 1088.

3. (1829) 9 B & C 577 = 4 Man & Ry 486.

tion in his deposition as 28 years. He had just attained majority when Ex. 1 was executed."

Now if respondent was relying on his having only just attained majority to explain Ex. 1 it was for him to say so. He never put forward any such plea. All he says by way of explanation is:

"I do not remember if my property was separately described in the mortgage deed."

Even taking the facts relied on by the learned Sub-Judge as regards his age, what are they? Ex. 1 is dated 5th August 1921. In a petition of 1928 respondent describes himself as 25, which no doubt would make him only 18 at the time of Ex. 1; but in 1928 he described himself as 28 which would make him 21 at the time of Ex. 1. Of what value are contradictory statements like these by the respondent himself as to his age at the time of Ex. 1 and why should one be relied on rather than the other? Then the Court remarks that

"although Ex. 1 set out that the attached properties were acquired by him from his maternal grandmother it does not set out how his father along with him had a right to them."

He was living as an undivided son with his father in the same house and the father was managing the property. He was also the only son. There would be therefore nothing surprising in his throwing his properties into the joint family; and when he distinctly says in Ex. 1 that they are owned jointly by himself and his father in their own right it is for him to explain this statement. The learned Subordinate Judge is of course correct when he says that the mere fact that the father was managing the properties and enjoying them jointly would not necessarily prove that they were thrown into the common stock, nor would respondent offering his own properties as security for the father's debt do so. But respondent has done far more than this. He has made the father's debt his own, as the document shows, and if he was merely offering his own properties for his father's debt there was no reason at all why he should not have said so in Ex. 1. It did not in the least benefit his father that he should describe the property as belonging to both of them as of right. In this connexion, Mayne's Hindu Law, p. 272, is quoted by the respondent's learned advocate. I do not think it helps him at all. Mayne says:

"The question whether he has done so or not

(i. e., thrown his property into the joint stock) is entirely one of fact to be decided in the light of all the circumstances of the case; but a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection."

For this last statement *Lal Bahadur v. Kanhaiya Lal* (4) and *Suraj Narain v. Ratan Lal* (5) are quoted. Those were both cases in which the property was actually held to have been thrown into the common stock except in the latter case a certain part of the property which the member bought in the name of his son-in-law, and they do not at all help the respondent. A ruling not available, *Jangi Nath v. Janki Nath* (6), was also mentioned which is quoted in Ramakrishna's Hindu Law, Vol. 1, p. 270. From the description of it in that book the three points which were held not enough to prove that the property had been thrown into the common stock were: (1) joint registry in the revenue accounts; (2) association by the members with his brothers in suits relating to the property; (3) payment out of income of the gifted property to his brothers. None of these things amount to what we have in this case a solemn declaration that the debt has been incurred jointly and that both the sets of properties which are being mortgaged are held jointly as of right by the respondent and his father. The last matter relied on by the learned Sub-Judge consists of unregistered leases counter parts of Ex. B series in 1923 and 1924, which the respondent took of the property from tenants. The best evidence for these documents, that of the tenants who executed them, has not been called and they are documents very easily got up. They may even be genuine, for they are executed two years after Ex. 1 and possibly in order to try and escape the implications of that document and to save the lands from being proceeded against for the father's debts. Besides the respondent the only witness called to these leases says:

"I do not know for how much rent Pallamaraju leased the lands. I do not know about the affairs of father and son."

This Court will not interfere in second appeal with a finding of fact for which

4. (1907) 29 All 244=34 I A 65 (P C).

5. A I R 1917 P C 12=44 I A 201=40 All 159=20 O C 211 (P C)=40 I C 988.

6. (1905) 2 A L J 225.

there is evidence but it is clear in this case that the learned Sub. Judge took a wrong view of the law in holding that Ex. 1 did not shift the onus of proof on to the respondent if not explained. There being no explanation offered of it the leases Ex. B are certainly not, under the circumstances, sufficient to discharge the onus now resting on the respondent nor is it in this light that the lower appellate Court has viewed them, for it has stated by holding that Ex. 1 is insufficient to discharge the onus resting on the appellant. It has also proceeded to give an explanation for Ex. 1 which it was for the respondent to give, and this explanation, so far as it rests on the respondent, having only just attained majority at the time of Ex. 1, is based on what one must call no evidence at all. I am of opinion therefore that this is a case where the lower appellate Court has gone wrong in its view of the law, and has also erred in setting up a defence for the respondent which it was for him to set up and which defence itself was not based on any evidence. The second appeal is therefore allowed with costs throughout and the order of the District Munsif dismissing the claim will be restored.

P.R.S./K.S.

Appeal allowed.

* A. I. R. 1933 Madras 568

PANDALAI, J.

Thirupathi Ayyangar — Defendant—Appellant.

v.

Yegnammal—Plaintiff—Respondent.

Appeal No. 193 of 1928, Decided on 13th December 1932, against appellate order of Dist. Judge, Ramnad, D/- 25th February 1928.

* (a) Civil P. C. (1908), S. 50 (1) and O. 21, R. 16—Execution application against legal representative of judgment-debtor without prayer to add such legal representative is valid.

The Civil Procedure Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor though in ordinary practice such a prayer is usually added in an execution petition. Hence an application for execution against the legal representative is valid and saves limitation even though it does not contain an express prayer for adding such legal representative: 31 *Mad* 77; *A I R* 1925 *Mad* 70 and *A I R* 1932 *Mad* 73, *Ref.* [P 568 C 2; P 569 C 1]

(b) Limitation Act (1908), Art. 182 (6)—Execution—Application returned for amendment is sufficient to save limitation.

An application which has been returned for

amendment, but not represented is sufficient to save limitation: 29 *I C* 16; 35 *I C* 876 and 40 *Mad* 949, *Ref.* [P 569 C 1]

C. S. Venkatachari—for Appellant.

A. V. Narayanaswami Iyer—for Respondent.

Judgment.—The legal representative of a deceased judgment-debtor whose plea of limitation against the execution of the decree by the legal representative of the decree-holder has been rejected by both the lower Courts urges the same plea in this second appeal. The dates are as follows:

" 28th July 1921.—Decree for money in favour of plaintiff against defendant 1.

In 1922.—Both the plaintiff and defendant 1 died on dates not known.

19th July 1923.—E. P. No. 400 of 1923 by the widow of decree-holder as legal representative of decree-holder praying to add the name of the appellant as legal representative of the deceased judgment-debtor and praying for execution against him. The petitioner (respondent) was recorded as the legal representative of the decree-holder, but as the appellant could not be served though three notices were taken out, the petition was not pressed and eventually dismissed on 26th November 1923.

17th July 1926.—Another petition for execution by respondent against appellant, but without an express prayer for adding the appellant as legal representative of the judgment-debtor. This petition was returned for supplying the omission, but was not represented.

3rd August 1927.—Third execution petition praying that petitioner (respondent) may be added as legal representative of the decree-holder, that the appellant may be added as legal representative of the judgment-debtor and that execution may issue by attachment and sale of the judgment-debtor's properties."

It will be noticed that the three execution petitions are all successively within three years of the date of decree and of each other. [The amendment of Art. 182 (5), by which the date of the final order was substituted for the date of the application came into force only on 1st January 1928.] If these were applications made in accordance with law and to the proper Court, the plea of limitation cannot stand. The appellant's objection is that the petition of 17th July 1926, was not one in accordance with law because it did not contain an express prayer for adding the appellant as legal representative of the judgment-debtor. The answer to this, as the lower appellate Court has held, is that the Civil Procedure Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor though in ordinary practice such a prayer is usually

added in an execution petition. It was probably this departure from practice which caused the return of the petition of 17th July 1926. But this cannot affect the legal validity of the petition if such an express prayer is not necessary. S. 50 (1), Civil P. C., says that where the judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased. That was what was prayed by the petition of 17th July 1926. This corresponds to O. 21, R. 16, which contains the corresponding provision in the case of death of the decree-holder that the transferee (the legal representative) may apply for execution of the decree to the Court which passed it. The result of this is that the petition of 17th July 1926, was a valid execution petition in so far as it asked for execution against the appellant though it did not expressly ask for his name being substituted. Reference may be made to *Alagirisamy Naidu v. Venkatachala-pathi Ayyar* (1), *Palaniappa Chettiar v. Subramania Chettiar* (2), and the recent decisions in *Venkatachalam Chetty v. Ramaswami Servai* (3) and *Venkata-lakshamma v. Seshagiri Rao* (4). It has also been held that where an application has been returned for amendment, but not represented such applications would still be sufficient to save limitation: *G. Seshayya v. Y. Venkatasubbiah* (5), *Kamakshi Ammal v. Pichu Ayyar* (6) and *Natesa Pillai v. Ganapathia* (7). The decision of the lower Courts was right and the appeal is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

1. (1908) 31 Mad 77=17 M L J 566.
2. A I R 1925 Mad 701=48 Mad 553.
3. A I R 1932 Mad 73=55 Mad 352 (FB).
4. A I R 1931 Mad 303=131 I C 610.
5. (1915) 29 I C 26.
6. (1916) 35 I C 876.
7. (1917) 40 Mad 949=38 I C 136.

A. I. R. 1933 Madras 569

WALSH, J.

(Pakkiri) Muhammad Rowther—Petitioner—Appellant.

v.

Maideen Pichai Sahib—Decree-holder—Respondent.

Appeal No. 130 of 1929, Decided on 13th March 1933.

(a) Civil P. C. (1908), S. 47—Party bound by decree applying to set it aside in execution—Application is under S. 47 and not Civil P. C. (1908), O. 21, R. 100.

If a party bound by a decree seeks in execution to have the decree set aside his application can lie if at all not under O. 21, R. 100, but under S. 47. [P 570 C 1]

(b) Civil P. C. (1908), O. 21, R. 100—Party bound by mortgage decree cannot set up paramount title in execution—Mortgage.

In a mortgage suit a defendant was impleaded as a puisne mortgagee. He remained ex parte. Decree was passed against him and he allowed the sale to take place. He in execution proceedings came forward to object to the execution on the ground of a paramount title:

Held: that he could not be permitted to do so as the question did not relate to execution, discharge or satisfaction of decree, but went to the root of the decree itself which could not be allowed in execution. [P 570 C 1, 2]

S. Nagaraja Ayyar and J. R. Alwar Naidu—for Appellant.

K. V. Srinivasa Ayyar—for Respondent.

Judgment.—The appellant is defendant 11 in the suit. The respondent is the plaintiff (decree-holder auction-purchaser). The plaintiff had brought the suit on a mortgage. Defendant 11 was impleaded as puisne mortgagee. A mortgage decree was passed. The property was purchased by the decree-holder and delivered over to him. Defendant 11 put in an application saying that part of the property marked A should not be delivered possession as he had certain rights in it. He was asked to define his rights properly by way of filing an affidavit, and he did so stating that he claimed both an easement right of way through portion A and also right in the portion Ex. A as cosharer with the mortgagors of the property. His application was put in both under S. 47 and O. 21, R. 100, Civil P. C. The application was dismissed by both the Courts below. The present second appeal has been filed against these decisions.

A preliminary point was taken that the petition was one under O. 21, R. 100, and not under S. 47 and so no first or second appeal lay. The appellant was a party to the suit and was bound by the decree and even a party who has been exonerated is a party to the suit for purposes of S. 47: *Sivasamba Iyer v. Kuppan Samban* (1), *Appia Rukmani Ammal v. Narasimha Iyer* (2) and *Go-*

1. (1915) 32 I C 769.

2. A I R 1921 Mad 612=63 I C 730.

vindarajulu v. Chinnathambi, A I R 1928 Mad 1270. The question whether a party bound by a decree can seek in execution to have the decree set aside is a different one from whether, if he does make such an application, it is to be under O 21, R. 100 or under S. 47. I consider that the only section under which it can lie, if it lies at all, is S. 47, but I agree with lower Courts that the petition will not lie at all. Three cases have been quoted to me, *Sivasamba Iyer v. Kuppan Samban* (1), *Appia Rukmani Ammal v. Narasimha Iyer* (2) and A I R 1928 Mad 1270, where parties to a decree had been allowed to put forward paramount title in execution proceedings, but in all those cases the parties had been exonerated and they were therefore not bound by the decree. In this case defendant 11 was impleaded as a puisne mortgagee. He remained ex parte. Decree was passed against him and he allowed the sale to take place. He now comes forward to object to the execution on the ground of a paramount title. The question is whether he can be permitted to do so. No authority has been quoted to show that such a thing can be permitted. The published report in A I R 1928 Mad 1270 does not disclose that the objecting defendant had been exonerated, but upon calling for the records of the case I find that it is so. No doubt the paramount title set up by defendant 11 is not an issue in the suit and the Court was not bound to adjudicate upon it in the suit if set up, but a decree has been passed against him in his capacity as puisne mortgagee. Several cases are quoted for the respondent which show that a party bound by a decree cannot be allowed to attack the decree in execution proceedings on the ground of paramount title: *Sahu Nand Kishore v. Dhanpat Rai* (3), *Khetrapal Singh Roy v. Shyama Prosad Barman* (4) and *Ram Charan Sahu v. Salik Ram Sahu* (5). In the last case the learned Judges say at p. 221 (of 52 All):

"It is clear to us that S. 47, Civil P. C., has no application to the circumstances of the case before us. The question which arises between the parties to the suit does not relate to the execution, discharge or satisfaction of the decree, but is one which, if decided in favour of

3. A I R 1922 All 49=133 I C 902.

4. (1905) 32 Cal 265.

5. A I R 1930 All 628=121 I C 702=52 All 217.

the plaintiff-appellant, strikes at the very root of the decree which the respondent is seeking to execute."

This is exactly the case here. As regards an exonerated defendant who is not bound by the decree it is perfectly clear that he can, if his interests are affected by executing the decree against those who are bound by it, ask the Court to hold that the decree shall not be executed against his interests; for a defendant bound by the decree to do so is to attack the decree itself. This is not a case where the properties sold are in excess of what the decree orders to be sold. Admittedly the properties which have been sold are the properties which have been ordered by the decree to be sold and the appellant's attempt is to set aside that decree by which he is bound by setting up his paramount title in execution proceedings. In my opinion the Courts below are right in holding that he cannot do so. In the result this appeal fails and is dismissed with costs.

P.R.S./M.N.

Appeal dismissed.

* * A. I. R. 1933 Madras 570

{ Full Bench

RAMESAM, ANANTAKRISHNA AYYAR
AND CORNISH, JJ.

M. Paramasivan Pillai—Appellant.

v.

A. V. R. M. S. P. S. Ramasami Chettiar—Respondent.

Letters Patent Appeal No. 59 of 1932, Decided on 20th January 1933, against judgment of Pandalai, J., reported in A. I. R. 1933 Mad. 447.

* * (a) Civil P. C. (1908), O. 40, R. 1—Receiver can be appointed in suit by simple mortgagee.

A simple mortgagee is not disentitled to obtain the appointment of a receiver if the other circumstances are such as to justify it merely on the ground that no personal remedy subsists to proceed against the other properties of the mortgagor. The appointment of a receiver is only a mode of execution to be used with caution and sound judicial discretion: A. I. R. 1918 All. 240, and A. I. R. 1932 Pat. 360, Expl. and Diss. from; Case law discussed. [P 575 C 1; P 576 C 1]

(b) Letters Patent (Mad.), Cl. 15 — Civil P. C. (1908), O. 43, R. 1 (s) and O. 40, R. 1—Appeal under Cl. 15 lies from order of single Judge rejecting application under O. 40, R. 1.

The provisions of Civil Procedure Code do not control sections of the Letters Patent and the provisions of the Letters Patent prevail; and therefore an appeal lies from the judgment of a single Judge of the High Court dismissing an application under O. 40, R. 1: Case law considered. [P 572 C 1, 2]

K. V. Sesha Ayyangar—for Appellant.

T. E. Ramabhadra Iyer — for Respondent.

Ramesam, J.—This is a Letters Patent appeal against the order of our brother Pandalai, J., in *Ramaswami Chettiar v. Paramasivan Pillai* (1). When the appeal came on for admission before our brothers Reilly and Venkatasubba Rao, JJ., while admitting it they directed it to be posted before a Bench of three Judges on the ground that the appeal raised a very important question on which conflicting views were expressed. The facts of the case are as follows : Defendant 1 executed a deed of mortgage in favour of one Krishna Pillai on 30th May 1924 for Rs. 20,000. The present plaintiff is his brother, plaintiffs 2 and 3 and defendant 7 are his nephews and plaintiff 4 is his grand-nephew. Krishna Pillai died and in the family arrangement entered into after his death the mortgage document fell to the share of the plaintiffs and defendant 7. Defendant 2 is the undivided brother of defendant 1.

The property that was originally mortgaged was the othi right in the suit properties created in favour of defendant 1 by one Dathaprakasam Pillai but after the suit mortgage, i. e., on 28th November 1928, defendants 1 and 2 purchased the whole proprietary right in the properties. Defendant 3 is the son of the purchaser of the properties from defendants 1 and 2 under a sale deed dated 23rd February 1929. Under the sale deed he was directed to pay Rupees 24,500, towards the suit debt. He offered to pay the said amount in complete discharge of the mortgage but the plaintiffs refused to accept it on the ground that more was due to them with the result that the amount remained unpaid. On 29th September 1930 a preliminary decree was passed in favour of the plaintiffs for Rs. 20,000 with interest at the rate of 13½ % per annum from the date of the plaint which amounted to nearly Rs. 37,000. In August 1931 the plaintiff applied for the appointment of a receiver of the suit properties on the ground that the properties were scarcely enough for discharging the decree and that there was no other means of realising the decree amount. The Subordinate Judge passed

an order holding that this was a fit case for the appointment of a receiver and directed the receiver to take possession of the properties from 1st November 1931. There was an appeal to the High Court by defendant 3 and it was followed by an application for the stay of the order of the Subordinate Judge. The order was stayed on the appellant giving security. The matter came on before our brother Pandalai, J., who reversed the order of the Subordinate Judge on 21st September 1932. This Letters Patent appeal comes on before us in due course.

The Subordinate Judge found that after the purchase by defendant 3 nothing was paid to the plaintiffs. He disbelieved defendant 3's story that the plaintiffs refused to receive the amount on account of dissensions among themselves. He observed that there was a prior application for the appointment of a receiver during the pendency of the suit and that it was dismissed, but he thought that this circumstance did not matter as at the time of the present application a much larger amount was due to the plaintiffs than at the time of the earlier application. It also appeared that the value of the hypotheca was going down day by day. Defendant 3 also relied on the fact that the plaintiffs gave up their right to get a personal decree against the mortgagors but the Subordinate Judge thought that that circumstance did not matter. On appeal our brother Pandalai, J., observed :

"If this appeal depended on the above or similar considerations which affect receiver applications in ordinary simple mortgage suits, I should have no hesitation of confirming the order of the learned Judge."

He referred to *Khubsurat Koer v. Saroda Charan Guha* (2), and *Rameshwar Singh v. Chuni Lal Shaha* (3), referred to with approval in *Maharaja of Pithapuram v. Gokuldoss Goverdhan Doss* (4). He finally concluded thus :

"I am satisfied that the likelihood is that the property will not be enough for the mortgage debt and that the appellant realising this is trying to delay the realisation of the debt as long as possible as it is profitable for him to do so. On the merits I am against the appellant."

But he thought he ought to allow the appeal on the ground that the plaintiffs having given up their right to personal

2. (1911) 12 I C 165.

3. A I R 1920 Cal 545=47 Cal 418=56 I C 839.

4. A I R 1931 Mad 626 = 54 Mad 565.

1. A I R 1933 Mad 447=143 I C 650.

remedies against the mortgagors the application for the appointment of a receiver amounted to an attempt to get through the machinery of receiver what they had given up. He therefore allowed the appeal. Mr. Ramabhadra Ayyar for the respondent took two preliminary objections to the hearing of this appeal. First he relied on the fact that the property has since been brought to sale and purchased by the decree-holder and therefore this appeal is infructuous and is merely academic. To this the appellant replies that the receiver not having been allowed to take possession of the property in accordance with the order of the Subordinate Judge he is entitled to the profits of the property for the interval between the order of appointment and the purchase by him in auction, and if he succeeds in this appeal he can recover it by realising the security furnished by defendant 3. There is no reply to this argument of the appellant. And though it is a pity that this appeal which has taken considerable time has to be heard solely for the purpose of settling the dispute about the profits for about a year, still we cannot refuse to hear the appeal as the learned Judges who referred the appeal observed that the point involved was an important one.

Secondly Mr. Ramabhadra Ayyar contended that under O. 43, R. 1, the order of Pandalai, J., was final and no Letters Patent appeal lay against his order. This question was the subject of consideration by several Judges of this Court under the old Code and though at one time a different rule prevailed; vide: *Vasudeva Upadhyaya v. Visvaraja Thiruthasami* (5), after the Full Bench decision in *Chappan v. Moidin Kutti* (6), which was a decision of six Judges and where all the prior cases were considered and the later case *Muthuvaian v. Periyasami Iyer* (7), the practice of this Court has been uniformly to hold that the Civil Procedure Code does not control the section of the Letters Patent. That principle has been applied in other decisions of this Court for example *Dhanaraju v. Balakisendas Motilal* (8).

5. (1897) 20 Mad 407=3 M L J 125.

6. (1899) 22 Mad 68=8 M L J 231 (F B).

7. (1903) 13 M L J 497.

8. A I R 1929 Mad 641 = 52 Mad 563 = 116 I C 343 (FB).

It is true that the Allahabad High Court has been always following a different rule under the new Code and under the old Code, but the practice of this Court has been different. There is nothing in the language of the new Code to show that the legislature intended to lay down a principle different from that in the old Code. The preliminary objections are overruled.

Coming to the merits of the case, the earliest decision of this Court on this matter is that in *Arunachalam Chettiar v. Manicka Vasaga Desikar* (9). The question was not elaborately examined in that case. The matter next came up for discussion before Oldfield and Sadasiva Ayyar, JJ., in *Venkataramajagopala Surya Row v. Basivi Reddy* (10). Oldfield, J., referred to the English cases. He pointed out that in *In re Pope*, (11) it was said that a Court of equity would not grant a receiver where the party applying had a legal right to possession: an equitable mortgagee could get a receiver but a legal mortgagee could not before the Judicature Act. It would now seem that in England after the Judicature Act even a legal mortgagee can get a receiver. He referred to some decisions under the Code of 1882 and distinguished them on that ground. The present O. 40, R. 1, uses language much wider than the language of the old Code, the words "just and convenient" being adopted from the Judicature Act. Then after referring to the case in *Arunachalam Chettiar v. Manicka Vasaga Desikar* (9) he relied on *Weatherall v. Eastern Mortgage Agency Co.* (12), *The Eastern Mortgage and Agency Co. Ltd. v. Rakea Khatum* (13) and *Khubsurat Koer v. Saroda Charan* (2). In the first two cases the Court held that default in payment of interest justified the appointment of a receiver. In *Eastern Mortgage and Agency Co. Ltd. v. Rakea Khatum* (13), the appointment of a receiver was refused on the ground that there was a decree for foreclosure, but the Court said that if it had been for sale and if it had been established that the security was not sufficient to satisfy the judgment.

9. (1909) 3 I C 497.

10. A I R 1915 Mad 133=26 I C 986.

11. (1886) 17 Q B D 743=55 L J Q B 522=34 W R 693=55 L T 369.

12. (1911) 9 I O 985.

13. (1912) 17 I O 202.

debt, a receiver would have been appointed almost as a matter of course, especially if there was default in payment of interest. The other learned Judge (Sadasiva Ayyar, J.) held that as under that particular decree the right of the mortgagee to proceed against the other properties was barred, it was not a fit case for the appointment of a receiver for rents and profits. It does not appear that the learned Judge meant to lay down any general rule of law that where a decree for sale has been obtained on a simple mortgage no receiver should be appointed or even where the personal remedy against the mortgagor did not exist there should never be a receiver. The learned Judge's language seems to indicate that on the particular facts of that case he thought it was not a fit and proper case for the appointment of a receiver.

In the present case defendant 3 purchased the property with knowledge of the prior mortgage of the plaintiffs and obviously it was intended that he should discharge the mortgage debt due to them. Unfortunately there seems to have been a mistake in calculation because the vendors said only Rs. 24,500 was due and asked the vendee to pay the amount who offered only that amount, but it turned out that more was due to the plaintiffs and if his purchase of the property was to completely enure to his benefit it was the vendee's duty to pay off the whole of the prior mortgage debt. An arithmetical error on the part of the vendor does not justify the debt being allowed to remain unpaid and from that date up to this the fact remains that not even interest was paid and the debt still remains unpaid. Under these circumstances the mortgagees having primarily to look to the mortgage property as security and the mortgagors and defendant 3 having intended that defendant 3 should pay off the debt, it is futile to urge in this case that the mortgagees having given up their personal remedy against the mortgagors that should be a circumstance against the appointment of a receiver. In my opinion that circumstance has no bearing on the question whether a receiver should be appointed for the property now in the hands of defendant 3, he having undertaken the payment of the debt.

In *Ethirajulu Chetti v. Rajagopala Chari* (14) the whole question was examined by Kumaraswami Sastri, J., and the learned Judge came to the conclusion that a receiver could be appointed on the application of a simple mortgagee and all the earlier English and Indian decisions were elaborately discussed. In *Maharaja of Pithapuram v. Gokuldas Govardan Das* (4) this decision was followed by Madhavan Nair, J. It is true that Madhavan Nair, J.'s judgment is distinguishable as pointed out by Terrell, C. J., in *Nrisingha Charan Nandy v. Rajniti Prasad* (15). The actual question before him was not whether a receiver should be appointed but a receiver having been previously appointed at the instance of the mortgagee the rents and profits should be applied for his benefit; but the fact still remains that the learned Judge agreed with the earlier decision of Kumaraswami Sastri, J. In *Rameshwar Singh v. Chuni Lal Shaha* (3) also the same view was taken though that case may be distinguished just as the decision of Madhavan Nair, J., was distinguished on the ground that there was a prior order for the appointment of receiver.

The decision in *Khoo Joo Tin v. Ma Seiw* (16) is also in favour of the same view, but as that decision is based upon an earlier ruling of the Burma Chief Court by which the learned Judges held themselves to be bound it is unnecessary to refer to it any further. The decision of our brothers Venkatasubba Rao and Reilly, JJ., in *Ponnu Chettiar v. Samasiva Aiyar* (17), in which some of these cases referred to was also a case where the appointment of a receiver had been previously obtained. Reilly, J., made observations in that judgment warning against the danger of relying on English decisions on mortgages and applying them to India. I agree that the English decisions ought to be used with great caution. There are observations in that judgment to the effect that a simple mortgagee can obtain the appointment of a receiver only in cases where the personal remedy subsists. The point did not arise in the case. Two deci-

14. AIR 1929 Mad 138=115 I C 244=52 Mad 979.

15. AIR 1932 Pat 360=142 I C 300.

16. AIR 1929 Rang 176=110 IC 620=6 Rang 261.

17. AIR 1933 Mad 293=141 I C 372.

sions which are opposed to series of authorities referred to above may now be mentioned. One is *Gobind Ram v. Jwala Pershad* (18), a decision of Sir Henry Richards, C. J., and Banerji, J. It was held that a simple mortgagee cannot obtain the appointment of a receiver and that the mortgagor is entitled to remain in possession until the property was sold. The other is a recent decision of Terrell, C. J., and Fazl Ali, J., in *Nrisingha Charan Nandy v. Rajniti Prasad* (15), already referred to. In the first of these cases the underlying idea was that the right to the appointment of a receiver depended on the right to obtain possession. Now it is true, as has been observed in some of these cases, the right of a simple mortgagee is primarily to proceed against the secured property and not against the other properties of the mortgagor unless there is a personal remedy. If the personal remedy is lost there is no right to proceed against the other properties of the mortgagor.

It is also true that a simple mortgagee is not entitled to possession of the mortgage property as a mortgagee. But where a mortgagee seeks to obtain the appointment of a receiver he does not proceed against the other properties of the mortgagor but wants to proceed against the mortgage property itself. The underlying idea in the opposite view is that the profits of the property not being mortgaged the mortgagee is really trying to proceed against property other than the mortgage property. But if the idea is carefully examined it seems to me there is a fallacy. In the first place the mortgagee never seeks to obtain possession for himself. Secondly the attempt to place the property in the hands of the receiver is really proceeding against the property so as to utilize it for the discharge of the debt. Now profits of property are an accession to the property and proceed out of it. When the property is taken from the hands of the mortgagor and placed in the hands of the receiver the receiver has to get it cultivated and derive income from it, and that income has to be utilized for the benefit of the mortgagee. It is not that the fruits of the mortgagor's labour bestowed on his land is to be taken away from him.

18. AIR 1918 All 240=43 IC 533.

If the crops on the mortgage property were raised by him, it may be said that he is proceeding against property other than the mortgage property. But where the property itself is taken away from his hands and is kept in the receiver's hands who has to make arrangements for its being cultivated and ultimately get profits from it, the whole proceeding is a proceeding against the mortgage property.

The matter can be looked at from another point of view. If a decree is promptly passed and the property is sold, the amount realised by the sale goes to the benefit of the mortgagee and from the time he receives the amount he gets interest on it. But instead of the sale promptly following the suit if there is delay, during all the time the sale is delayed the mortgagor will be enjoying the profits of the property which would have been enjoyed by the mortgagee in the shape of interest on the mortgage money if there had been an early sale. The profits of the property correspond to the interest on the money when once it is sold and converted into money, and wherever the mortgagor does not keep down the interest, he is really enjoying the profits of the property which in one sense represents the property which would have belonged to the mortgagee but for the delay. Anyhow it is not correct to say where the attempt is to realize the debt secured out of the profits of the property and appropriate it towards the mortgage debt, it is the same as proceeding against other property. For these reasons I am not able to agree with the decision in *Govind Ram v. Jwala Prasad* (18). The reasoning of Terrell, C. J., in the Patna decision proceeds on a somewhat different line. His judgment proceeds on the ground that an equitable mortgagee's right to get a Receiver appointed was based on his right to be put by the Court into the position of a legal mortgagee. In the first place the passages in Coote on Mortgage where the position of an equitable mortgagee is discussed show that unless there is an express covenant for getting possession under certain circumstances the equitable mortgagee is not entitled to possession and it would not be correct to say that the English decisions allowing a receiver to be appointed in the case of an equitable mortgage

depended on his right to possession. On the other hand, the observations in *In re Pope* (11) show that the appointment of a receiver in the case of an equitable mortgage was based on just the opposite ground. It is because an equitable mortgagee is not entitled to possession it was said that a receiver should be appointed and it was refused in the case of a legal mortgage. Whatever may be the position of an equitable mortgagee under English law, an equitable mortgagee under Indian law is merely a creature of the Transfer of Property Act. Under the Transfer of Property Act an equitable mortgagee has no right to possession. His only right is to obtain a decree for sale. I am not aware of any decision where it has been held that an equitable mortgagee is entitled to ask and demand possession of the mortgage property. I am therefore unable to concur with the statement of Terrell, C. J. :

"The same difference therefore between a simple mortgagee under Indian law and a legal mortgagee under English law exists between a simple mortgagee and an equitable mortgagee."

Far from there being such a difference at least in the matter of obtaining possession, a simple mortgagee and an equitable mortgagee seem to stand on the same footing. In both the mortgagee is not entitled to possession and it is on the consideration that a mortgagor who continues to enjoy the property without paying down the interest from out of the profits of the property may be said to be from an equitable point of view committing a breach of his undertaking and where there are other circumstances such as the property being insufficient that Courts have to proceed to appoint receivers in the case of equitable mortgages. The Madras and Calcutta cases appointing receivers in the case of equitable mortgages cannot be distinguished on the ground suggested by Terrell, C. J. The other learned Judge, Fazl Ali, J., agrees with the conclusion and has based his reasons on the ground that the case before him was not a fit one for the appointment of a receiver. He said nothing on the right of a simple mortgagee or an equitable mortgagee. For these reasons with great deference, I am unable to agree with the Allahabad and Patna decisions referred to above and agree with the large current of authority in favour of the appointment of

a receiver even in the case of a simple mortgage. The decision in *Satrucharla Gangaraju v. Ramchandra Deo Garu* (19) is a case where the Judges thought that, on the facts, it was not a case for the appointment of a receiver of property other than the mortgage property and lays no proposition of law. Of course I must not be understood as saying that a simple mortgagee is entitled to the appointment of a receiver as a matter of course. During the pendency of the suit there may be questions about the proof of the document itself and even after the decree the circumstances may not be such as to entitle him to such an appointment. Where interest is allowed to accumulate into heavy arrears, and the security became inadequate thereby I should say that such a case may be a fit one for the appointment of a receiver. Again where a defendant mortgagor or a purchaser from him undertakes to pay the interest during the pendency of the suit and until the property is brought to sale, the appointment of a receiver ought to be refused. But where a person in the position of defendant 3 in this case has not paid any amount for several years towards the mortgage debt and where, as has been found by the Subordinate Judge and Pandalai, J., there are no merits in favour of the appellant, that would be a fit case for the appointment of a Receiver.

The learned advocate for the respondent relied on a case in *C.M.P. No. 1362* of 1932, decided on 29th April 1932 (20), an interlocutory order of Curgenven, J. But that case merely illustrates what I said. In that case the learned Judge directed that the interest should be paid regularly and observed that no Receiver should be appointed so long as that direction was obeyed. A decision of myself and Jackson, J., in *Shri Devi Amma v. Valia Narayana* (21) was referred to as showing that a simple mortgagee has no right to the appointment of a receiver. What we meant in that case was that he has no absolute right to insist on the appointment of a receiver and not that if the circumstances were such the Court may not exercise the discretion in appointing a receiver.

19. AIR 1926 Mad 797=96 I C 194.

20. (1932) 62 M L J 35 (NRC).

21. AIR 1929 Mad 20=114 I C 839.

We simply decided in that case that no appeal lay and we were trying to show that there was no hardship by so holding. That case does not help the respondent. In my opinion a simple mortgagee is not disentitled to obtain the appointment of a receiver if the other circumstances are such as to justify it merely on the ground that no personal remedy subsists to proceed against the other properties of the mortgagor. The appointment of a receiver is only a mode of execution (S. 51 of the Code) to be used, no doubt, with caution and sound judicial discretion. It was ordered by the Judicial Committee in a simple money decree, (*Vibhuda Periya v. Lakshmindra* (22)), why should the simple mortgagee be in a worse position than the holder of a money decree? If it is said that he has taken property as security, what about the case when it has become insufficient? I would therefore allow this appeal with costs before us and Pandalai, J. The costs will be assessed on the amount of Rs. 1,600 (vide C. M. P. No. 31/33), i. e., he will get minimum fee.

Anantakrishna Ayyar, J.—This Letters Patent appeal has been preferred against the decision of Pandalai, J., in *Ramaswami Chettiar v. Paramasivam Pillai* (1) in which, though the learned Judge held on the merits that a case for the appointment of a Receiver had been made out, yet he reversed the order of the Subordinate Judge of Tuticorin appointing a Receiver in respect of the property which was the subject-matter of the mortgage suit, on the ground that the Court had no jurisdiction to appoint a Receiver since the plaintiff had given up right to personal relief against the mortgagor. (After stating facts, His Lordship proceeded). A preliminary objection was taken by the learned advocate for the respondent (defendant 3), that, having regard to the provisions of S. 104, Civil P. C., no further appeal lay from the judgment of the learned Judge in an appeal preferred under O. 43, R. 1, Cl. (s), Civil P. C. He argued that only one appeal lay against the order passed by the Subordinate Judge under O. 43, R. 1, Cl. (s), Civil P. C., but that no further appeal lay from an order passed in such an appeal,

having regard to the provisions of S. 104 (2), Civil P. C. The appeal before us was preferred under the provisions of S. 15, Letters Patent, of this High Court.

The question whether an appeal lies under Cl. 15, Letters Patent, against the judgment of a single Judge of the High Court passed on an appeal preferred to the High Court under O. 43, Civil P. C., (corresponding to S. 588 of the earlier Code) has been the subject of discussion in some cases in this Court. The decision of Boddam and Bhashyam Ayyangar, JJ., in *Muthuvaian v. Periasami Iyen* (7) is directly against the contention raised by the respondent before us. The learned Judges, after noticing the reasoning of the Full Bench of this High Court in the case reported in *Chappan v. Moidin Kutti* (6), and of the Privy Council decision in *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (23), and of the decision of a Bench of this Court in *Sabapathi v. Narayanaswami* (24) came to the conclusion that the provisions of the Letters Patent prevailed, and that an appeal lay from the judgment of one Judge of the High Court in such cases. It was remarked that the prohibition contained in the Civil Procedure Code related only to the entertainment of a further appeal by another Court of a higher grade in such cases, and that the provisions of the Letters Patent conferring a right of appeal from the judgment of one Judge of the High Court to the same Court were not in any way interfered with by the provisions of the Civil Procedure Code.

That view has been accepted all along in this Court, though the Allahabad High Court would seem to be of a different opinion: *Sri Kishen v. Ishri* (25) and *Piri Lal v. Madan Lal* (26). See also the decision of the Full Bench in *Dhanaraju v. Balakissen Das Motilal* (8) where it was held that the procedure to be adopted by the High Court in the case of an equal division of opinion among the Judges of the High Court in an appeal preferred to it under the Civil Procedure Code is governed by the Letters Patent and not by the Civil Procedure Code.

23. (1889) 9 Cal 482=10 I A 4 (P C).

24. (1902) 25 Mad 555=11 M L J 346.

25. (1892) 14 All 223=(1892) A W N 73.

26. (1917) 39 All 191=39 I C 460.

22. AIR 1927 P C 131=101 I C 545=54 I A 228=50 Mad 497 (P C).

Having considered the provisions of S. 588 of the old Code on the one hand, and S. 104 and O. 43 of the present Code on the other, I do not think that there is any sufficient ground for holding that the decision in *Muthuvien v. Periasami Iyen* (7) should not govern judgments passed under the present Civil Procedure Code, by a learned Judge of this Court in an appeal preferred under O. 43, Civil P. C. I have no hesitation in overruling the preliminary objection. The matter has been fully discussed in the decisions already cited, and I do not propose to say anything more on the point.

The substantial question in the appeal is whether the Court has jurisdiction, in a case where personal relief against the mortgagor and his other properties has been given up by the mortgagee, to order the appointment of a receiver in the suit of a simple mortgagee. The preliminary decree passed by the lower Court on 29th September 1930 no doubt contains a statement that the mortgagees had given up their right to personal relief against the other properties of the mortgagor. The mortgage sued on is dated 30th May 1924 and the suit was filed on 6th September 1929, i.e., within six years from the date of the mortgage, and therefore it is rather difficult to understand the circumstances under which the plaintiff's pleader gave up the plaintiff's right to personal relief against the other properties of the mortgagor; but, in the face of the statement, above referred to in the preliminary decree dated 29th September 1930 passed in this case, we must take it that the recital in the decree is correct. The question therefore is whether the order passed by the Subordinate Judge appointing a receiver over the mortgage properties was passed without jurisdiction having regard to the fact that the plaintiffs had given up their right to personal relief against the mortgagors and their other properties.

It must be taken to be settled law in this Court at present that though a simple mortgage does not carry with it right to possession and though a simple mortgagee's remedy is only by way of sale of the mortgage property, yet the Court has jurisdiction in a suit brought by a simple mortgagee to recover money, to appoint a receiver in a proper

case. The decision of Kumaraswami Sastriar, J., in *Ethirajulu Chetti v. Rajagopal Chettiar* (14), has made that position clear, after reviewing the earlier authorities on the point. The learned Judge noticed the provisions of O. 40, R. 1, Civil P. C., and also of S. 503 of the Code of 1882. The learned Judge came to the conclusion that whether the mortgagee was or was not entitled to possession, he may invite the Court to appoint a receiver if the demands of justice require that the mortgagor should be deprived of possession. While observing that it is impossible to lay down a hard and fast rule enumerating the circumstances under which alone the Court will appoint a receiver in respect of property subject to a simple mortgage, the learned Judge held that where on account of circumstances created either by the conduct of the mortgagor or connected with the state of the property, the mortgagee is likely to sustain losses not foreseen by him at the time he took the simple mortgage the Court will have jurisdiction to appoint a receiver to take possession of the property for the benefit of the mortgagee.

In the case before the learned Judge the default of the mortgagor in paying the interest and the fall in value of the mortgage property were taken by the learned Judge to be facts constituting it "just and reasonable" that a receiver should be appointed. The decision in *Ethirajulu Chetty v. Rajagopala Chettiar* (14), has been followed in numerous cases in this Court, though the learned Judges have always made it clear that under the Indian law it is not one of the ordinary remedies of a simple mortgagee who has filed a suit on his mortgage to have a receiver appointed as a matter of course in respect of the mortgage properties, but that the Court would appoint a receiver only in special circumstances when it considered it "just and convenient" to do so. It is not necessary at present to refer to the earlier cases where the law to the same effect has been laid by Courts in India: see *Arunachalam Chettiar v. Manicka Vasaga Desikar* (9), *Ghanashyam Misser v. Gobinda Moni* (27), *Weatherall v. Eastern Mortgage Agency Co.* (12), *Rameshwar Singh v. Chuni Lal Shaha* (3), *Mt. Khub-* 27. (1903) 7 C W N 452.

surat Kaur v. Saroda Charan Guha (2), *The Eastern Agency Co. Ltd. v. Rakea Khatum* (13) and *Jai Kissan Das Ganga-das v. Zenabai* (28). The wording of S. 503 of the Code of 1882 relating to the appointment of a receiver were different from the wording of O. 40, R. 1 of the present Code. Under the present Code, the Court could appoint a receiver if it appears to it to be "just and convenient" to do so. No doubt, the Court could not order the removal from the possession or custody of property any person whom any party to the suit has not a present right so to remove. But the jurisdiction of the Court to appoint a receiver under the present Code is very wide. That discretion, though very wide, should be exercised on well established principles of law and not simply according to the whim and caprice of individual Judges.

In my view the circumstance, that a simple mortgagee in India under the provisions of the Transfer of Property Act is not entitled to possession of the mortgage property even on default of payment of the mortgage money, see the observations of Lord Hobhouse in *Papamma Rao v. Vira Pratapa H. V. Rama Chandra Razu* (29), at p. 254, to the effect that

"if indeed the matter were new it might reasonably be argued that the terms of simple mortgage justify usufructuary possession; but long practice now embodied in a statute has settled that the remedy of the mortgagee is a judicial sale,"

does not necessitate the conclusion that the Court has no jurisdiction to appoint a receiver over the mortgage properties in a suit brought to enforce the simple mortgage, should it consider just and convenient to do. No doubt a simple mortgagee is not entitled to possession. His only right is to have a sale of the mortgage properties; but when the object of the suit is to have sale of the mortgage properties but owing to inevitable delay in litigation the same could not be ordered at once, and the other circumstances such as those found in the present case exist, it does not follow that the Court could not order the appointment of a receiver in such a case if it considered it just and proper to do so. It is only regarding the property which was mortgaged to the

plaintiff that the Court appoints a receiver in such a case. The circumstance that the right of the mortgagee to have personal relief against the mortgagor and his other properties has been given up or has become barred by limitation or does not exist in particular cases is no ground, by itself to hold that the Court has no jurisdiction to appoint a receiver in such cases. The order appointing a receiver affects only the mortgage property which is the subject of the suit and not any other property of the mortgagor. The delay in litigation could not always be imputed to the plaintiff; it is well known that defendants also in several cases contribute to the delay in the disposal of the suit. As a matter of fact in the present case it is found by the learned Judge of this Court and also by the Subordinate Judge that defendant 3 has allowed interest to accumulate and is only anxious to continue in possession for as long a period as possible with the sole view of enjoying the income of the properties thus causing prejudice to the plaintiffs.

It is admitted that in case of waste, or destruction of the mortgage property, or when revenue or head-rent is not paid, the Court has jurisdiction to appoint a receiver over the mortgage property. But does this exhaust the jurisdiction of the Court to appoint a receiver in mortgage suits, though those would undoubtedly be cases in which Courts would more readily appoint a receiver? In discussing the question one must keep separate two questions: (1) Whether the Court has jurisdiction; and (2) Whether the Court should in a particular case appoint a receiver in the exercise of its jurisdiction. *Prima facie*, if the Court could appoint a receiver over the mortgage property in some cases in a suit on a simple mortgage it would surely indicate that the Court has jurisdiction to appoint a receiver over the mortgage property as such; and the other question whether in a particular case it would make the order or not would be one dependent entirely on the particular circumstances of that case. We should not mix the two questions especially when one of them relates to the very existence of jurisdiction in such a suit in certain circumstances. As already stated, the question is not whe-

28. (1890) 14 Bom 431.

29. (1896) 19 Mad 249=23 I A 92 (P C).

ther the plaintiff has a strict legal right to have a receiver appointed in such a case as the one before us. Even in a case where there was a specific agreement between parties that on the happening of a particular event, one of the parties was entitled to have a receiver appointed, the Court held that it was entirely a matter of discretion with Courts whether a receiver should be appointed in any particular case or not. It therefore seems to me that it is attacking the problem from a wrong end to say that because a simple mortgagee is not entitled to possession therefore the Court has no jurisdiction to appoint a receiver, that because right to personal relief is given up therefore the Court has no jurisdiction to appoint a receiver in respect of the mortgage property. I agree with the learned Judges of this Court who have often remarked that in cases of mortgages Courts in India should be very careful before implicitly following English decisions passed with reference to mortgage law in force in England. In England a simple mortgagee is entitled to take possession of the mortgage properties on the mortgagor's default to pay the mortgage debt at the stipulated period. Being in a position to take possession of the mortgage property, English Courts were reluctant at one stage to appoint a receiver at the instance of a simple mortgagee. As remarked by Dr. Ghose in his *Law of Mortgage in India*, Edn. 4, Vol. 1, p. 590:

"The position of a mortgagee in possession is so full of peril that no mortgagee, except under the strongest pressure, should assume possession, and certainly never when he could get a receiver. For by means of appointing a receiver, mortgagees are able to obtain the advantages of possession without its drawbacks."

Under the Law of Property Act, 1925, a simple mortgagee could apply for appointment of a receiver. An equitable mortgagee in England had always the right to apply for the appointment of a receiver as a matter of course. The law in India is different. While it is open to the Courts in suits by simple mortgagees and as also in suits by equitable mortgagees, to appoint a receiver over the mortgage property there is no such thing as a right on the part of the said mortgagees for the appointment of a receiver in such cases. In India in such cases receivers are not

appointed as a matter of course. Even when the income, rent and profits of the property have been expressly included in a simple mortgage as security for the mortgage debt, the mortgagee is not entitled as of right to have a receiver appointed. The case will be the same when the right of personal relief against the mortgagor and his other property is still subsisting. The appointment of a receiver is not a matter of right on the part of the mortgagee. The above circumstances would ordinarily work in favour of such appointment, in conjunction with the other facts of the case. Special circumstances have always to be proved before the Court could come to the conclusion that it is just and convenient in that particular case to have a receiver appointed over the mortgage properties. If on the other hand it is proved to the Court's satisfaction that it is just and convenient to appoint a receiver, there is nothing in any provision of law to which our attention was drawn, nor any decision binding on us that prevents the Court from making such an order. In the various cases decided by Courts in India referred to above I do not find any reference made to personal relief against the mortgagor being available as a necessary condition for such appointment. In *Ponnu Chettiar v. Sambasiva Iyer* (17) the learned Judges had not to decide and in fact did not decide that a receiver could be appointed only when the personal remedy against the mortgagor was available and that is specially noted by one of the learned Judges. The only direct decision of this Court on this point in which the question is discussed is that reported in *Venkata Rajagopala Surya Row Bahadur v. Basivi Reddi* (10). In that case, Oldfield, J., was of opinion that the Court has power to appoint a receiver of mortgage property where a decree for sale is passed on a simple mortgage though the personal remedy is barred by limitation. Sadasiva Iyer, J., on the other hand would seem to have been of a different opinion though at p. 463 that learned Judge says that "he has come to the conclusion that this is not a fit case for the appointment of a receiver."

The decision in *Satrucharla Gangaraju v. Ramachandra Deo Garu* (19) does not discuss the question of jurisdic-

diction of the Court; but having regard to the facts of that case the learned Judges

"saw no reason to appoint a receiver for property which is not the subject-matter of the suit" and "which descended to the mortgagor after the mortgage suit was filed as reversioner to the estate of a minor."

The decision turned on the facts of the case only. The circumstance that the mortgagee's right to proceed personally and against the other properties of the mortgagor is not available is in my opinion no bar to the Court appointing a receiver over the mortgage property (as distinct from the non-mortgage property). Execution of such decrees could be stayed either by means of injunction issued in other suits or as a result of appeal. Though it is open to Courts in such cases to impose terms before granting injunction or staying execution *prima facie* the jurisdiction of the Court over the subject-matter of the litigation before it should not, except for cogent reasons, be held to have been taken away from it. Whether the mortgagee could proceed against the property of the mortgagor or not it is essential that the mortgagee should be protected in the manner of his proceeding against the very property mortgaged which is the subject-matter of the suit. I have already referred to the circumstance that the mortgagee in the case of a simple mortgage in India is not entitled to possession of the mortgage property. It follows that the mortgagor could deal with the right to possession of such property even after creating a simple mortgage over the said property. Till a suit is instituted it would be open ordinarily to the person who has acquired right to possession of the property to appropriate the income of the mortgage property for his sole benefit. That proposition is not disputed.

But when a suit is instituted by a simple mortgagee for the sale of the mortgage property with a view to realize the mortgage debt then the argument relating to possession loses force. It cannot be denied that in a proper case it is open to the Court in execution of a mortgage decree to direct that instead of the mortgage property being sold at once a receiver should be appointed to collect the rents and profits of the mortgage property, so that if

the decree amount could be paid within a reasonable time, the sale of the mortgage property might be avoided. The argument urged on behalf of defendant 3 in the present case would, if logically pressed, deprive the Court of jurisdiction to do so. I would therefore hesitate before accepting defendant 3's contention which would lead to such a result.

Again his contention, if logically applied, would deprive the Court of jurisdiction to appoint a receiver over the mortgage property by removing a person in the position of defendant 3 (a subsequent purchaser of the equity of redemption) from possession of the same, because, even if personal relief against the mortgagor be available, it would be available only as against properties and rights that vested in the mortgagor on the date on which the receiver is appointed and in a case where the mortgagor had already parted with (for value) his right to possession of the property in favour of a third person (like defendant 3 in this suit) the Court could not deal with the right to possession of the mortgage property which *ex hypothesi* had left the mortgagor and passed to a third person in the position of defendant 3 before us. Defendant 3's argument based on the non-existence of right to personal relief against the mortgagor would seem logically to lead to the conclusion that even when right to personal relief subsists the Court would have no jurisdiction to appoint a receiver, since right to possession had passed to the purchaser of the equity of redemption, and did not remain in the mortgagor on the date of the suit. The same argument of defendant 3 would also lead to the conclusion that, in such a case, a Court could not appoint a receiver over the mortgage property, even by its decree in the suit. The argument, in my opinion, ignores the distinction between the mortgage property and "non-mortgage property;" the jurisdiction to appoint a receiver would always subsist in the case of mortgage property, the subject-matter of suit, whereas it would not exist with reference to non-mortgage property in a case where the personal remedy is not available. But when a similar argument was advanced before the very same learned Judge—Krishnan Pandalai, J., in *C. M. A. 493*

of 1931—decided on 1st November 1932, that learned Judge (as I understand the judgment) overruled the contention and, in my opinion, rightly. The learned Judge observed that the act of the mortgagor in selling the equity of redemption could not deprive the Court of its jurisdiction to appoint a receiver and that by transferring possession to a stranger a mortgagee could not be baffled. This last argument, in my view, really takes away the bottom from the respondent's contention.

It has been held that a Court has jurisdiction, in a suit filed by an equitable mortgagee in India to recover money due on the equitable mortgage, to appoint a receiver over the mortgage property. An equitable mortgagee in India has no right to possession of the mortgage property. If the Court has jurisdiction in the case of an equitable mortgage to appoint a receiver over the mortgage property it should surely have jurisdiction to appoint such a receiver in the suit of a simple mortgagee in India. The Court has complete jurisdiction over the subject-matter of the suit and if the Court could sell the mortgage property it should also have jurisdiction to appoint a receiver over the same. In the circumstances, I think it is for defendant 3 to satisfy us that the Court has no jurisdiction to appoint a receiver in such a case. He has not only not satisfied me that it is so; but for reasons already given it seems to me that the Court has got jurisdiction in the matter.

With great respect I am not able to agree with the observations of the learned Chief Justice of the Patna High Court in *Nrisingha Charan v. Rajniti Prasad*, A I R 1932 Pat 360, regarding the rights of an equitable mortgagee in India to demand possession of the mortgage property. In my opinion there is no difference in this respect between a simple mortgage and an equitable mortgage in India and neither of the said mortgages carries with it any right to demand possession in India. The other learned Judge in the Patna case did not discuss the question of law, but held on evidence that no case for appointment of a receiver had been made out in that case. In *Ghose on Mortgages*, Edn. 3, p. 597 (Note 1) and

Edn. 5, p. 632 (a), the learned author states as follows :

"It should be noticed that the Court may appoint a receiver at the instance of the mortgagee where the action is for foreclosure or sale, if there is reason to suspect that the security is insufficient or if the interest is in arrear."

In *Jaikissan Das Gangadas v. Zenabai* (28), a case decided under the Code of Civil Procedure of 1882, Sir Charles Sargent, Kt., C. J., and Telang, J., held that :

"The High Court possesses the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act."

The learned Judges observed that when it was "just and convenient" to do so, a receiver could be appointed by the Court. That was not the test laid down in S. 503 of the Code of 1882, but the learned Judges applied that test. Under the present Code of Civil Procedure, O. 40, R. 1, the test of "just and convenient" has been expressly enacted for guidance in appointing receivers in suits. Therefore, the ruling in *Jaikissan Das Gangadas v. Zenabai* (28) is rather useful for decisions of cases that arise under the present Code of Civil Procedure. At p. 435, the learned Judges stated as follows :

"Now in the present case, we think, it is 'just and convenient' that a receiver should be appointed. There are exceptional circumstances here. The mortgage debt is for a very large amount. The value of the property is said to be insufficient to cover the debt, and there is a large sum owing for arrears of interest. It is, therefore a case in which a receiver is desirable and we think he ought to have been appointed by the decree made by the Court below."

For these reasons, I have come to the conclusion that the Court has jurisdiction, in a proper case, to appoint a receiver in respect of mortgage properties in a suit filed by a simple mortgagee to realize his debt from the mortgage properties, and that appointment of receiver is only a mode of realizing such security in the case of a simple mortgage. As the learned Judge has agreed with the Subordinate Judge on the merits that, if the Court has got jurisdiction in this matter, the order appointing receiver was justified by the circumstances, it follows that the Letters Patent appeal must be allowed and the decision of the Subordinate Judge restored with all costs in the High Court.

Cornish, J.—In the determination of the question before us not much assis-

tance, I think, is to be got from English rules and precedents. The reasons for the rule for appointing a receiver for the benefit of a legal mortgagee or of an equitable mortgagee in England (see Kerr on Receivers, pp. 32, 35 and Coote on Mortgage's Vol. 2, p. 823) do not stand good for the appointment of a receiver in favour of an Indian simple mortgagee; but that argument does not exclude the possibility of a receiver being appointed on behalf of a simple mortgagee. The power in India to appoint a receiver by way of execution is conferred on the Courts by the Civil Procedure Code and it is a mistake, in my opinion, to treat it as if it must be dependent upon English equitable rules.

The remedy of the simple mortgagee is a judicial sale of the mortgaged property: *Papamma Rao v. Vira Pratapa H. V. Ramchandra Razu* (29). That is his legal remedy. In the absence of any clear rule to the contrary why is he not to be entitled to crave as auxiliary to his legal remedy the equitable remedy provided by O. 40, R. 1, of the appointment of a receiver? O. 40, R. 1, is available unless we hold with the view taken in *Makhan Lal v. Mushtaq Ali* (30) that O. 34 shuts out any recourse to O. 40, R. 1. But that ruling finds no support in any of the decisions of this High Court or in the Bengal and Bombay High Courts relating to the appointment of a receiver in mortgage suits, and I am not prepared to follow it. O. 40, R. 1, is expressed in general terms. It empowers the Court to appoint a receiver of any property whenever it appears to the Court to be just and convenient. If the question had to be decided simply on the language of O. 40, R. 1, I would say that if the Court was satisfied that justice and convenience required the appointment of a receiver for the benefit of a simple mortgagee the rule was sufficiently wide to sanction the appointment. There is a considerable weight of authority on the side of this interpretation. The cases are summarised by Kumaraswami Sastri, J., in *Ethirajulu Ghetty v. Rajagopala Chariar* (14), and the conclusion he arrived at was that in the case of a simple mortgage, if the circumstances warranted it, the Court had power to appoint a receiver. With that conclusion, I agree.

Krishnan Pandalai³ J., from whom this appeal comes appears to have been guided in his decision very largely by the observations of Sadasiva Iyer, J., in *Venkata Raja Gopala Surya Row Bahadur v. Basini Reddi* (10). With due deference, I think that what Sadasiva Iyer, J., said in that case was in favour of the Court's power to appoint a receiver, though in the particular circumstances he thought that a receiver should not be appointed. He began by expressing the opinion that the existence of a right in the plaintiff to receive rents and profits was not an indispensable pre-requisite for the exercise of the Court's power to appoint a receiver. That amounted to an opinion that the equitable remedy in favour of a simple mortgagee had no relation to a right to enter into possession of the mortgaged property, a right which a simple mortgagee has not got. He then proceeded to reject the suggestion that the words "any property," in O. 40, R. 1, meant exclusively the property the subject of the suit, i. e., the property subject to the mortgage. And he concluded by holding in the special circumstances of the case (inter alia the personal remedy against the mortgagor was apparently barred) that "it was not a fit case for the appointment of a receiver." The power to appoint is given to the Court by O. 40, R. 1, and is independent of anything done by the mortgagee. It may be that the circumstance of the mortgagee having given up his personal remedy against the mortgagor, as he is alleged to have done in the case before us, or of his having allowed it to become barred by lapse of time, might weigh with the Court in considering whether the equitable remedy should be given to the mortgagee. Those are matters which might influence the Court's discretion; but I fail to see how they could possibly control the Court's power.

It is admitted that the present case is a proper one for a receiver to be appointed, and I think that the Court had power to make the appointment.

P.R.S./R.K.

Appeal allowed.

* * A. I. R. 1933 Madras 583

Full Bench

RAMESAM, ANANTAKRISHNA AYYAR
AND CORNISH, JJ.M. N. Nagendran Chettiar — Appel-
lant.

v.

Lakshmi Ammal—Respondent.

Appeals Nos. 182 of 1931 and 481 of 1930, Decided on 18th January 1933, from appellate order of Dist. Court, Trichinopoly, D/- 5th October 1931.

* * Mortgage—Priority between purchasers of same property in execution of mortgage decrees by different mortgagees to which mortgagor alone made party—Deciding factor is priority in date of sales and not dates of mortgages—T. P. Act (1882), S. 48.

When immovable property is hypothecated to one person (first mortgagee) and thereafter a second (puisne) mortgage (without possession) is created over the same property by the mortgagor in favour of another person (second mortgagee), and each of the mortgagees files separate suits to realize money due on his mortgage by sale, making the mortgagor only party to the suits, and in execution sales two different persons become purchasers, for determining which of the purchasers is entitled to possession, the deciding factor is the priority in the date of sale which carried with it the right to possession : *Case law discussed.* [P 588 C 2]

T. M. Krishnaswamy Ayyar, B. R. Chakravarthi, K. V. Sesha Ayyangar and T. R. Ramachandran—for Appellant.

T. R. Venkatarama Sastri, M. S. Vaidyanatha Iyer and C. A. Seshagiri Sastri—for Respondent.

Ramesam, J.—The facts out of which this second appeal arises may be stated as follows: The respondent Lakshmi Ammal obtained a deed of maintenance from her deceased husband's brothers in 1918 under which a house was charged with the payment of the maintenance to her. The owners of the house also executed a second mortgage of it in 1922. As the maintenance was not paid up to the year 1927, Lakshmi Ammal filed a suit O. S. No. 454 of 1927, without making the second mortgagee a party and obtained a decree. In execution of the decree she was appointed receiver on 27th January 1930 for realization of the profits of the house and appropriating the same towards her decree. She got possession of the house in April 1930. The second mortgagee filed a suit on his mortgage O. S. No. 12 of 1928 without making Lakshmi Ammal a party and obtained a decree and got the property

sold. It was purchased by Nagendram Chetty, the appellant before us, on 28th January 1931. He sought to obtain possession of the property but was resisted by the respondent. The appellant applied to the District Munsif under O. 21, R. 97, Civil P. C., for the removal of the respondent's obstruction. The application was allowed by the District Munsif. There was an appeal to the District Judge of Trichinopoly. The District Judge allowed Lakshmi Ammal's appeal. Nagendram Chetti files this second appeal. When the case came on for disposal before Madhavan Nair, J., he referred the matter to a Bench of two Judges. When the case came on accordingly before Jackson, J. and Mockett, J., it was thought that there was some conflict between *Chinnu Pillai v. Venkatasamy Chettiar* (1) and *Chinnaswami Padayachi v. Darmalinga Padayachi* (2), and they referred the matter to a Full Bench. The case accordingly came on before us.

The first point to be noticed in the case is that the question now between the parties is, who is entitled to possession until a regular suit is filed in which the two mortgage rights are brought face to face and can be worked out? The plaintiff-receiver in the first suit was the first mortgagee and is also entitled to possession by reason of the order of the Court appointing her a receiver for realization of the mortgage amount. The purchaser in execution of the decree in the second suit stands in the shoes of the second mortgagee. By the general law a second mortgagee is entitled to redeem the first mortgagee. The first mortgagee before selling the property ought to afford an opportunity to the second mortgagee to redeem the first. Only after such an opportunity is given and not utilized can the first mortgagee sell the property free of both the mortgages for the realization of the mortgage debt. Similarly the second mortgagee in suing on his mortgage might have impleaded the first mortgagee either offering to redeem the mortgage, or asking for the sale of the property subject to the mortgage, or praying for sale of the property free of both mortgages and a direction that the prior mortgagee's debt be first paid off and the amount due to himself

1. (1917) 40 Mad 77=34 I C 507.

2. AIR 1932 Mad 566=139 I C 309.

should be paid out of the balance. Unfortunately the second mortgagee was not a party in the suit of the first mortgagee and the first mortgagee was not a party in the suit of the second mortgagee.

Thus up to now there has been no suit in which the two mortgagees, or persons who stand in the position of the mortgagees, have been brought face to face so as to enable them to work out the rights under the mortgages according to the principles of law applicable to successive mortgages. Such a suit has yet to be filed. The question in this case is, who, in the meanwhile, i. e., until such a suit settles the dispute between the parties finally is entitled to possession? Prior to the decrees the mortgagors were the persons entitled to possession, the mortgagees being only simple mortgagees. By the order of appointment of Lakshmi Ammal as receiver she has got a right to possession from January 1930, and the mortgagors' right to possession has passed to her. By the sale in execution of the second mortgage decree in January 1931, the mortgagors' right to possession, if any, that remained in them passed to Nagendram Chettiar; but, as already mentioned, the mortgagor's right to possession had already passed to Lakshmi Ammal by the earlier order of January 1930. Applying our mind only to the right to possession and not to the priority of the mortgages, it is thus seen that no right to possession passed to Nagendram Chetty because at the time of the sale the mortgagors had no right to possession, it having already passed to Lakshmi Ammal. So far I have stated the effect of the proceedings without reference to any of the authorities. The second mortgagee's right is not extinguished. His right is not affected by the first mortgagee's suit to which he was not a party. He still therefore has got a right to redeem the first mortgagee and realize by sale the amount of both the mortgages, or without redeeming he may obtain a decree for sale and a direction that after such amount as is due to the first mortgagee is paid the balance should be paid towards his own debt. These rights of his are not affected. Nor does any discussion about such rights arise in the present proceedings which are confined merely to the right to possession.

I will now examine the authorities. In *Venkatanarasammah v. Ramiah* (3) there were two mortgages in 1864 and 1868. The suit on the first mortgage was in August 1871. The exact date of the suit on the second mortgage does not appear. It was sold also in the year 1871. The first purchaser was in the suit on the first mortgage. The learned Judges held that he was the person entitled to possession. Kernan, J., observed that this would be so until the rights of the mortgagees are worked out in a later suit. Innes, J., expressed no opinion on this matter and seemed to doubt whether the second mortgage is still on foot and capable of being enforced. As will appear from later authorities this doubt of Innes, J., was not justified. The second mortgagee's right is not lost because he is not a party to the first mortgagee's suit. In *Chinnu Pillai v. Venkatasamy Chettiar* (1), Srinivasa Ayyangar, J., thus refers to Innes, J.'s observations:

"The other learned Judge, though he did not express any final opinion, thought that the second mortgagee's right was practically extinguished. Nobody now contends that the latter view is correct."

I agree with these observations of Srinivasa Ayyangar, J. The second mortgagee's right was certainly not extinguished in that case. The only point before their Lordships was the right to possession, and as to that their decision was that the first purchaser was entitled to possession. The doubt of Innes, J., regarding the right of the second mortgagee to realize his mortgage amount was not necessary as the point did not arise. In *Nanack Chand v. Teluckdyekoer* (4) there were two mortgages dated July 1868. Each mortgagee filed a suit. In one of the suits the property was sold on 28th June 1869. In the other suit the sale was on 24th September 1872. The learned Judges held that the person who purchased in 1869 was entitled to possession, and the priority of the mortgages need not be considered. In *Dirgopal Lal v. Bolakee* (5) there were two mortgages in the year 1868. In execution of the second mortgagee's decree the property was purchased on 22nd April 1870. In execution of the first mortgagee's decree the purchase was on

3. (1878) 2 Mad 108.

4. (1880) 5 Cal 265=4 C L R 558.

5. (1880) 5 Cal 269.

29th April 1870. It was held that the purchaser in execution of the second mortgagee's decree was entitled to possession. His possession was no doubt subject to the first mortgage right which was in the purchaser in the execution of the first mortgage suit; but until proper proceedings to enforce it are taken, the purchaser of 22nd April 1870, was entitled to possession. The ground of the judgment is thus stated:

"As this is a suit for possession, we consider that the party who first purchased the mortgagor's interest and obtained possession, is entitled to retain possession as against the other."

Both these decisions were by Garth, C. J., and Prinsep, J. The decision of *Venkatanarasammah v. Ramiah* (3), was not referred to in them. But all the three decisions are in accord with each other. In *Venkata Somayajulu v. Kannan Dhora* (6), there is first a mortgage of 30th March 1863, without possession and a second mortgage of 8th July 1865 with possession. In the suit by the first mortgagee on his mortgage the second mortgagee was not a party. The purchaser in the sale that followed, it was held, was not entitled to eject the second mortgagee who had a right to possession by reason of his possessory mortgage, but the priority between the two mortgages could be worked out in a subsequent suit. This case is peculiar in that one of the mortgages was a usufructuary mortgage and itself gave right to possession. In *Rangayya Chettiar v. Parthasarathy Naicker* (7), there were two mortgages. The first mortgagee obtained a decree without making the second one a party. It was held (by Shephard and Subramania Ayyar, JJ.) that the second mortgagee was entitled to a decree for sale subject to the right of the representatives of the first mortgagee if the purchaser did not elect to redeem. In a later case in *Muhammad Usan Rowthan v. Abdulla* (8), Shephard, J., pointed out that the language used in *Rangayya Chettiar v. Parthasarathy Naicker* (7), was open to exception. He observed:

"The point actually decided had regard solely to the sufficiency of the decree made in favour of the second mortgagee."

There is no question in that case as to the first mortgagee's right to possession and the decree did in fact completely protect the rights of the first mortgagee who had bought. In the last-mentioned case, *Muhammad Usan Rowthan v. Abdulla* (8), the first mortgagee obtained a decree without making the second one a party. He purchased in execution sale and transferred his right of possession to a stranger. The second mortgagee afterwards brought another suit and obtained a decree for sale subject to the assignee's rights. The land was sold and was purchased by the second mortgagee. It was held that the assignee from the purchaser in the first mortgage suit was entitled to possession. Shephard, J., pointed out that the case was similar to *Venkatanarasammah v. Ramiah* (3), and to the two decisions in *Nanack Chand v. Teluckdyekoer* (4) and *Dirgopal Lal v. Bolakee* (5), and that those are distinguishable from *Venkata v. Kanam* (6). He criticised the language of his own judgment in *Rangayya Chettiar v. Parthasarathy Naicker* (7) and explained it. The facts of *Ramanadhan Chetti v. Alkonda Pillai* (9) resemble those of *Dirgopal Lal v. Bolakee* (5).

The second mortgagee who purchased the property in execution of his own decree was the earlier purchaser, the date of his sale being 29th January 1889, while the sale in execution of the first mortgagee's decree was on 27th September 1889. It was held that the former was entitled to possession. The decision in *Akatti Moidin Kutty v. Chirayil Ambu* (10) is similar to *Ramanadhan Chetti v. Alkonda Pillai* (9), the first purchase being in execution of a decree on second mortgage. In *Kutti Chettiar v. Subramania Chettiar* (11), it was held that the purchaser in the first sale was entitled to possession and that the purchaser in the second sale took nothing. The purchaser in the second sale was not entitled to possession. The actual suit being for possession he was not entitled to a decree. But it was also observed that the rights of the second mortgagee were unaffected by the sale held in execution of the prior decree to which he was not a party but those rights cannot be enforced in a suit for possession but only in a suit for redemption.

6. (1832) 5 Mad 184.

7. (1897) 20 Mad 120.

8. (1900) 24 Mad 171.

9. (1895) 18 Mad 500=5 M L J 597.

10. (1903) 26 Mad 486.

11. (1909) 32 Mad 485=4 I C 1077.

tion or for sale. The decisions in *Venkatanarasammah v. Ramiah* (3) and *Nanack Chand v. Teluckdykoer* (4) were again approved and it was held that

"not the dates of the mortgages but of the several purchases have to be considered in deciding the right to possession."

In *Mulla Vittel v. Achuthan Nair* (12) the rights of a second mortgagee who was not made a party to the suit on the earlier mortgage were very much discussed. It was observed that his rights were not affected by such a suit. Substantially this is correct. His right to recover his mortgage money, his right to have an opportunity of redeeming the earlier mortgage or selling the property subject to the rights of the first mortgagee always remains. It may not be strictly right to say that his rights are not in any way affected at all by the earlier suit. There might be some difference in the kind of remedy that is open to him after the first suit resulting in a purchase, but in the main his rights are not substantially affected. The actual case is one where the second mortgagee was entitled to possession and in this respect it resembled the decision in *Venkata Somayajulu v. Kannan Dhora* (6). The next case I have got to refer to is the decision in *Chinnu Pillai v. Venkatasamy Chettiar* (1). The learned advocate for the appellant Mr. Krishnaswamy Ayyar contended that this case is in his favour and that as a result of the observations in this case the decisions in *Venkatanarasammah v. Ramiah* (3), in the two cases in *Nanack Chand v. Teluckdykoer* (4) and in *Muhammad Usan Rowthan v. Abdulla* (8) and *Kutti Chettiar v. Subramania Chettiar* (11), should be regarded as erroneous. There may be here and there expressions in the judgment which seem to support this contention of the learned advocate. But if one carefully considers the facts of the case and the question in dispute with reference to which the observations were made, I do not think this contention can be upheld. In that case there were three mortgages.

The purchaser in execution of a decree obtained without making the third mortgagee a party held the rights of the two earlier mortgagees. The third mortgagee then filed a suit making the purchaser in execution of the earlier decree

12. (1911) 9 I C 513 (F B).

a party. Thus in this case we have not got a suit of the later mortgagee without making the person interested in the rights of the earlier mortgagees a party as in all the other suits. The actual question in the suit was not one of right to possession but one relating to the form of the decree for the mortgage amount claimed by the third mortgagee, whereas in all the other cases discussed a further suit between the persons entitled to the mortgage interests was contemplated as the only one which can solve the priorities between the mortgagees and the actual suit in the decision involved only the right to possession. In the case in *Chinnu Pillai v. Venkataswamy Chettiar* (1), the actual suit was the suit relating to the mortgage amount and not a right to possession. The Subordinate Judge gave a decree that the property should be sold free of all mortgages but the purchaser who had the right of prior mortgagees in him must be paid the amount due to him and only out of the balance should the plaintiff get the decree for the amount due to him, i. e., the decree he passed recognized the priority of the purchaser-defendant and the actual decree given was one subject to the rights of the purchaser-defendant. Only the form of the decree is not one directing the sale subject to the rights of the earlier mortgages but one directing a sale free of all mortgages and the priority of the mortgages was to be worked out on the sale proceeds. The defendant (purchaser in the earlier suit) filed the second appeal to the High Court. His contention was that the plaintiff should first redeem him and was not entitled to a decree for sale in the manner granted by the Subordinate Judge.

A little examination of the merits of such a contention would show that it was unfounded. The property was either enough to pay the two earlier mortgages and would leave a balance for the third mortgage or it was not. The appellant's apprehension was that the property may not be enough for his two mortgages. So he thought that the best contention he could put forward was that the plaintiff should redeem his two mortgages and thus ensure his recovery of the whole amount due to him without running the risk of the property being

sold for an amount inadequate for his two mortgages. But surely there is no justice in such an attempt. If the property is inadequate to pay the two mortgages there is no reason why the third mortgagee should pay him an amount larger than the value of the property. But if on the other hand the property is really worth more than the amount of the first two mortgages but there is an apprehension that it may not fetch its proper value in Court sale all that the appellant has to do is to bid at the sale up to the proper price so as to recover the whole of the amount due to him. If the bids exceed the amount due to him he can stop further bidding. Either way whether he or another is the purchaser, once the bids passed beyond the amounts due to him the payment of his own debt was ensured and he could have no grievance against the decree actually passed. His insisting on a redemption by the plaintiff could not in any way be supported. It was with reference to such a contention against the actual decree by the Subordinate Judge that all the remarks in that judgment were passed. That decision was not a decision to the effect that the plaintiff in that case was entitled to a decree for sale of the property subject to the prior mortgages. That was not the decree passed by the Subordinate Judge, and upheld by the High Court. The casual remark at p. 80 relied on by the learned advocate for the appellant is as follows :

"The learned pleader for the appellant says, that if we decide that the plaintiffs are entitled to a decree for sale subject to the previous mortgages he is content to leave the decree as it is."

This is different from saying that the Court was prepared to pass a decree for sale subject to the prior mortgages and the case lays down no such proposition. In all such cases if there had not been the accident of a prior suit and a prior purchase the second mortgagee's right may take three shapes : (1) If nobody representing the first mortgagee's interest was made a party to the suit, he can get a decree for sale which as a matter of fact would afterwards be only subject to the rights of the first mortgagee or anyone representing him. But if either the first mortgagee or a purchaser in execution of the first mortgagee's suit was a party to the second mortgagee's

suit, then he can get a decree (1) for redemption and a further sale, or (2) for a sale free of the mortgages with a direction to pay off the prior mortgages and to recover his own amount out of the balance. In such a suit with a purchaser as a party a decree for sale subject to the first mortgage is not open on account of the accident of the prior purchase. But this is not the same as saying that the second mortgagee's rights are affected. The right to recover his mortgage amount is still unaffected. But out of the three possible remedies involving differences in matter of procedure, two are still open but not the third. This only concerns the form of the decree and his rights are still remaining unaffected. Equities of the situation require that the other two remedies are still remaining open to him but not the particular form of sale subject to the earlier mortgage. The learned advocate for the appellant suggested that 2 *Mad.* was dissented from in this case. There is no such thing. The observations of Innes, J., in his judgment raising the question whether a second mortgagee's right was totally extinguished or subsisted for being worked out in a later suit were dissented from. The learned Judge (Srinivasa Ayyangar, J.) sums up his propositions at the end of the judgment. In para 7 it was said that the second mortgagee

"can bring his own action for sale making the mortgagor a party if there had been no sale in the first mortgagee's suit."

This is unexceptionable. Then it was said:

"Or if there had been a sale making the purchaser a party in his capacity of the ultimate owner of the equity of redemption ; and the purchaser in the second mortgagee's execution sale gets a good title to the property."

These remarks are not made with reference to a right to possession but with reference to the mode of working out the mortgage itself, and nothing was said in this paragraph as to his getting a decree for sale subject to the earlier mortgages. The actual decree was for sale free of all the mortgages. The actual decision in the case was perfectly correct and any other remarks which seem to support the appellant must be taken with reference to the facts of the case and cannot be taken to overrule the long catena of cases beginning with 2 *Mad.* and ending with 31 *Mad.*

In that case the purchaser, who stood also in the position of the purchaser of the mortgagor's right besides standing in the shoes of the earlier mortgagees might, if he liked, have offered to redeem the plaintiff's mortgage and sought a decree for sale to recover the amount of all the three mortgages, but this of course did not suit him. He wanted the plaintiff to redeem him, but the plaintiff could not be so compelled. The last decision is in *Chinnaswami Padayachi v. Darmalinga Padayachi*, (Waller and Pandalai, JJ.) (13) which also examined the earlier decisions and is substantially to the same effect as indicated by me. The suit in *Sukhi v. Ghulam Safdar Khan* (14) was not a suit for possession but was a suit in which the relative rights of all the mortgagees were being worked out and it was held that the person who obtained a foreclosure decree on the first mortgage without making the later mortgagees as parties could use his mortgage as a shield. It is substantially in accord with all the decisions I have examined. In my opinion, leaving aside *Rangayya Chettiar v. Parthasarathi Naicker* (7), which was doubted by Shephard, J., himself, all the decisions I have examined including that in *Chinnu Pillai v. Venkatasamy Chettiar* (1) are consistent and there is no conflict between them provided we remember the particular right in question in each case and that the remarks in this judgment were made with reference to that particular right.

In some of these judgments language is used for instance that the second purchaser in the second suit purchased nothing. This would not be strictly accurate. He did purchase something. What is meant by "nothing" is that he did not get the right to possession as against the earlier purchaser but as against the mortgagor he purchased something. But that incomplete something has got to be worked out in a later suit. The decision in *Chandramma v. Seethan Naidu* (15) does not help the appellant as the suit was for possession and to attempt to amend it into one to work out the mortgage was refused. I doubt the correctness of the decision in

Venkatasubbarayudu v. Nagamma (16). In my opinion, all other decisions are in accord. The decisions in *Venkatanarasammah v. Ramiah* (3), *Nanack Chand v. Teluckdyekoer* (4) and *Dirgopal Lal v. Bolakee* (5) have never been disapproved and are good law. The appeal fails and ought to be dismissed with costs. After the respondent's maintenance decree is satisfied, the appellant is entitled to possession but we think it will be subject to the respondent's charge for future maintenance.

C. M. A. No. 481 of 1930.

It follows that this appeal fails and is dismissed with costs. This does not affect the appellant's remedies in another suit for realization of his mortgage amount.

Anantakrishna Ayyar, J.—The main question of law that arises for decision in these two appeals is the same, and it is this: When immovable property is hypothecated to one (first mortgagee) and thereafter a second (puisne) mortgage (without possession) is created over the same property by the mortgagor in favour of a third person (second mortgagee), and each of the mortgagees files separate suits to realise money due on his mortgage by sale, making the mortgagor only party to the suits, and in execution sales two different persons become purchasers, when a dispute is raised in execution proceedings or in a separate suit for possession simpliciter, which of the purchasers is entitled to such possession, before the rights of parties are worked out in a proper suit to which all persons interested are parties. Both the mortgages are simple mortgages (hypothecations, without possession). In the first mortgagee's suit to recover money by sale, the second mortgagee was not made a party, but only the mortgagor. Similarly, in the second mortgagee's suit to recover money by sale, the first mortgagee was not made a party, but only the mortgagor. Each of the mortgagees obtained a decree in his suit, and in execution sale, separate persons became the auction purchasers in each. In the appeals before us, the question was raised in execution proceedings as to which of the auction purchasers was entitled to possession. The auction-sales by Court were held on different

(13) AIR 1932 Mad 566=139 I C 309.

(14) AIR 1922 P C 11=48 IA 465=43 All 469=65 I C 151 (P C).

(15) AIR 1931 Mad 542=133 I C 497.

(16) AIR 1930 Mad 570=127 I C 228.

dates. There is no question of *lis pendens* in these appeals. The question is which of the auction purchasers is entitled to possession in the circumstances.

In one of the suits, in execution proceedings a receiver was appointed with a view to realize the decree amount by taking possession of the properties and applying the income thereof towards the decree amount. As possession was taken in execution, we may take it that from the legal point of view, the substantial question for decision in the two appeals is the same. Both the mortgages were simple mortgages. Under S. 58, T. P. Act, the right of a simple mortgagee so far as the mortgage property is concerned is to have the mortgage property sold and the proceeds of the sale applied so far as may be necessary in payment of the mortgage amount due to him: see also S. 67. A simple mortgagee as such has no right to possession of the mortgage property, but his right is only a right of sale of the said property. There being no question of *lis pendens* raised in these appeals, it seem to me that in answering the question the definition of simple mortgage and the exact rights of a simple mortgagee with reference to the mortgage property should be kept in view. In *Sri Raja Papamma Rao v. Vria Pratapa H. V. Ramachandra Razu* (17), Lord Hobhouse in delivering the judgment of the Privy Council made these observations at p. 254:

"If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale."

In *Vyapuri v. Sonamma Boi Ammani* (18), at p. 826, Srinivasa Ayyangar, J., observed as follows:

"In Roman law there was, it seems, in later times, no distinction between a *pignus* and *hypotheca*, and in both forms of mortgage the mortgagee was entitled to the possession of the mortgaged property. In *pignus* the possession was given to the mortgagee at the time of the transaction, while in *hypothecation* the mortgagee was entitled to obtain possession after debt became due. (Hunter's Roman Law pp. 436 and 447 (remedies), Salkowski's Roman Law at p. 485, and Mackledy's Roman Law at p. 285). It is instructive to note that Lord Hobhouse thought that except for long practice and the

17. (1896) 19 Mad 249=23 IA 32 (PC).
18. (1916) 39 Mad 811=31 IC 412 (FB).

Transfer of Property Act, it might be reasonably argued that a simple mortgagee in India is entitled to usufructuary possession under the terms of his contract after the mortgage debt became due."

Under the Transfer of Property Act, a simple mortgagee is not entitled to possession of property, but his right is to have the mortgage property sold with a view to have the mortgage debt discharged. If all persons interested in the mortgage property or the right of redemption be made parties to a suit on a mortgage, the Court could pass the appropriate decree working out the rights of all persons interested. Unfortunately, in spite of facilities afforded by registration of documents, it often happens that the first mortgagee files his suit making his mortgagor only party to that suit, leaving out the *puisne* mortgagee or the purchaser of the equity of redemption. Similarly, a *puisne* mortgagee in his suit often makes only the mortgagor a party but not the purchaser of the equity of redemption; and though the *puisne* mortgagee is not bound to make the prior mortgagee party to such a suit, it is clear that a further suit on the prior mortgage would be inevitable. The expense and inconvenience incurred by making all subsequent mortgagees, and purchasers of the equity of redemption, parties to the suit should be taken to be nothing when compared with the trouble that otherwise invariably arises subsequently. As observed in Jones on Mortgages Vol. 2, para. 1395:

"It is in many cases a matter of much expense and inconvenience to join as parties all the subsequent incumbrancers, but it is much more expensive and inconvenient to omit any."

One cannot impress too much on the litigants in India the importance of the above observation. I am not suggesting that a suit filed by the first mortgagee without impleading the subsequent incumbrancers, &c., should be dismissed on that ground. That is not what the Civil Procedure Code provides for. Whether the first mortgagee was personally aware of the existence of the subsequent incumbrances or not (see Ghose on Mortgages Vol. 2, p. 933), his ignorance cannot affect the right of any person interested in the equity of redemption, and a decree obtained by him would not prejudicially affect the rights of the subsequent incumbrancers

who were not parties to his suit, though it will no doubt bind the persons who are actually parties to the decree. In such cases, the question arises whether the first purchaser in point of time is or is not entitled to have and retain his possession till a proper suit is instituted to which he is made a party to adjudicate on the rights of all the persons interested. Similar questions have arisen for decision in this and other Courts. But before I go into the decisions I should state that to my mind the principle is very clear. A simple mortgagee has no right to possession.

The right to possession remains in the mortgagor who is entitled to deal with the same in any way he likes. He may create a subsequent usufructuary mortgage in favour of another and give him possession; or, the mortgagor may sell the equity of redemption to a stranger and put him in possession. In all these cases, the person who gets possession pays consideration for the same, just in the same way as the prior simple mortgagee has paid considerations for acquiring an interest in the property as simple mortgagee. The rights of persons thus in possession could not be prejudiced by the conduct of the prior simple mortgagee in filing a suit to recover money by sale of the properties, to which suit, such persons in possession were not made parties. The right of the simple mortgagee to have a decree for sale is not in any way enlarged by his omission to make persons in possession parties to the suit. A person's rights could not be enlarged by an omission made by him; nor could any person take advantage of a default or omission made by him. Questions of lis pendens apart, it seems clear, on principle, that a person who has acquired a right to possession on the date of a simple mortgagee's suit could not in any way be prejudiced regarding that right by the result of a decree or proceedings in that suit to which he was not party. Such a person could not be compelled to redeem such prior mortgagee or subsequent purchaser in execution of such mortgagee's decree. The rights conferred by the prior mortgage should, in such circumstances, be worked out, as against such persons in possession, only by a fresh suit for sale, if it be otherwise maintainable.

In decided cases, one finds general expressions used by learned Judges in discussing rights of parties with reference to mortgage suits, which are likely to lead to confusion if some stray sentences from such judgments be sought to be taken as laying down the law, irrespective of the other sentences in such judgments, the facts of the case and the actual decision in the suit. One will have to see what the actual decision was, and what exact contentions were in fact put forward by the contending parties, also, who had possession and how the same was acquired and when, and the nature of the proceedings in which possession was taken. If these and other relevant circumstances are ascertained and kept in view, it seems to me that almost all the decisions (except *Venkatasubbarayudu v. Nagamma* (16), by one learned Judge) that were quoted to us could be reconciled. I am far from saying that there are not observations in some of the judgments which, taken by themselves, would not be too wide; further, there are some observations which are quite obiter, with reference to points not necessary for the actual decision in such cases. But the various decisions themselves seem to be generally reconcilable to one another and in accordance with sound legal principles, and, in my view, the law of mortgages relating to the point now under consideration, should be taken to be well settled so far as our Courts are concerned.

I now proceed to consider the important decisions to which our attention was drawn. In *Venkatanarasamma v. Ramiah* (3) (decided before the Transfer of Property Act), the first mortgagee became purchaser in execution of his decree in a suit to which the second mortgagee was not a party. As the date of sale under which the first mortgagee purchased was prior to the sale under which the second mortgagee claimed possession, it was held that the earlier purchaser was entitled to possession, subject to the substantial rights of the parties being worked out in a proper suit. To the actual decision of the learned Judges in that case, no exception could be taken; but there are observations in the course of the judgments which are open to objection. One of the learned Judges went so far as to

observe whether the defendant's mortgage was still on foot and capable of being enforced, being apparently of opinion that the defendant's mortgage right—if still existing — was barred of any further remedy, though the other learned Judge simply remarked that the Court could not give effect to the defendant's mortgage in that suit, but must leave the defendant to assert his rights on foot of it as he may be advised.

In *I. L. R. 5 Cal.*, there are two cases relevant to the question, one *Nanak Chand v. Teluckdyekoer* (4) at p. 265 and other *Dirgopal Lal v. Bolakee* (5) at p. 269, both by Sir Richard Garth, C. J., and Prinsep, J. The learned Judges held that in such cases no question could arise as to which mortgage was prior in point of time, observing that the real question that has to be decided was which of the parties could prove a prior title to possession. In one of those cases both the mortgages bore the same date, and in the other case the second mortgagee was the first purchaser in point of time. In *Ramanadhan Chetty v. Alkanda Pillai* (9) the first purchaser was held entitled to obtain possession, subject to the rights of parties being adjudicated in a proper suit. The learned Judges, Best and Subramania Ayyar, JJ., observed as follows at p. 502 :

"For the purposes of this suit, the fact that, by reason of plaintiff's purchase of the plaintiff land, the mortgagor's interest therein had ceased to exist prior to the defendant's purchase is sufficient for holding that plaintiff is entitled to the declaration and injunction asked for in his plaint."

Similarly, in *Muhammad Usan Rowthan v. Abdulla* (8), at p. 174, Shephard, J., observed, (Boddam, J., concurring):

"These cases are plainly distinguishable from the case in which the second mortgagee has taken possession under his mortgage. It stands to reason that the right to possession so obtained cannot be affected by the result of a suit on the first mortgage, in which the mortgagee in possession was not made a party."

And later on

"it is necessary consequence of framing a decree in the manner in which the decree now being executed has been framed that further litigation should ensue. Practically the question we have to decide is who shall take the first step in that litigation? In my view it is the respondents who must take the first move, since the appellant was in possession under a title prior to that acquired by the respondents."

The second mortgage was one

with possession and the second mortgagee was not made a party to the first mortgagee's suit. It was held that the first mortgagee was not entitled to dispossess such a second mortgagee in possession in execution proceedings. In *Akati Moidin Kutty v. Chiravil Ambu* (10) the learned Judges held that in such cases priority must be determined, not by reference to the dates of the mortgage documents, but according to the dates of the sales. *Kanaran v. Unnooli* (19) was a case decided by Bodham and Miller, JJ., where the first mortgagee had not made the subsequent purchaser of the equity of redemption in possession of the properties party to his suit, and it was held that the auction purchaser in the first mortgagee's suit was not entitled to sue for possession simpliciter, as all that passed to him at the Court sale in such a suit was the right of the first mortgagee as a simple mortgagee. Similarly in *Kutti Chettiar v. Subramania Chettiar* (11) it was held by Sir Arnold White, C. J., and Abdur Rahim, J., that the interests of the judgment-debtor passed to the purchaser at the first sale, and the purchaser at the second sale of the judgment-debtor's interest in the property took nothing, as the judgment-debtor had then no saleable interest in the property, and that the suit filed by the purchaser in the second sale simply to recover possession was not maintainable.

In *Chandramma v. Seethan Naidu* (15) I had to consider practically the same question. The first mortgagee filed a suit against the mortgagor only, without making the purchaser of the equity of redemption, who was in possession of the property, a party to the suit. It was held that the auction purchaser could not dispossess such purchaser of the equity of redemption in similar circumstances. The case was similar to the one in *Kanaran v. Unnooli* (19). After discussing the rights of parties in such cases the Court (Reilly, J., and myself) held that the auction purchaser's suit in such cases should not be one simply to recover possession, but should be one to enforce the first mortgage. That principle applies to the present case also. The question has been recently discussed by Waller and Krishnan Pandalai, JJ., in *Chinnaswami* 19. (1907) 30 Mad 500=17 MLJ 431.

Padayachi v. Darmalinga Padayachi (13). The earlier cases are noticed in extenso, and the same result has been arrived at by the learned Judges. To the same effect is the decision of a Full Bench of five learned Judges of the Allahabad High Court reported in *Hargu Lal Singh v. Gobind Rai* (20), the facts of which were similar to the facts in *Kanaran v. Unnooli* (19) and *Chandramma v. Seethan Naidu* (15).

The reference to the Full Bench on the present occasion has been caused because of a contradiction between *Chinnaswami Padayachi v. Darmalinga Padayachi* (13) and *Chinnu Pillai v. Venkatasamy Chettiar* (1). On going through the judgment in *Chinnu Pillai v. Venkatasamy Chettiar* (1) I find that there were three mortgages in that case and that the third mortgagee — the plaintiff in the later suit — was not joined as a party to the earlier suit on the second mortgage. Defendant 1 was the mortgagor. In execution of the second mortgagee's decree, the property was purchased by defendant 2, who also redeemed the first mortgage (on which also a suit evidently had been brought and a decree obtained). Defendant 2 contended that the plaintiff's only remedy was to redeem the first two mortgages which were then vested in him (defendant 2). The lower Court held that the properties should be sold free of all mortgages and that the proceeds of the sale should be applied first in payment to defendant 2 of the amounts due under the first two mortgages, and the balance, if any, should be applied towards the discharge of the third mortgage held by the plaintiff. Against that decree defendant 2 (who, as already stated, represented the first mortgagee and also the rights of the auction purchaser in the second mortgagee's suit) preferred an appeal to the High Court. The appeal was dismissed. No objection could be taken to the actual decree passed in that case. No doubt in the course of a very long discussion contained in the judgment, there are certain observations which taken apart from the facts of the case would be too wide and dubious if not open to objection. But, as already remarked, the observations of the learned Judges especially in such mortgage suits should be taken

along with the facts of the cases, keeping in mind, who was in possession of the property, and under what right, and also the decrees actually passed in such cases. The learned Judges, while in their turn criticising the decision in *Venkatanarasimma v. Ramiah* (3) and *Venkatagiri v. Sadagopachariar* (21) have themselves made certain observations—rather too wide—unless those are taken with the facts of the case and the actual decision thereon.

The Full Bench decision in *Mulla Vittil Seethi v. Achuthan Nair* (12) is in favour of the view we are inclined to take, and is in consonance with the actual decision in the several cases quoted above. The facts of the case in *Mulla Vittil Seethi v. Achuttan Nair* (12) resemble the facts of the cases in *Kanaran v. Unnooli* (19) and *Chandramma v. Seethan Naidu* (15). The Full Bench held that the first mortgagee who purchased the property in execution of a decree on his mortgage was not entitled to a decree for possession against the puisne mortgagee with possession who was not impleaded in the first mortgagee's suit. In *Het Ram v. Shadi Ram* (22) at p.410 (of 40 All) (*Het Ram's case*) the Privy Counsel observed :

"As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the (first mortgagee's) suit of 1892."

As already remarked, a simple mortgage does not confer on the mortgagee the right to possession of the property but only a right of sale thereof. The right to possession remains in the mortgagor who is entitled to transfer possession to anybody he likes, in spite of the fact that he has created, thereon, simple mortgages already. The person to whom such possession is transferred may be, a second usufructuary mortgagee, or the purchaser of equity of redemption from the mortgagor after the simple mortgage or a purchaser in Court sale might have obtained possession in execution of a money decree to which the mortgagor was a party. Such a decree might be a mere money decree, or it may be a decree for sale passed at the instance of a simple mortgagee whether he be the first simple mortgagee or

21. (1912) 14 I C 449.

22. A I R 1918 P C 34=45 I C 798=45 I A 130
=10 All 407 (P C).

20. (1897) 19 All 511=(1897) A W N 154 (FB).

a puisne mortgagee. The purchaser of the mortgagor's rights in such cases would be entitled to be put into possession of the property. He has purchased such right to possession for valuable consideration, and that being so, he could not be deprived of such possession except by proceedings properly taken by such mortgagee or later purchaser in a suit properly brought for proper relief, making such purchaser in possession, party to the same. It is elementary law that a person's rights could not, ordinarily be affected by proceedings to which he was not party. The mortgagor could not represent such person in possession, in proceedings instituted after such person had acquired right to possession. Questions of *lis pendens* apart, the person who first acquired the right to possession, that is, first in point of time, in proceedings to which the mortgagor was a party if the acquisition was by virtue of Court proceedings, or privately from the mortgagor if the same be effected outside Courts, would be entitled to have and also to retain such possession, till a proper suit is instituted by the mortgagee concerned (or the auction purchaser in his suit) after making also such person in possession, party to the same. It is not right to say that the right of the person thus entitled to, or actually in possession, is only to redeem the prior mortgage. No doubt such a person would be entitled to redeem the prior mortgage, but he could not be compelled to do so (as if that was the only thing he was entitled to), if having regard to the value of the property and the amount of the prior mortgage, he should not think it profitable or worth his while to do so. A simple mortgagee, whether he be the first mortgagee or puisne mortgagee, could not take advantage of his own omission in making persons in possession of the property parties to his suit; nor could he contend that the right of such a person in possession is only to redeem the prior mortgage. A simple mortgagee's right is *prima facie* one to have the mortgage property sold. Such a mortgagee does not acquire higher or further rights by filing (what may be called for the present purpose) an ineffective suit by omitting to make persons entitled to possession and puisne mortgagees parties to the same. Such a

result could not be avoided by the plea of want of notice, on the part of the prior mortgagee of the subsequent transactions relating to the property. Equity of redemption and right to possession are valuable "rights in rem" and persons who have properly acquired such rights could not be prejudiced in their legal rights simply because the prior simple mortgagee had not personal knowledge or notice of the same. Cases of choses in action might be different.

In some of the cases, the second mortgage was a usufructuary mortgage with possession: see *Muhammad Usan Rowthan v. Abdulla* (8). It is clear that such second mortgagee could not be dispossessed by the auction purchaser in the first mortgagee's suit, when he was not made party to such suit. In other cases, both the mortgages were simple mortgages, but the second mortgagee sued first and obtained a decree, and in the auction sale the mortgagor's right to possession was purchased by a third person as the auction purchaser. When such auction purchase was made prior in point of time to the sale held in execution of the first mortgagee's decree, it was held that the first auction purchaser was entitled to, and also to retain, possession. The same result was arrived at when the first auction purchase was made in execution of the first mortgagee's suit, but emphasis was laid on such auction sale being prior in point of time to the auction sale held in execution of the second mortgagee's suit. It is expressly mentioned that the priority in the date of the mortgage does not matter, but that the deciding factor is the priority in the date of sale which carried with it the right to possession. I need not repeat that, in the present case, there is no complication caused by the application of the doctrine of *lis pendens* to these suits. This is the view expressed by Dr. Rash Behari Ghose in his *Law of Mortgage in India*: see 4th Edn., pp. 621 and 622.

"The first mortgagee could in such circumstances only call for the sale of the property if he is not redeemed by the persons left out in such suit; he would be entitled to a first charge on the proceeds to the extent to which the purchase money was applied in payment of the mortgage debt (p. 621)."

And at p. 623, the learned author expressly states:

"I may here observe in passing that as between two rival purchasers, the title to the outstanding equity of redemption is determined by the priority, not of the respective mortgages, but of the respective sales."

Having regard to the actual decisions in *Venkatanarasammah v. Ramiah* (3), *Chinnu Pillai v. Venkatasami Chettiar* (1) and *Chinnasamy Padayachi v. Dharmalinga Padayachi* (13). I am not able to find "any contradiction in principle" in the said decisions. I hold that the purchaser whose purchase is earliest in point of time is entitled to retain possession in such cases, and that the rights of a simple mortgagee, who omitted to make subsequent puisne mortgagee or subsequent usufructuary mortgagee or subsequent purchaser of the equity of redemption, party to his suit, should be worked out in a suit for sale to be instituted by him or his representative in interest. In this view, it follows that the Civil Miscellaneous Appeal should be dismissed with costs. In the Civil Miscellaneous Second Appeal, it is necessary to observe that as soon as the decree, in execution of which the receiver was appointed, is satisfied, the auction purchaser (appellant before us) would be entitled to possession, since no absolute right to possession (but only a qualified right to possession) passed away from the appellant. The auction purchase of the appellant in Civil Misc. Second Appeal No. 182 of 1931 will have effect, subject to the other decree being satisfied. The decree-holder's right of charge in respect of maintenance for subsequent period will not be affected. No such distinction occurs in the other Civil Misc. Appeal No. 481 of 1930 before us. Subject to these observations, both the Civil Miscellaneous Appeal and the Civil Miscellaneous Second Appeal are dismissed with costs.

Cornish, J.—If the appellant here was suing to enforce his rights, acquired by purchase, of puisne mortgagee against the respondent as the prior encumbrancer, *Chinnu Pillai v. Venkatasami Chettiar* (1), would be applicable. In that case it was held that where a prior mortgagee has sued for sale without impleading the puisne mortgagee, and the property has been sold in execution, the puisne mortgagee is entitled to sue for a sale of the mortgaged property (the purchaser being made a party) free of all

mortgages, the prior mortgage first being paid out of the sale proceeds. But the case with which we are called upon to deal has not reached that stage; it is one of proceedings in ejectment under O. 21, R. 97, Civil P. C. The appellant, the purchaser of the property at a sale in execution of the mortgage decree, complained that he had been resisted by the respondent in obtaining possession of the property. By R. 99 of that order the Court is directed, if satisfied that the resistance is occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account, to dismiss the application. I cannot imagine a stronger instance of a bona fide claimant resisting dispossession than the respondent. She had been put in possession by the Court as receiver in execution of her decree against the judgment-debtors in enforcement of a charge created by them in her favour upon the property. Her charge, her decree, and her possession were severally anterior in date to the mortgage, the mortgage-decree, and the appellant's purchase under that mortgage. The appellant was not a purchaser from a person in possession of property. Possession at the time of his purchase and before it was with the respondent. The facts are, in my opinion, quite sufficient to negative appellant's claim to eject the respondent. There is a string of cases commencing with *Venkatanarasammah v. Ramiah* (3) which have confirmed the principle that where the competition for possession is between the purchasers under mortgages of different dates upon the property sold priority of date of purchase gives priority of title to possession. This principle appears to me to be unshaken by the criticism made in *Chinnu Pillai v. Venkatasami Chettiar* (1) upon some of those cases. The Court in *Chinnu Pillai v. Venkatasami Chettiar* (1) was not commenting upon the soundness of the principle but upon certain expressions in the judgments under criticism. There is nothing in the judgment opposed to the claim of the respondent in this appeal to remain in possession. I agree that the appeals should be dismissed.

P.R.S./R.K.

Appeals dismissed.

A. I. R. 1933 Madras 595

WALSH, J.

Annavi Pillai — Petitioner — Appellant.

v.

Machammal and others—Respondents.

Appeal No. 187 of 1929, Decided on 3rd February 1933, from appellate order of Dist. Judge, Trichinopoly, D/- 15th October 1929.

Mortgage — Prior mortgagee impleading second mortgagee and obtaining decree — Property purchased in private sale and satisfaction of decree entered—Subsequent suit by 2nd mortgagee impleading prior mortgagee —Property purchased in execution—Latter decree prevails—2nd mortgagee being first purchaser in Court auction is entitled to possession.

The prior mortgagee brought a suit on his mortgage impleading the 2nd mortgagee also as a party. The property was put up for sale but there were no bidders. The prior mortgagee bought the property by private sale from the mortgagor for a sum less than the decree amount and satisfaction for the sum was entered. The 2nd mortgagee then brought a suit on his mortgage impleading the prior mortgagee. He obtained a decree for sale and purchased the property. The prior mortgagee put in an application that as he was the first purchaser every right which had been obtained by the 2nd mortgagee was subject to his prior lien.

Held: that as both the mortgagees were parties to both the suits both were bound by both decrees on the principle that where the rights obtained under two decrees are in conflict with each other, the rights under the latter decree must prevail. The puisne mortgagee having been the first purchaser in Court auction he was the person entitled to possession: *A I R* 1921 *Mad* 612, *Appl.*; 14 *I C* 449; 24 *Mad* 171; *A I R* 1932 *Mad* 566; 31 *Cal* 737 and *A I R* 1933 *Mad* 583 (FB), *Dist.* [P 596 C 1]

T. M. Krishnaswamy Ayyar—for Appellant.

S. K. Ahmed Meeram and K. Rajah Ayyar—for Respondents.

Judgment.—Defendant 3 in the suit is the appellant in this matter arising in execution. On 1st May 1900 there was a mortgage of item 1 to defendant 3 and on 25th March 1901 there was a mortgage of items 1 and 2 in favour of plaintiff 1. Defendant 3 brought a suit, O. S. No. 219 of 1904, on his mortgage. A preliminary decree was passed on 13th June 1904 and the final decree was passed on 12th April 1905. In this suit he impleaded the 2nd mortgagee, the present plaintiff 1. The property was put up for sale on 5th August 1905 but there were no bidders. Defendant 3

bought the property by private sale from the mortgagor for Rs. 799. This was less than the decree amount and satisfaction for the sum was entered in E. P. No. 28 of 1928. Plaintiff 1, the 2nd mortgagee brought O. S. No. 317 of 1914 on his mortgage impleading the prior mortgagee, the present appellant, as defendant 3. He obtained a decree for sale of both the items. The decree directed that item 2 should be sold first and that item 1 should be sold subsequently subject to defendant 3's prior lien. In that auction the assignee decree-holder purchased the property. He put in a petition for delivery and got an ex parte order for delivery in his favour. Defendant 3 put in an application that as he was the first purchaser every right which had been obtained by the plaintiff as 2nd mortgagee was subject to his prior lien. The learned District Munsif disallowed his claim and his order was confirmed on appeal by the District Judge. Against this order this second appeal is filed.

The appellant relies on *Venkatagiri v. Sadagopachariar* (1), *Muhammad Elsmann Rowthen v. Abdulla* (2), *Chinnaswami Padayachi v. Darmalinga Padayachi* (3) and *Ram Narain Sahoo v. Bandi Pershad* (4), and also on a recent Full Bench case in *Nagendra Chettiar v. Lakshmi Ammal* (5), but I consider that they are not relevant to this case. All these cases are clearly distinguishable from the present for two reasons. In all these cases one of the mortgagees was not made a party in at least one of the suits, and secondly the purchase relied on for possession was one in Court auction. Here we have purely a private sale by the mortgagor to the mortgagee and no authority whatever has been quoted to show that the possession which the mortgagee obtained stands on a different footing from the possession of the mortgagor. The appellant is really driven to rely entirely on para. 2 of the decree in the plaintiff's suit "subject to defendant 3's prior lien" and to argue that the defendant is entitled on this to remain in possession till his mortgage is redeemed. 19 Halsbury, p. 2. para. 1,

1. (1912) 14 *I C* 449.

2. (1901) 24 *Mad* 171.

3. *A I R* 1932 *Mad* 566=139 *I C* 309.

4. (1904) 31 *Cal* 737.

5. *A I R* 1933 *Mad* 583 (FB).

is relied on for the general meaning of the word "lien" where it is said that lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. But "lien" may be either possessory or non-possessory: vide Fisher on Mortgages, p. 392. See also 19 Halsbury, p. 4, para. 4. It is sought also to support this interpretation by *Venkatarama Aiyar v. Rangiyar Chetty* (6), but "lien" in that case was said to mean "all the rights of defendant 14 under his decree." In that case defendant 14 had got his decree even before the widow, the puisne mortgagee, had got hers. This case is no authority for saying that the lien spoken of in the decree here means anything more than what defendant 3 got under his decree. He had chosen to satisfy his decree so far as the property was concerned by private purchase and is only therefore in possession as representing his mortgagor. These considerations are in my opinion sufficient to dispose of the appeal.

The Full Bench case *Nagendra Chettiar v. Lakshmi Ammal* (5) is totally irrelevant as will be seen from the consideration placed in the forefront of the judgment:

"The question now is who is entitled to possession until a regular suit is filed when the two mortgagees are brought face to face."

Here we have both the mortgagees face to face in both the suits. And if there is any conflict between the decrees they have obtained, then the principle laid down in *Rukmani Ammal v. Narasimma Iyer* (7) is applicable. There both the mortgagees were parties to both the suits, and Sadasiva Ayyar, J., held that

"each having been impleaded, both are bound by both decrees on the principle that where the rights obtained under two decrees are in conflict with each other the rights under the latter decree must prevail."

In fact, on the appellant's own argument, the puisne mortgagee having been the first purchaser in Court auction he is the person entitled to possession. I may perhaps note an argument as regards res judicata raised in favour of the respondent in the execution proceedings, particularly as there seems to

be an incorrect statement on the point in the order of the learned District Judge which runs:

"In the course of the execution proceedings prior to sale, the appellant filed no less than three petitions urging that his claim must be satisfied before the property was brought to sale; but his petitions were dismissed; and he filed no appeal against any of these adverse orders."

It is on this ground that the plea of res judicata is urged on behalf of the respondent. So far as can be made out not one of the execution petitions was filed by the appellant; E. P. No. 890 of 1923 was filed by the respondent and is summarised as follows:

"States amount due to defendant 3 shall be fixed, but there is no necessity and the sale is held subject to his lien."

Then there is E. P. No. 1441 of 1925 put in by the respondent. The note is (appellant here appears by Mr. M.K.R.).

Order.—My predecessor in his order dated 5th March 192 in E. P. No. 890 of 1923 has ordered that there is no necessity to specify the amount due to defendant 3. The decree also does not specify it. The property will be sold subject to D's lien as mentioned in the decree. Sell on 24th November 1927. (Sale not held for want of bids). Previous E. P. one property was sold."

It would appear that the E. P. was put in by the respondent and the request to specify the amount was probably made by defendant 3's pleader. Then there is E. P. No. 143 of 1928 which was again by the respondent on which it is noted:

"The only objection raised is that the amount due under D's lien should be fixed; similar objections were raised on prior E. Ps., viz. in E. P. No. 890 of 1923 and in E. P. No. 1441 of 1925, and there it was ordered that it was not necessary to specify the amount due to defendant 3 and that the property will be sold subject to defendant 3's lien as specified in the decree."

The objection was held to have failed. Constructive res judicata has got to be cautiously applied in the case of execution petitions and I would hesitate to say that defendant 3's claim to remain in possession until his mortgage was redeemed is barred by res judicata by reason of the orders passed on these petitions. No doubt the Court refused to find out how much was due to him, but it still sold the property subject to some lien which he was considered to have. The procedure, as remarked by the then District Judge, was quite wrong. He rightly says that

"it should be the object of the Courts to avoid multiplicity of litigation. It would have been

6. A I R 1924 Mad 449=77 I C 504 (FB).

7. A I R 1921 Mad 612=63 I C 730.

possible for the executing Court to have ordered the sale of the hypotheca free of encumbrances, with the direction that the appellant's claim should be met from the sale price."

I doubt whether under the circumstances one could say that the failure to do so rendered defendant 3's claim as to the possessory lien *res judicata*; but it is unnecessary to give a final opinion on that matter as I consider that the appeal must otherwise fail. It is dismissed with costs.

P.R.S./R.K.

Appeal dismissed.

*** A. I. R. 1933 Madras 597**

WALSH, J.

Ramanathan Chettiar — Defendant—Appellant.

v.

Estate Collector of Sivaganga — Plaintiff—Respondent.

Appeal No. 99 of 1929, Decided on 3rd February 1933, from order of Dist. Judge, Ramnad, D/- 24th November 1928.

*** Limitation Act (1908), Art. 182 (5)— Mere drawing out of money without any application is not step-in aid.**

The mere drawing out money is not a step-in-aid of execution unless there was an application either before or after to draw the money so that such application might be construed as a step-in-aid of execution: *AIR 1914 Mad 628* and *17 Mad 165*, *Dist.*; *2 Mad 17*; *16 Mad 452*; *22 Bom 340*; *AIR 1919 Mad 929*; *8 Cal 89* and *10 Cal 549*, *Hef.* [P 598 C 2]

V. Ramaswamy Ayyar—for Appellant.

K. Kuttikrishna Menon—for Respondent.

Judgment.—The matter is one of limitation arising in execution of a decree. There was a decree obtained against the appellant by the Sivaganga Estate on 7th June 1920. In execution of the decree the estate after arresting the appellant collected Rs. 682-5-6 on 29th October 1920. The appellant appealed and on 13th November 1923 the decree in execution of which money had been collected was reversed. The decreeholder then deposited a certain amount in Court and on 21st October 1924, intimation was given by the Revenue Divisional Officer to the appellant that the money had been deposited. The appellant received it on 31st October 1924 and on 9th July 1927, filed the present petition claiming interest by way of

restitution on the amount during the time it was in the hands of the other side until the amount was paid to him by the Revenue Divisional Officer. The Revenue Divisional Officer dismissed the petition on the ground that it was not presented within three years from the date of the remittance of the principal amount. This apparently is an error because the principal amount was remitted on 26th October 1924 and the petition was within three years of this date.

On appeal the District Judge confirmed the order on the ground that the application of the defendant was not one for the execution of the decree within the meaning of Art. 182, Lim. Act, and that such amount due to the defendant by way of interest had not been stated in the decree and had to be determined separately. An application for payment of interest could not therefore be regarded as an application for execution of the decree. Before me it is argued that this reasoning is wrong: vide *Somasundaram v. Chockkalinga* (1) and *Unnamalai Ammal v. Arunachalam* (2). In the latter case it was held that the application is governed by Art. 182 and not by Art. 181.

It has however to be seen whether this application, execution petition, is in time. The decree was on 13th November 1923, and the decree is in the petitioner's favour. He has to show that he took a step-in-aid of execution within three years. It has been argued before the learned District Judge that he made an application to the Sub-Treasury to draw the money. The letter of the Revenue Divisional Officer was dated 21st October 1924, and the application to draw the money was, it is argued, a step-in-aid of execution. As observed above the learned District Judge dismissed the application on other grounds. I therefore made a reference to the Revenue Divisional Officer to see whether there had been any such application. It appears that there was no application apart from the present execution petition. But it has been argued that the money would not have been paid out without an application and therefore an application may be pre-

1. (1917) 40 Mad 780=38 I C 806.
2. (1917) 42 I C 530.

sumed. The letter of intimation by the Revenue Divisional Officer was on 21st October 1924, and runs as follows :

"Please take notice that a sum of Rs. 781-6-8 has been deposited in the Sivaganga Sub-Treasury in satisfaction of the decree in A. S. No. 796 of 1920 on the file of the District Court at Ramnad at Madura on Special Deputy Collector's S. S. No. 1862 of 1918 and the same has been ordered to be paid to you by the Sub-Treasury Officer, Sivaganga, in my R. O. C. A. No. 3-2013-24, dated 27th September 1924."

Now the intimation should have taken some such form as this :

"To the Sub-Treasury Officer. Pay such and such sum to Ramanathan Chettiar due to him in satisfaction of the decree in A. S. No. 96 of 1920."

There is nothing to show that any application by the petitioner was necessary. In Courts such payment orders are made by cheques drawn on the treasury. *Sabapathy Chetty v. Shunmugappa Chetty* (3) was relied on to show that a mere payment out by Court was a step-in-aid of execution, but two things have got to be observed in that case. In that case the learned Judge was dealing with Art. 183 where expressly payment out establishes revivor. Secondly as a matter of fact, there was an application in that case. On p. 455 (46 *M. L. J.*) the Judge says :

"As regards Art. 182 the cases in *Venkatarayalu v. Narasimha* (4), *Kerala Varma Valia Rajah v. Shankaran* (5), *Koormayya v. Krishnama Naidu* (6), *Bapu Chand v. Mugutrao* (7) and *Thangi Sehtlith v. Duja Shetti* (8), take the view that payment out of a sum from Court is a step-in-aid of execution under Art. 182, Cl. 5. But *Hem Chunder v. Broji Soonduri* (9), *Fazal Imam v. Metha Singh* (10), and other cases take the contrary view."

The first part of this is put too widely. In *Koormayya v. Krishnama Naidu* (6) there was some report from the sheristadar under a subsequent order from the Judge. Their Lordships held that it must be inferred from this document that there was a request for the payment of the money realized in satisfaction of the decree. Any such request is sufficient to keep the decree alive. It was

distinctly held therefore that there was an application. Here there is nothing to show, that in connexion with the intimation received from the Revenue Divisional Officer, there was any application either before or after by the petitioner so that such application might be construed as a step-in-aid of execution. In all the other cases quoted there was an application. Therefore I must hold that the mere drawing out of the money is not a step-in-aid of execution. If so the present application is time-barred and the appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

** A. I. R. 1933 Madras 598

MADHAVAN NAIR, J.

Sorimuthu Pillai and others—Appellants.

v.

Muthukrishna Pillai—Respondent.

Appeal No. 85 and Civil Revn. Petn. No. 1367 of 1931, Decided on 11th November 1932, from order of Sub-Judge, Tuticorin, D/- 23rd February 1931.

** (a) Civil P. C. (1908), S. 65 and O. 21, Rr. 92 and 94—Sale in execution of decree and purchase by third party — Decree reversed on appeal within 30 days of sale—Decree need not be subsisting for confirmation of sale.

Against the decree passed in the suit the petitioners preferred an appeal. During the pendency of the appeal the decree-holders brought the properties of the petitioners to sale in execution of the decree and one lot of such property was purchased by a stranger. The sale was held on 3rd October. On 16th October the appellate Court allowed the appeal and dismissed the suit. The present petition was filed on 27th October, i. e., after the dismissal of the suit by the appellate Court and before the confirmation of the sale. This petition was filed under Ss. 47, 151 and O. 21, R. 89, whereby the petitioners prayed that the auction-sale should not be confirmed or that the sale should be set aside for which they deposited only 5 per cent of the purchase money:

Held: that the Court was bound to confirm the sale and could not refuse to do so on the ground that there was no subsisting decree at the time of the confirmation because by the omission of the proviso to S. 65, it was no longer necessary for the confirmation of the sale that the decree should be subsisting at the time of the confirmation: *Case law discussed.* [P 603 C 1, 2; P 605 C 2]

Held also: that the reversal of a decree is not mentioned in R. 92 as one of the grounds for refusing to confirm the sale: *AIR 1931 P C 93 Rel on.* [P 603 C 2]

3. A I R 1924 Mad 638=46 M L J 453=78 I C 832.

4. (1878) 2 Mad 174.

5. (1893) 16 Mad 452.

6. (1894) 17 Mad 165=3 M L J 296.

7. (1898) 22 Bom 340.

8. AIR 1919 Mad 929=48 I C 226.

9. (1882) 8 Cal 89=10 C L R 272.

10. (1884) 10 Cal 549.

(b) Civil P. C. (1908), O. 21, R. 92—R. 92 applies only to cases of valid sales.

Order 21, R. 92 relates only to cases of valid sale where no application is made under Rr. 89, 90 and 91 or where such application is made and disallowed. It has no application to cases where the sale is a nullity. [P 605 C 1, 2]

(c) Civil P. C. (1908), O. 21, R. 89—Deposit of mere 5 per cent is not sufficient to set aside sale under O. 21, R. 89.

A judgment-debtor who wishes to take advantage of the provisions under O. 21, R. 89 must strictly comply with the same, by paying all the amounts as directed by the rule. Hence a deposit of merely 5 per cent without the sum mentioned in Cl. (b) for payment to the decree-holder is not sufficient even though the decree in execution of which the sale has been held has been set aside: 39 *Mad* 429, *Foll*; *Case law reviewed*.

[P 606 C 1]

* (d) Civil P. C. (1908), S. 47—Question arising between stranger auction-purchaser and judgment-debtor falls under S. 47 and decision thereon is appealable.

A question arising between a stranger auction-purchaser and the judgment-debtor is one of a nature in which both are adversely interested and hence it falls under S. 47 and decision thereon is appealable: *AIR* 1920 *Mad* 324 and *AIR* 1921 *Mad* 420, *Foll*; *AIR* 1921 *Mad* 81, *not Foll*.

[P 607 C 1, 2; P 608 C 1]

Judgment.—This civil miscellaneous second appeal arises out of a petition filed by the defendants in O. S. No. 12 of 1928 under Ss. 47, 151 and O. 21, R. 89, Civil P. C., in which they asked either that the Court should not confirm the auction sale held in execution of the decree against them or that the Court should set aside the sale under O. 21, R. 89, Civil P. C., for which they deposited 5 per cent of the purchase money. The property was sold in two lots; one lot was purchased by the decree-holders themselves who were respondents 1 and 2 to the petition, and the other lot was purchased by respondent 3. The lower Court refused to confirm the sale so far as the first lot was concerned as the purchasers were decree-holders themselves, but with regard to respondent 3 to the petition who is a stranger auction-purchaser, the Court dismissed both the prayers in the petition. It is against this order that the present civil miscellaneous second appeal and civil revision petition have been filed. Respondent 3 to the petition, the stranger auction-purchaser, is the only respondent in this Court. The facts necessary for understanding the contentions of the parties are these: Against the decree passed in the suit the petitioners preferred an appeal. During

the pendency of the appeal, the decree-holders, i. e., respondents 1 and 2 to the petition, brought the properties of the petitioners to sale in execution of the decree and themselves purchased the first lot as already stated, while the second lot was purchased by respondent 3. The sale was held on 3rd October 1930. On 16th October 1930 the appellate Court allowed the appeal and dismissed the suit. The present petition was filed by the petitioners on 27th October 1930, i. e., after dismissal of the suit by the appellate Court and before the confirmation of the sale.

On behalf of the appellants it is urged that since the decree has been set aside by the appellate Court, there is no jurisdiction for the Court to confirm the sale. In the event of the sale being confirmed the petitioners request the Court to set aside the sale and for that purpose they have deposited 5 per cent of the purchase money. It will be observed that under O. 21, R. 89, Civil P. C., those who desire to have the sale set aside should in addition to the 5 per cent make a deposit, for payment to the decree-holder. This had not been done in this case because the petitioners contend that there is no necessity for making the deposit as the decree had been set aside on the date of the petition. The respondent contends that under the present Code the existence of a decree is not necessary for the confirmation of the sale and that the petition for setting aside the sale cannot be entertained unless the petitioners comply with the conditions of O. 21, R. 89, by making all the necessary deposits mentioned therein which admittedly they have not done. The respondent raises also a preliminary objection that no second appeal lies; but the appellant has filed also a civil revision petition. I shall deal with the preliminary objection later.

The question to be decided with reference to the first prayer of the appellants in the petition is, whether the decree under which the sale took place should still be subsisting at the time of the confirmation for the sale to be confirmed. The argument on this point has mainly centred round the provisions of S. 65 and O. 21, R. 94 of the present Civil P. C., and of the corresponding provisions in the previous Code, S. 65 of the present Code runs as follows:

"Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute."

Order 21, R. 94 of the Code, is in these terms:

"Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute."

These provisions have taken the place of S. 316 of the Code of 1882 which was as follows:

"When a sale of immovable property has become absolute in manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that date."

It will be observed that the first part of S. 316 of the Act of 1882 is now represented by O. 21, R. 91, Civil P. C., with some slight alterations and its second part is represented by S. 65 with important alterations. There are two important differences between S. 65 of the present Code and the corresponding portion of S. 316 of the Code of 1882. One difference is that under the present S. 65 the property vests in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute as under the old section. The other difference is that the statement in the old section, that the property vests in the purchaser from the date of the certificate and not before, was subject to a proviso

"that the decree under which the sale took place was still subsisting at that date."

This proviso is omitted in S. 65 of the present Code. The question is whether the dropping out of the proviso introduces any substantial change in law. Mr. Ramaswami Ayyar argues that the omission of the proviso in S. 65 does not introduce any change in the law, that the existence of the decree has been always a necessary condition to give jurisdiction to the Court to confirm the sale, that without a decree there can be no jurisdiction for the confir-

mation of the sale, that the principle is a general rule of jurisprudence that has always been recognised in the Civil Procedure Code, that, that being so, the legislature thought that it was unnecessary to state it specifically and, therefore, dropped it out in the new Act of 1908. According to him, even before the proviso was enacted the rule contained in it was the law, that it was introduced only to settle some doubts that had arisen in the Bombay Courts, that when it was discovered by the legislature that that had been the law always, it omitted the proviso in the new Code, so that it is not right to say that the law has been now altered by its omission. Having regard to the arguments of Mr. Swaminatha Ayyar which I shall presently refer to, Mr. Ramaswami Ayyar also contends that there is no connexion between the proviso and the time when the property vests in the purchaser.

Mr. Swaminatha Ayyar's arguments may be summarised as follows: (a) Title of property vested in the purchaser from the date of the certificate under S. 316 of the Act of 1882; in order that title may start from that date it is a necessary preliminary that there should be a subsisting decree at that date and this was the reason why the legislature introduced the proviso

"that the decree under which the sale took place should be subsisting at that date."

If the decree did not subsist at the date of the certificate then the purchaser will not get any title to the property. According to the law contained in this section the existence of the decree at the date of the sale will not be enough to vest title to the property in the purchaser, for the title starts from the date of the certificate and not from the date of the sale. (b) Under the present Code the title to the property vests in the purchaser when the sale becomes absolute from the time when the property is sold and not from the date when the sale becomes absolute, and so, it will be sufficient to give title to the purchaser if there is a subsisting decree at the date of the sale. The existence of a decree at the date when the sale becomes absolute being thus unnecessary, it is argued that the proviso was dropped in the present Code and therefore the sale can

be confirmed even though there is no subsisting decree at the date of the confirmation. According to this argument there is thus an intimate relation between the necessity for the existence of the decree and the time when the property vests in the purchaser. This argument is met by Mr. Ramaswami Ayyar, as already stated, by saying that even before the Act of 1882 the rule was that the title to the property vested in the purchaser from the time of the sale and notwithstanding that law, the existence of the rule contained in the proviso was then recognized. (c) Another part of Mr. Swaminatha Ayyar's argument has reference to O. 21, R. 92, Civil P. C., which says that where no application has been made under Rr. 89, 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale. It is argued that the language of the rule is imperative and that if after a sale, no application has been made to set it aside as in the present case, then the Court is bound to confirm the sale and cannot refuse to do so on the ground that the decree has been set aside and does not exist or on any other ground.

I shall first consider the history of the "proviso" and then examine whether there is any necessary connexion between the rule contained in it and the time when the property becomes vested in the purchaser, and lastly deal with the argument based on O. 21, R. 92, Civil P. C. In this connexion we need not go earlier than the Act 8 of 1859. The first part of S. 256 of the Act of 1859 says that

"no sale of immovable property shall become absolute until the sale has been confirmed by the Court"

Section 259 states that

"after a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title, and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

Section 260 states that

"the certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser"

The proviso appearing in S. 316 of the Act of 1882 did not find a place in any

one of the above sections of the Act of 1859. S. 314 of the Act of 1877 corresponds with the first part of S. 256 of Act 8 of 1859. S. 316 of the Act corresponds with S. 259 and the first part of S. 260 of Act 8 of 1859. In the Act of 1877 also, we do not find the proviso appearing in S. 316 of the Act of 1882. This proviso was introduced for the first time by S. 49 of Act 12 of 1879 which amended S. 316 of the Act of 1877. After amendment the section ran as follows:

"When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser."

Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date. This amended section appears in the same form and language without any change as S. 316 in the Act of 1882. To complete the history, the proviso was omitted and S. 316 was split up into S. 65 and O. 21, R. 94 in the Act of 1908 as already mentioned.

M. Ramaswami Ayyar's argument already noticed is that though the proviso was first introduced by Act 12 of 1879 the principle underlying it was recognized by the Courts of law even before that date (under the Act of 1859) and that the amendment by introducing the proviso was only stating a principle that was already recognised and that when this was found to be so later, the proviso was dropped out as an unnecessary provision, that therefore no change in the law has taken place, and that even now, the existence of a decree is absolutely necessary for the confirmation of a sale. To support this contention in all its entirety, the appellant will have to show not only that the principle of the proviso was recognised even before the amendment of the Act of 1877, but also that there was no necessary relation between the time when the title to property became vested in the purchaser and the rule contained in the proviso: or in other words, that even before the amendment when the principle of the

proviso was used to be freely recognized and given effect to, the title to the property of the auction purchaser used to relate to the date of the sale. The first part of the argument is sought to be supported by a decision of the Bombay High Court in *Basappa v. Dundayya* (1), and the second part is made to rest on a decision of the Calcutta High Court in *Bhyrub Chunder v. Soudaminee Debi* (2). The decision in *Basappa v. Dundayya* (1), was under the Act of 1877 before its amendment by Act 12 of 1879 which introduced the proviso to S. 316 of the Act of 1877. In that case

"plaintiff's title to certain land in dispute was derived from the purchaser at a Court sale, under a decree which was reversed in appeal subsequent to the sale, but before it had been confirmed."

It was held that

"the Court, which had made the decree, ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree,"

and that the confirmation of the sale would confer no title. In the course of the judgment the learned Judge pointed out that the

"purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed: (p. 541)."

It is argued that in this decision even without any enactment of a proviso like the one in S. 316 the principle was recognized and given effect to under the Act of 1877 and that it was on account of this decision that the legislature enacted the proviso by the Amending Act 12 of 1879. In this connexion my attention was invited to the Report of the Select Committee that considered the bill to amend the Civil Procedure Code of 1877. Therein the Committee stated:

"We have also altered S. 316 so as to make it clear that the title to the property sold vests from the date of the certificate only when the decree under which the sale took place was still subsisting at that date. This will preclude the doubt which has, we understand, arisen in Bombay, where a certificate was granted to an auction purchaser in ignorance of the fact that the decree under which the sale took place had been previously reversed on appeal."

Mr. Ramaswami Ayyar's contention that the principle underlying the proviso in question was recognized by Courts even before the amendment may be con-

ceded on the strength of this decision; but the question is, what was the law that prevailed then regarding the time when the property sold vested in the auction purchaser. Mr. Ramaswami Ayyar would say that at that time also, the law was that when property was sold in auction the purchaser's title to it commenced from the date of the sale. To this argument Mr. Swaminatha Ayyar responds that there was no settled law on that point during the operation of the Acts of 1859 and 1877 and so when the legislature decided to recognise the existence of the principle of the "proviso" by introducing the amendment, it at the same time stated clearly the law relating to the time when the title of the auction purchaser would commence, with the result that we find in S. 316 the law was stated to be this, that the title to the

property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that time,"

thus establishing an intimate relation between the time when the property vests and the condition laid down in the proviso. The question is which view is right. In support of his contention Mr. Ramaswami Ayyar relies on the Full Bench decision in *Bhyrub Chunder Bundopadhya v. Soudamini Debi* (2). The facts of the case are thus stated in the head-note:

"The defendant became a purchaser at an execution sale of a share of certain property, of which the plaintiff held another share partly as zamindar and partly as patnidar; the sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May 1873. Between the date of the sale and the confirmation a considerable sum became due for Government revenue on the whole property and to prevent its being sold, the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, it was held, that on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and therefore she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation."

It may appear at first sight that this decision supports Mr. Ramaswami Ayyar's view, but the true scope and significance of the decision is thus explained in Mr. Broughton's Commentaries on the Civil Procedure Code of 1877 (see p. 453):

1. (1877) 2 Bom 540.

2. (1876) 2 Cal 141.

"The case was referred to a Full Bench because the decisions were conflicting on the point whether the title of the auction purchaser under a decree relates back to the date of the sale : see *Kalee Dass Neogee v. Hur Nath Roy* (3), or merely takes effect from the date of confirmation : see *Bepin Beharee Biswas v. Jadu Nath Hazrah* (4); and it will be observed that this was not decided *except for the purpose of the particular suit*."

(The italics are mine). This commentary puts the matter beyond any doubt. On the question under consideration there was no settled law under the Act of 1859 and the decision cannot be said to lay down a proposition of law applicable to all the cases. The same must be considered to be the position under the Act of 1877 also, for, as I have shown, the relevant provisions under both the Acts are similar and in neither of the Act do we find any such specific statement of law regarding the time when the title to the property vests in the auction purchaser as we find in S. 316 of the Act of 1877 after the amendment in 1879, which was repeated as S. 316 of the Act of 1882, and in the present Act of 1908. By S. 49, Amending Act of 1879, it was enacted that the title of the auction purchaser to the property would start from the date of the certificate and in order that it may be so formal recognition was given to the principle that there must be a decree in existence at the time of the certificate; and that the proviso came to be enacted as a necessary condition upon which would depend the commencement of the title of the auction-purchaser; and when the law on the latter point was altered, there was no need for the existence of the proviso and so it was dropped out from the new Code. This I think is the true history of the proviso in question, and, read in this light, I cannot agree with the contention of Mr. Ramaswami Ayyar that the omission of it in the present Code does not indicate any change in the law. On the other hand, from what I have said, it follows that the argument of the respondent that on account of the omission of the proviso it is no longer necessary for the confirmation of the sale that the decree should be subsisting at the time of the confirmation should be accepted. The next argument of the

respondent's learned counsel is that having regard to the language of O. 21, R. 92, Civil P. C., the reversal of the decree after sale but before confirmation cannot be relied on as a ground by the appellant for asking the Court not to confirm the decree. O. 21, R. 92, provides that

"where no application is made under Rr. 89, 90 or 91 or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

The language of this rule is imperative, and when no application under Rr. 89, 90 or 91 has been made, as in the present case, after sale, it is the duty of the Court to confirm it. Under this rule the act of confirmation of sale should follow automatically after sale has taken place when no such application as is referred to in R. 92 was made or when such application was made and disallowed. The present case admittedly does not fall under the exceptions mentioned in this rule. The reversal of the decree is not mentioned in the rule as one of the grounds for refusing to confirm the sale. This interpretation of O. 21, R. 92, is supported by the decision of the Privy Council in *Nanhelal v. Umrao Singh* (5). In that case it was held :

"Once a sale has been duly effected, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court."

In holding so, their Lordships of the Privy Council relied solely on O. 21, R. 92 and the interpretation of the language thereof. In the course of their judgment the following observations occur :

"When once a sale has been effected, a third party's interest intervenes and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in R. 89. That this is so is, in their Lordships' opinion, clear under the wording of R. 92, which provides that in such a case (i. e., where the sale has been duly carried out), if no application is made under R. 89 the Court shall make an order confirming the sale and thereupon the sale shall become absolute" (p. 429 of 60 M. L. J.).⁵

It may be observed that their Lordships made no reference to cases under R. 90 or 91 referred to in R. 92 as these had no application to the case before them. To the same effect is the decision

3. (1864) W R 279.

4. (1874) 21 W R 367.

5. AIR 1931 P C 33=130 I C 686=58 I A 50=27 N L R 95=60 M L J 423 (P C).

of the Full Bench of the Nagpur J. C.'s Court reported as *Shankar v. Jawaharlal* (6). The learned Judges in that case held that the private satisfaction of a decree certified in Court after sale of immovable property has been held and before the confirmation is ordered, does not extinguish the decree and prevent the Court from confirming the sale where a third person has purchased the property bona fide at the auction sale. The judgment of that case discusses the question in all its detail. One of the grounds of the judgment is based on O. 21, R. 92. The learned Judge, Kinkhede, A. J. C., states that

"provisions of R. 92 are imperative and the Court cannot refuse to confirm the sale unless the requirements of R. 89 or R. 90 are strictly complied with : (p. 897 of 111 I. C.)."

In the course of the judgment the same observation is repeated in somewhat different language thus :

"The provisions of sub-R. (1), R. 92, O. 21, Civil P. C., also are peremptory. They cast an imperative duty on the executing Court to make an order confirming the sale unless the conditions specified in Rr. 89, 90 or 91 were fulfilled,"

Sub-R. (2) lays down

"the conditions under which alone the Court is permitted to make an order setting aside the sale" (p. 898).

Later on the learned Judge observed as follows :

"If the legislature had desired to refuse confirmation and veto the purchaser's rights on any grounds other than those mentioned in Rr. 89, 90 or 91 of the order, there was nothing to prevent it from providing for such a contingency in the Code. If it had intended to leave him to the mercy of the decree-holder and judgment-debtor by enabling them to defeat his rights and even to oust the Court's jurisdiction, by a private pact of their own, formed behind the purchaser's back, the Code would have expressly provided for the exercise of such a right. In my opinion the very absence of any such provision in the Code for vetoing or negating the purchaser's rights under the Court sale, itself constitutes the strongest proof of the absence of any such intention" p. 899 (of 111 I. C.).

Mr. Ramaswami Ayyar tries to distinguish the case on the ground that it relates to a case of the private satisfaction of the debt by adjustment outside the Court. But having regard to the imperative language of the provision contained in O. 21, R. 92, the distinction is meaningless; and the reversal of the decree and the adjustment of it outside the Court stand so far as the language of R. 90 is concerned on the same foot-

6. AIR 1928 Nag 265=111 I C 895=24 N L R 127 (FB).

ing; because, barring the cases mentioned in that rule the Court cannot recognise, once a sale is held, any other ground for refusing to confirm it. This case is interesting because it deals also with the argument of Mr. Ramaswami Ayyar that I have already dealt with, viz., that by the "dropping out of the proviso" in the present Code no change in the law has been made by the legislature and that even under the present Code the subsistence of a decree at the time of the confirmation of the sale is a necessary condition for the sale being confirmed. Regarding this argument the learned Judge Kinkhede, A.J.C., observed as follows :

"If the intention of the legislature had been to make the acquisition of title by the auction-purchaser, contingent upon the decree being a subsisting decree at the date of the confirmation, there was no point in deleting the words to that effect from S. 316 of the old Civil P. C., when S. 65 of the new Code was in its stead enacted. All that appears to be necessary under the Code from the point of view of third party purchasers is that, to give them a good title at the date when the sale is held, the decree must be a subsisting decree. If that decree ceased to exist at the date of the sale there is no debt to recover and therefore the Court loses its jurisdiction to sell the judgment-debtor's property, and consequently every sale held under such circumstances must be treated as a nullity."

To show that confirmation of sale can be refused on grounds other than those mentioned in R. 91 and therefore impliedly it can be refused if there was no subsisting decree at that time, and that therefore the argument based on the language of O. 21, R. 92, should not be accepted, the learned counsel for the appellant has drawn my attention to cases under S. 47, Civil P. C., mentioned in Mulla's Civil Procedure Code at p. 160 under the heading,

"A judgment-debtor may seek to set aside a sale on grounds other than those mentioned above,"

the grounds "mentioned above" being (1) on deposit under O. 21, R. 89; (2) for material irregularity under O. 21, R. 90, and (3) for fraud under O. 21, R. 90. The significance of most of these cases can be explained with reference to their special facts; but I shall deal with four cases as the learned counsel specially emphasised their importance in support of his contention. These cases are *Sahdeo v. Ghasiram* (7), *Rajaopala v. Ra-*
7. (1894) 21 Cal 19.

manujachariar (8), *Raghavachariar v. Murugesu Mudaliar* (9) and *Ariatullah v. Sashi Bhusan Hazrah* (10). *Sahdeo v. Ghasiram* (7) and *Rajagopala v. Ramanujachariar* (8) may be dealt with together. The facts show that in these two cases the sale was held without giving notice to the judgment-debtor as required under the Code. It was held that such a sale was a nullity and therefore should be set aside. These are instances of cases where the Court held that in law there was no sale at all. To such a class of cases O. 21, R. 92 will not apply, cases to which that rule relates being only cases of valid sale,

"where no application is made under Rr. 89, 90 and 91 or where such application is made and disallowed."

In *Raghavachariar v. Murugesu Mudaliar* (9) it was held that the Court has inherent power to refuse to confirm the sale on the ground that it was misled in fixing the reserved price. This also may be treated as a case, having regard to the fact that the Court was misled into passing an order for sale, where there has been no valid sale.

In *Ariatullah v. Sashi Bhusan Hazrah* (10) it was held that

"a sale in execution of a decree for an amount in respect of which there was no decree existing at the time is illegal, and the Court would be justified in refusing to confirm it."

This was also a case where there was no valid sale as there was no decree justifying the sale at the time when it was held. To cases of this kind O. 21, R. 92, will not apply. This is clearly pointed out by the learned Judges in their order. They state:

"We do not think that that is contemplated by O. 21, R. 92. O. 21, Rr. 89, 90, 91 and 92 presuppose a valid decree under which the sale is held, and the first three rules provide for setting aside the sales, and R. 92 says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed. R. 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorise the sale."

None of these cases can therefore help the appellants. Having regard to the decisions of the Privy Council in *Nanahal v. Umrao Singh* (5) I must hold

8. A I R 1924 Mad 431=80 I C 92=47 Mad 288 (FB).

9. A I R 1923 Mad 635=72 I C 545=46 Mad 583.

10. A I R 1920 Cal 99=55 I C 547.

that under O. 21, R. 92, Civil P. C., where no application is made under Rr. 89, 90 or 92 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other grounds, for the language of the rule is imperative.

For the above reasons the first prayer in the appellants' petition asking the Court to refuse to confirm the sale on the ground that the decree was reversed in appeal has to be disallowed. In this connexion I may draw attention to the opinion expressed in Mulla's Civil Procedure Code which supports this view. At p. 218, Edn. 9, of the book, the learned author expresses the following opinion referring to S. 316 of the Code of 1882:

"On referring to S. 316 of the Code of 1882, p. 213, it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the decree under which the sale was effected had ceased to be a subsisting decree."

That proviso has not been reproduced in the present section. Under the present section therefore a sale held in execution of a decree may be confirmed, in any event where the purchaser is a third party, though the decree has been removed before confirmation of the sale: see O. 21, R. 92, and note the words:

"The Court shall make an order confirming the sale."

In an earlier page, at 214, referring to the omission of the proviso to S. 316 when dealing with S. 65 of the present Code it is stated

"that it is therefore no longer necessary that decree should be subsisting at the time of the confirmation of the sale."

The opinion of Sir Dinshaw Mulla is therefore against the contention of the learned counsel for the appellant. It is but fair to say here that Mr. Nandlal in his commentaries on the Code of Civil Procedure takes a different view. He says that the omission of the proviso does not introduce any change in the law.

I shall now deal with the alternative prayer for setting aside the sale contained in the appellant's petition. The appellant asks the sale to be set aside on the contingency of the Court confirming it. There are various objections in granting this alternative prayer. It

has been held in *Raghuram Pandey v. Deekali Pande* (11) that a person who impeaches the validity of the sale cannot file an application under O. 21, R. 89, Civil P. C. In that judgment it is pointed out that

"when the payment is made under R. 89, the person making the payment must accept the validity of the sale. He cannot make a payment under O. 21, R. 89, and at the same time challenge the validity of the sale. A payment under R. 89 must be an unconditional payment . . ."

This case has been followed in this Court in *Kummu Kutti v. Neelakandan Nambudri* (12). There is a still more serious objection to the grant of the appellants' alternative prayer. The appellants have deposited only 5 per cent of the purchase money for payment to the purchaser. Under O. 21, R. 89, Civil P. C., if the appellants wish to set aside the sale they should deposit not only 5 per cent of the purchase money, but also should make a deposit of the sum mentioned in Cl. (b) for payment to the decree-holder. This has admittedly not been done by them in this case. They refuse to make this deposit because they say that the decree has been set aside and that therefore the decree-holder is not entitled to get any amount. But that consideration cannot in any way affect their obligation to deposit the amount under the rule. This really shows the inconsistency of the alternative prayer contained in the appellants' petition. For in an application under O. 21, R. 89, the petitioners cannot be heard to say that the sale which they seek to set aside is invalid; and unless they are permitted to do this, they cannot be absolved from the statutory duty of depositing the amount mentioned in sub-Cl. (b), Cl. 1. Those who impeach the sale, as already pointed out, cannot apply under O. 21, R. 89. It has been held in *Karunakara Menon v. Krishna Menon* (13) that

"a judgment-debtor who wishes to take advantage of the provision under O. 21, R. 89, must strictly comply with the same by paying all the amounts as directed by the rule . . ."

The two cases relied on by the learned counsel for the appellant, *Vedala Lakshminarasimha v. Lakshmiamma* (14)

11. A I R 1928 Pat 193=115 I C 193=7 Pat 30.
12. A I R 1930 Mad 921=128 I C 509=58 Mad 943.
13. (1915) 39 Mad 429=27 I C 952.
14. (1912) 14 I C 326.

and *Anantha Lakshmi Ammal v. Sankaran Nair* (15) which show that it is not necessary to make all the payments mentioned in sub-Cls. (a) and (b) to Cl. 1, O. 21, R. 89, have been distinguished in this case. The learned Judges state that *Anantha Lakshmi Ammal v. Sankaran Nair* (15) only decides that where a decree-holder had agreed to give up a portion of the decree amount, he was not entitled to insist upon the deposit or payment of the full amount mentioned in the proclamation of sale. About the case in *Vedala Lakshminarasimha Charyulu v. Lakshmiamma* (14) they point out that

"in that case an agreement by the decree-holder to set off a portion of the decree amount was held to amount to payment."

It is clear that these two cases do not show that the payment required under O. 21, R. 89, need not be made. The present case does not fall within the scope of either of these decisions. The decision in *Subbaya v. T. Muthayya* (16) accepts the strict view of O. 21, R. 89, held in *Karunakara Menon v. Krishna Menon* (13). The same view of O. 21, R. 89, is entertained by the Bombay High Court also. In *Manaji Kuvverji v. Aramita* (17) it was laid down :

"The provisions of O. 21, R. 89 being a concession allowed to a judgment-debtor must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession."

This decision was followed in *Dattatraya Krishna v. Jagannath* (18). In this connexion my attention was drawn by Mr. Swaminatha Ayyar to the decisions in *Tirumal Rao v. Dastagiri Miyah* (19) and *Chundicharan Mandal v. Banke Behari Lal* (20) also. These also support the view contended for by the respondent. As the appellants have not deposited all the amounts required under O. 21, R. 89, Civil P. C., the alternative prayer asked for in their petition cannot be granted. In the result both the prayers of the appellants have to be refused.

I shall now deal with the preliminary objection raised by the respondent that no second appeal lies. The objection is

15. (1913) 18 I C 579.
16. A I R 1922 Mad 54=65 I C 983.
17. A I R 1922 Bom 193=63 I C 39=46 Bom 171.
18. A I R 1929 Bom 215=117 I C 527.
19. (1899) 22 Mad 286.
20. (1899) 26 Cal 449=3 C W N 283 (F B).

not of much importance as the appellants have filed a civil revision petition also, and if the lower Court's order is wrong this Court may well interfere with it under S. 115, Civil P. C., as the question involved is without doubt a question of jurisdiction, namely, whether the Court has jurisdiction to confirm a sale when the decree on which the sale is based has been reversed in appeal subsequent to the sale and before its confirmation. But the respondent presses the preliminary objection for another reason, and it is this, namely, that if I hold that there is no second appeal and therefore deal with the case as a civil revision petition, then my order will be final and not be subject to any further appeal; but if I deal with the case as a second appeal, then the order passed by me will be subject to a Letters Patent Appeal provided I give permission to file an appeal. This technical advantage which he hopes to get is of course dependent upon the assumption that the appellants' case is going to be dismissed. If the appellant succeeds then the preliminary objection will certainly react against the respondent. However, as the question has been raised I will deal with it.

If the appellant's petition to the lower Court is to be considered as one under O. 21, R. 89, then it is clear that there is only one appeal under the Code against the order that may be passed upon it, and against the appellate order only a revision under S. 115, Civil P. C., can be filed and not a second appeal. But the appellants have filed their application under S. 47, Civil P. C., also. It is argued by the respondent that the contest being between the judgment-debtors and the auction-purchaser, having regard to the Full Bench decision in *Veyindra Muthu Pillay v. Maya Nandan* (21) which holds that a stranger auction-purchaser is a representative of the judgment-debtor, it must be held that the question does not arise between "parties to the suit" and that therefore one of the conditions for the application of S. 47, Civil P. C., lacking, the petition does not lie under that section. At first sight this objection seems to be insurmountable, but having regard to the explanation put upon the Full

Bench decision by a Bench of this Court subsequently, this objection has to be overruled. The scope of the Full Bench decision has been discussed in detail by Krishnan, J., in *Jainaulabdin v. Krishna Chettiar* (22), where the learned Judge pointed out that the Full Bench, after holding that the stranger auction-purchaser is a representative of the judgment-debtor, went further and held on the authority of the Privy Council decision in *Prosunno Kumar Sanyal v. Kali Das* (23) that

"Irrespective of any question of the representative character of the auction-purchaser appellant, S. 47, Civil P. C., should be applied to his case where the question raised is one relating to execution and is one in which the decree-holder and the judgment-debtor are adversely interested."

The learned Judge ends his discussion of the question with this observation:

"The Full Bench, as I understand them, held that the condition in S. 47, Civil P. C., that the question should be one 'arising between the parties' is satisfied by the question being one of a nature in which the parties to the suit adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. In fact they gave an extended meaning to these words."

Ayling, J., concurred with the opinion of Krishnan, J., stating that he was not prepared to dissent from his view though he was inclined to think that the Full Bench judgment extended the applicability of S. 47, Civil P. C., to a decree hardly suggested by the wording of the section. In this case there can be no doubt that the question for decision is one of a nature in which the auction-purchaser and the judgment-debtors are adversely interested, and it therefore follows that the petitioners' application would fall under S. 47, Civil P. C., and if so, on an appeal against the first Court's order a second appeal will lie to this Court, the order passed on an application under S. 47 being in the nature of a decree. As against this contention of the appellants based on the interpretation of the Full Bench judgment as given in *Jainaulabdin v. Krishna Chettiar* (22), Mr. Swaminatha Ayyar has called my attention to the decision in *Yagnasami Ayyar v. Chidambara Natha Mudaliar* (24), where it was held by Abdur Rahim, J., who was a party to

22. AIR 1921 Mad 420=63 I C 200 (FB).

23. (1892) 19 Cal 683=19 I A 166=6 Sar 209 (PC).

24. AIR 1921 Mad 81=61 I C 961.

21. AIR 1920 Mad 324=54 I C 209=43 Mad 107 (FB).

the Full Bench decision, and Odgers, J., subsequent to the Full Bench decision in *Veyindra Muthu Pillay v. Maya Nadan* (21) that a question arising for decision between the judgment-debtor and auction-purchaser does not fall under S. 47 and the decision thereon is not appealable.

The judgment is a short one and the Full Bench decision is not discussed in it, nor does it refer to the later decision of this Court in *Veyindra Muthu Pillay v. Maya Nadan* (25) referred to by Krishnan, J., in his judgment. For these reasons I am inclined to accept the decision in *Jainaulabdin v. Krishna Chettiar* (22) in preference to the decision in *Yagnasami Ayyar v. Chidambara Natha Mudaliar* (24). Mr. Swaminatha Ayyar draws my attention to a decision of mine where I upheld the preliminary objection and dismissed the civil miscellaneous appeal on the strength of the Full Bench decision in *Veyindra Muthu Pillay v. Maya Nadan* (21). But no attempt was made before me to distinguish the Full Bench decision, nor was my attention invited to the decision in *Jainaulabdin v. Krishna Chettiar* (22). The appellants' learned counsel in that case accepted the preliminary objection and I therefore dismissed the second appeal. For the above reasons I would hold that in the present case a civil miscellaneous second appeal would lie. In the result both the civil miscellaneous second appeal and the civil revision petition are dismissed, but the respondent will get his costs only in the civil miscellaneous second appeal.

P.R.S./S.K.

*Appeal and
Revision dismissed.*

25. AIR 1920 Mad 126=58 I C 501=43 Mad 696.

A. I. R. 1933 Madras 608

LAKSHMANA RAO, J.

Krishnalal Jankiprasad — Petitioner.
v.

Hyathkhan Saheb — Opposite Party.

Civil Revn. Petn. No. 1392 of 1932,
Decided on 16th February 1933, from
order of Dist. Judge, West Godavari,
D/- 27th August 1932.

Provincial Insolvency Act (1920), S. 75—
Leave to amend insolvency petition can be
granted in appropriate cases even after

**expiry of period of limitation prescribed for
main proceeding.**

An insolvency petition was grounded on the sale by the debtor in favour of his wife though it was alleged to be a nominal and collusive transaction intended to delay and defeat the creditors, and leave to insert a paragraph in the petition was prayed for, that even if the Court should hold that the debts referred to in the sale-deed are true, the transfer would nevertheless be a fraudulent preference which is void as against the receiver:

Held: that the amendment was permissible :
In re Phillips Baston, Ex parte, (1900) 2 Q. B. 329 and 37 Mad. 555, *Ref.*

Held further: that in appropriate cases leave to amend can be granted even though the amendment was asked for after the expiry of the period of limitation prescribed for the main proceeding : A. I. R. 1921 P. C. 50, *Rel. on.*

[P 608 C 2]

V. V. Srinivasa Aiyangar and R. Sundarajan—for Petitioner.

Somasundaram—for Opposite Party.

Judgment. — The insolvency petition was grounded on the sale by the debtor in favour of his wife though it was alleged to be a nominal and collusive transaction intended to delay and defeat the creditors, and what is prayed for is leave to insert a paragraph in the petition that even if the Court should hold that the debts referred to in the sale-deed are true, the transfer would nevertheless be a fraudulent preference which is void as against the receiver. Such an amendment is permissible : vide *In re Phillips Baston Ex parte* (1) and *Mahomed Ayyub Sahib v. J. P. Gunnis & Co.*, (2) ; and as pointed out in *Charan Das v. Amir Khan* (3) in appropriate cases leave to amend can be granted even though the amendment is asked for after the expiry of the period of limitation prescribed for the main proceeding. Under the circumstances leave to amend the petition was rightly granted in this case by the Subordinate Judge and the order of the District Judge cannot be upheld. It is therefore set aside and the order of the Subordinate Judge is restored. The petitioner will however pay the costs of the respondent in this proceeding in all the Courts.

P.R.S./K.S.

Order set aside.

1. (1900) 2 Q B 329 = 69 L J Q B 601 = 82 L T 691.

2. (1913) 37 Mad 555=19 I C 19.

3. A I R 1921 P C 50 = 47 I A 255 = 48 Cal 110=57 I C 606 (P C).

A. I. R. 1933 Madras 609

WALSH, J.

(Marudugula) Subbarayudu — Plaintiff—Petitioner.

v.

Pandivi Satyanandam and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 1361 of 1929, Decided on 14th December 1932, from decree and judgment of Dist. Munsif, Rajahmundry, D/- 19th February 1929.

Provincial Insolvency Act (1920), Ss. 4, 68 and 75—Adjudication of father and sale of property by Official Receiver—Order as to removal of obstruction—Subsequent suit by son of insolvent under S. 9, Specific Relief Act, dismissed—High Court should not interfere in revision—Specific Relief Act (1887), S. 9.

A father of a joint Hindu family was adjudicated insolvent and some properties were sold by the Official Receiver. There was obstruction by several persons including a son-in-law of the insolvent and on the application of the vendor and the Official Receiver, the obstruction was removed by an order of Court. Subsequently the son of the insolvent filed a suit under S. 9, Specific Relief Act, which was dismissed on the ground that he had not been dispossessed otherwise than in due course of law:

Held: that the High Court should not interfere on such a difficult and obscure question of law when the petitioner had other remedies such as appeal under Ss. 68 and 75, Insolvency Act or an application under O. 21, Rr. 97, to 101, Civil P. C.: *Case law discussed.* [P 610 C 2]

P. Venkataramana Rao — for Petitioner.*G. Lakshmana and G. Chandra Sekhara Sastri*—for Opposite Parties.

Judgment.—The plaintiff who is the petitioner in this Civil Revision Petition filed a suit under S. 9, Specific Relief Act, for possession of a certain part of a house on the ground that he has been forcibly dispossessed by the Official Receiver. The Court dismissed the suit holding that he had not been dispossessed otherwise than in due course of law and against this he has filed this revision petition. One Marudugula Subbarayudu had two sons Venkatasubbayya and Venkataratnam. They were both adjudicated insolvents. The wife of the former is defendant 8 and the wife of the latter is defendant 9. Venkatasubbayya had two sons, the plaintiff and one Appala Raju, whose son is defendant 7. Venkataratnam's son is defendant 6. All these formed a joint Hindu family. The Official Receiver sold the properties in dispute and some other properties to the respondents who were defendants 1 to 5 in the suit. The sale was in 1926. It

was obstructed by certain persons including a son-in-law, 3rd obstructor, who filed a petition under S. 68, Provincial Insolvency Act. This was dismissed and the appeal against it also to the High Court in C. M. A. 108 of 1927 was dismissed on 4th March 1931. There had been a sale of the house by the insolvents in favour of a son-in-law and afterwards a resale of the property in favour of the third obstructor, the nephew and son-in-law of the insolvents. The Official Receiver applied to the Court to have the sale set aside and this was done by the District Judge which was confirmed in appeal by the High Court reported in *Venkataratnam v. Official Receiver, Godavari District* (1). As there was obstruction to delivery both the Official Receiver and the vendees moved the Court to have the obstruction removed and by an order of Court on 17th February 1928 this was done. The plaintiff, a son of one of the insolvents who apparently raised no objections at that time, subsequently filed this O. S. No. 253 of 1928 under S. 9, Specific Relief Act.

The question at issue really is whether the order on the obstruction petition directing removal of the obstruction was a decree or not. For the petitioner *Narasimhayya v. Veeraraghavalu* (2) is relied on. But the decision of that case is not really applicable because at that time S. 4, Provincial Insolvency Act, was not in force. This has been pointed out in *Ramaswami Chettiar v. Ramaswami Iyengar* (3), which is entirely in respondents' favour. It was held in that case that under Ss. 4, 5 and 56, Provincial Insolvency Act, 5 of 1920, the Court of insolvency can inquire into the disputed title and order delivery of the insolvent's property to a purchaser thereof from the Official Receiver by removing the obstruction of a third party. This was also the case of a father and sons. But the petitioner relies on a later case, *Venkata Raman v. Chokkier* (4) and he argues that the sons are in a better position than a third party claiming to hold under the insolvent in this matter. *Venkata Raman v. Chokkier* (4) professes to distinguish *Ramaswami Chettiar v. Ramaswami Iyengar* (3) on the

1. AIR 1924 Mad 358=76 I C 1006.

2. AIR 1918 Mad 702=42 I C 525=41 Mad 440.

3. AIR 1922 Mad 147=65 I C 394=45 Mad 434.

4. AIR 1928 Mad 531=109 I C 516=51 Mad 567.

ground that in that case the purchase was benami, but if *Ramaswami Chettiar v. Ramaswami Iyengar* (3) is studied, it will be seen that though the insolvent's son raised the plea that the purchase was benami that was not the plea on which the case was decided and it proceeded entirely on the position of an undivided son. *Venkata Raman v. Chokkier* (4) does appear to reverse *Ramaswami Chettiar v. Ramaswami Iyengar* (3) though it does not profess to do so.

It has been argued for the counter-petitioner before me that the two cases, *Official Receiver of South Arcot v. Perumal Pillai* (5) and *Chittammal v. Ponnusami Naicker* (6), referred to in *Venkata Raman v. Chokkier* (4), as placing the position of the sons on a different footing from that of the father do not really do so. It is not for me sitting as a single Judge to canvass that point. In *Official Receiver of South Arcot v. Perumal Pillai* (5) it was admitted that the insolvents had no present right to joint possession of the properties with the persons obstructed. In *Chittammal v. Ponnusami Naicker* (6) there had been a previous division of the property. Several cases as to what is meant by "dispossession in due course of law" have been quoted to me, but the position of the Official Receiver with regard to an insolvent father and his sons is so peculiar and difficult that these cases are not of very much assistance. *Rudrappa v. Narasingarao* (7) quoted for the petitioners is a case of a landlord dispossessing tenants who held over. It was held to be not in the usual process of law. On the other hand *Kamini Sundari Dasaya v. Saheb Sheikh* (8) is a case where the tenants were dispossessed in execution of a decree against their landlord and it was held that they were not dispossessed otherwise than in due course of law. *Roshanulla v. Nazir Mahmud* (9) is a very brief judgment which gives no reasons and it does not refer to *Kamini Sundari Dasaya v. Saheb Shiek* (8).

After the decision in *Ramaswami Chettiar v. Ramaswami Iyengar* (3) and until *Venkata Raman v. Chokkier* (4) it was good law here, and the Court was entitled to remove obstruction by the

sons of insolvents. There was some doubt whether the vendees or only the receiver could make the application; so in the present case, to make sure, both applied to remove the obstruction and to give possession. That decision was in force when the vendees and the Official Receiver applied and the order of the Court was passed on 17th February 1928. The decision in *Venkata Raman v. Chokkier* (4), now relied upon, was given on 5th December 1927. It was, I understand, first reported only in *A.I.R.* 1928 *Mad.* at p. 531. It was not therefore reported at the time the Court made the order. As I said before, the legal position of an Official Receiver in regard to the joint sons of the insolvent's father is an extremely difficult problem and the history of this case shows that every conceivable obstacle has been put in the way of realising the insolvent's assets. If the decision in *Venkata Raman v. Chokkier* (4) is to be relied on, it appears to me that *Ramaswami Chettiar v. Ramaswami Iyengar* (3) has been entirely reversed although the learned Judges appear to think that *Ramaswami Chettiar v. Ramaswami Iyengar* (3) may be distinguished later. The question is whether in a case of this sort should I interfere in revision petition, on a difficult and rather obscure question of law when the petitioner had undoubtedly other remedies such as appeal to the insolvency Court, under Ss. 68 and 75, Provincial Insolvency Act, or an application under O. 21, Rr. 97 to 101, Civil P. C.? The plaintiff stood by and then proceeded to attack the decree collaterally by the present suit. I do not think, even if the view of the learned District Munsif is wrong that this is a case in which I should interfere in revision. The revision petition therefore fails and is dismissed with costs.

P.R.S./K.S. *Petition dismissed.*

A. I. R. 1933 Madras 610

WALSH, J.

Rudrappa Nayak and others—Plaintiffs—Appellants.

v.

Dasan and others—Defendants—Respondents.

Second Appeal No. 293 of 1929, Decided on 6th March 1933, against judgment and decree of Sub-Judge, Tuticorin, D/- 24th September 1928.

5. AIR 1924 Mad 387=79 I C 322.

6. AIR 1926 Mad 363=92 I C 573=49 Mad 762.

7. (1905) 29 Bom 213=7 Bom L R 12.

8. (1910) 5 I C 793.

9. (1913) 18 I C 727.

Landlord and Tenant — Poramboke land—Registration of land as cattle stand in settlement register does not imply grant to villagers—Assignment of such land—Discretion vests in Government and cannot be questioned by civil Court.

The registration of land as cattle stand in the settlement registers does not imply any grant to the villagers; and the right of the Government to assign such land is not restricted by the condition that the villagers would not be prejudiced by their cattle-stand ground being diminished by such assignment beyond what is required for them. The Revenue Officials must be left to their own judgment in such matters and their judgment cannot be questioned by the civil Court: *Mad. S. A. No. 692 of 1926, Foll.; A I R 1931 Mad. 213, not Foll.; 31 Cal 503 (P C), Dist.*

[P 611 C 1, 2; P 612 C 1]

C. S. Venkatachariar and S. Narayana Iyengar—for Appellants.

P. V. Rajamannar—for Respondents.

Judgment.—The plaintiffs as representing the villagers of Kalingapatti brought a suit for a declaration that the plaint property, Survey No. 225 measuring 96 cents, and Survey No. 1690 measuring 3.83 acres, have been set apart for communal purposes from time immemorial and that the Secretary of State (defendant 3) had no right to assign portions of the above survey numbers to defendants 1 and 2. These two survey numbers are both registered as cattle-stand in the re-settlement registers. Both the Courts found, as a matter of fact, that Survey No. 225 is not being used for this purpose but is used for other purposes and that of the 3 acres 83 cents of which Survey No. 1690 consists, only portions are used as cattle-stand and that 59 cents assigned in that number are not being so used. The suit was dismissed in the trial Court and the decree was confirmed in the lower appellate Court. Against this the plaintiffs have preferred this second appeal.

The registration of the land as cattle-stand in the settlement registers does not imply any grant: see decision in *Venkatasami Naidu v. Agaram Chenga* (1) and *S. A. No. 692 of 1926* of this Court. In the former case Wallace, J., held that

“the mere registry of land in a village as a particular kind of poramboke creates no vested right in the villagers to hold it as against Government,”

and in *S. A. No. 692 of 1926* he held that the mere entry of the field as grazing ground poramboke in the settlement registers which is what the lower appel-

late Court relies upon is of course no proof of any dedication. It is not argued before me that any grant or dedication has been proved in the present case, but it is said that once it has been registered as cattle-stand, Government can only transfer it provided they do not prejudice the rights of the villagers by diminishing the cattle-stand ground beyond what is required and that there is no finding that the land left was sufficient for the use of cattle by the villagers. This argument was also raised in *S. A. No. 692 of 1926*. Wallace, J., there remarks:

“It is urged that the only principle which ought to guide Collectors in consenting to a reduction of the area of grazing ground poramboke is the consideration of whether the extent left still suffices for the village needs; that is generally so and has been recognized as a correct principle by various Board's proceedings and Government orders: see Ex. 9. But that principle is not embodied in the Board's Standing Orders as a *sine qua non* nor is it the only principle to be considered. For example, another principle is also set out in the G. O.'s (to) the general needs of the whole village. Another principle, one may perhaps add, might be the necessity for raising public revenue, or the advisability of restoring the loss of revenue which Government has suffered by the decision in 1874 to transfer from patta land to poramboke. All these requirements have to be considered broadly by the Collector in a case like the present. It might be for example that the question that the Collector has to decide is whether existing grazing ground should not, to the advantage of the whole village, be converted into tank bed or into house site, even though thereby the need for grazing ground is unduly curtailed. The revenue officials must be left to their own judgment in such matters and their judgment cannot be questioned by the civil Court. We see the undesirable result of the civil Courts' interference in the present case.”

Collector of Godavari District v. Pedda Rangiah (2), which is quoted for the appellants, appears to be against them. It was there held, that according to the Common law of the country the control of the gramanatham vests in the revenue authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it. In that case the plaintiff sued the Collector on behalf of the Secretary of State to have the grant set aside and for a declaration that the plaintiff and others were entitled to use the land as a standing place for the village cattle and for common village purposes and that the Collector had no right to make any grant of the land. The other case

1. A I R 1930 Mad 621=125 I C 74.

2. (1908) 4 M L T 440.

quoted, *Ramaswami Iyer v. Secy. of State* (3), so far as the point decided there is concerned, does not help the appellants. There the land was described in the settlement register as Mandai poramboke but the Government subsequently transferred it to Natham poramboke and the suit plot was allotted by the Government as house sites and granted to certain residents of the village. In that case it was not proved that the remaining area was not sufficient having regard to the needs of the community. It was held that the plaintiffs' customary right was not an absolute one and the Court could restrict the user to the remaining portions of the land. The result was the dismissal of the suit. This decision which was by a single Judge, Venkatasubba Rao, J., is however relied on as indicating the principle that Courts can decide what is the reasonable amount of land to be left for the purpose required. This is an obiter dictum and with great respect I am unable to see how such a principle is reconcilable with the direction of the Government in the matter. The Privy Council case quoted in that connexion, *Bholanath Nundi v. Midnapore Zamin-dari Co.* (4), was not a case wherein Government was concerned; the plaintiffs, being resident cultivators of the village belonging to the defendants, the proprietors of an indigo concern, claimed a right of free pasturage over the waste lands of the village. With respect I prefer to follow the opinion of Wallace, J., in S. A. No. 692 of 1926 and I am bound to do so as the case before him was decided on the actual point. In the result the second appeal fails and is dismissed with costs (one set).

P.R.S./K.S. *Appeal dismissed.*

3. A I R 1931 Mad 213=129 I C 630.

4. (1901) 31 Cal 503=31 I A 75=8 Sar 611 (P C).

A. I. R. 1933 Madras 612

CURGENVEN AND SUNDARAM CHETTY, JJ.

M. K. R. M. Muthuraman Chettiar—
Plaintiff—Appellant.

v.

Subramanian Chettiar and others—
Defendants—Respondents.

Second Appeal No. 232 of 1926, Decided on 24th February 1933, against decree of Sub-Judge, Sivaganga, in O.S. No. 25 of 1925.

(a) Evidence Act (as amended by Act 31 of 1926), S. 68—Retrospective effect—*Quaere*

Whether S. 68 as amended by Act 31 of 1926 is not retrospective so far as the operation of admitting evidence is concerned: A I R 1929 Mad 881 and A I R 1928 Bom 267, Ref.

[P 613 C 2]

(b) Civil P. C. (1908), O. 17, R. 1—Plaintiff taking steps to secure attesting witness and not responsible for non-service—Witness dead during appeal—Plaintiff can prove document by other means—His own evidence is sufficient—Evidence Act (1872), Ss. 68 and 69.

Where the plaintiff has taken early steps to secure the attendance of the attesting witness and is not responsible for the last summons being ineffective, an adjournment should be granted for examining the attesting witness; and if the witness has died during the pendency of the appeal, whether under the amendment of S. 68 or under S. 69, Evidence Act, it is open to the plaintiff to prove the document by other means. His own evidence in the circumstances would be sufficient to prove the document.

[P 613 C 2]

Patanjali Sastri—for Appellant.

S. Varadachariar and A. Swaminatha Iyer—for Respondents.

Curgenven, J.—The plaintiff, who appeals, is a money-lender and sued upon a hypothecation bond which purports to have been executed to him for a sum of Rs. 4,000 on 29th November 1918 by one Palaniappa Chetty. The property hypothecated consisted of an undivided one-third share in the family house, the other two shares being owned by other branches. Palaniappa Chetty died in 1923 and the suit was brought against his two sons, defendants 1 and 2, and his natural brother defendant 3, who had been adopted to his uncle. The plaintiff was put to the proof that Palaniappa Chetty had executed the document, and the further defences were raised that the bond was not supported by consideration and was not binding upon the shares of the sons. The learned Subordinate Judge found against the plaintiff upon all these points and dismissed the suit.

So far as proof of execution is concerned the lower Court found that one of the attestors was alive and had not been examined by the plaintiff. Accordingly under S. 68, Evidence Act, as it then stood, the document could not be used as evidence. Since then the section has been amended by Act 31 of 1926, which provides that it shall not be necessary to call an attesting witness in proof of the execution of such a document unless its execution by the person

by whom it purports to have been executed is specifically denied. In the present case there is no such specific denial. All that the written statement of defendants 1 and 2 claims is that the plaintiff should be put to the proof of the execution. The question then arises whether the amendment introduced by this Act operates retrospectively. Two cases have been cited to us as authority for the view that it does so operate, *Thayammal v. Muthukumaraswami Chettiar* (1) and *Yacubkhan v. Guljarkhan* (2). Mr. Varadachariar has questioned the correctness of these decisions upon this point, arguing that the amendment has not been made retrospective by express enactment and therefore can only be held to be so as a provision of processual law. It is retrospective in the sense that it affects documents already in existence, provided that the operation of receiving them in evidence takes place after the amendment came into force. It is not retrospective so far as the operation of admitting evidence is concerned. We do not think that it is necessary to decide this matter in its general aspect because of certain special features which are present in this case. The learned Subordinate Judge admits that the plaintiff made an attempt to secure the evidence of the surviving attester, Sowmya Ayyangar, but considers that summons was not taken out early enough for this purpose. We find the name of the witness first appearing in a list filed by the plaintiff on 7th November 1925, and summons was accordingly issued on 9th November 1925 for 28th November. This summons was served by affixture. The name again appears in a list dated 22nd December and summons was issued on 25th December for 8th January 1926. This was returned unexecuted for want of time, the Christmas holidays doubtless having reduced the time available. A third attempt was made to summon the witness on 4th March 1926 for the 16th, and was returned with the report that he had left his home two days before and the time of his return was not known.

The hearing of the case was taken up on 16th and 17th March and on the

latter date an application by the plaintiff's pleader for an adjournment in order that the attester might be examined was refused and judgment was pronounced on 18th March. We cannot help thinking that this adjournment should have been granted, because the plaintiff took early steps to secure the attendance of the witness and was not so far as appears responsible for the last summons being ineffective. If matters stood there therefore we should have been disposed to remand the case for taking this evidence which, although formal, is indispensable. Such a remand would of course re-open the case and it can hardly be contended that then the trial Court could not avail itself of the amendment to S. 68. But we are informed that this witness has since died and accordingly, whether under the amendment or under S. 69 of the Act it is open to the plaintiff to prove the document by other means. His own evidence is, we think, in the circumstances sufficient to do this and we hold that the proof has accordingly been given. The next question is whether the bond is supported by consideration. (After discussing evidence, His Lordship concluded). The evidence certainly suggests that some consideration passed, but if specific evidence relating to payment is disbelieved there is no proof that the full consideration passed. And if the full consideration did not pass the question how much, if any, passed becomes incapable upon the evidence of any definite answer. We have accordingly no other course but to confirm the finding of the trial Court upon this issue and dismiss the appeal with costs.

P.R.S./R.K. *Appeal dismissed.*

A. I. R. 1933 Madras 613

CURGENVEN AND SUNDARAM
CHETTY, JJ.

(Nagar) Damodara Shanbhogue—
Plaintiff—Appellant.

v.

Chandapur Pujary and others—Defendants—Respondents.

Appeal No. 223 of 1926, Decided on 6th March 1933, against decree of Sub-Judge, South Kanara.

(a) Transfer of Property Act (1882), S. 58 (d) — Usufructuary mortgagee has no right to sue for sale of mortgaged property unless there is express personal covenant to

1. AIR 1929 Mad 881=121 IC 858=53 Mad 119.
2. AIR 1928 Bom 267=111 IC 267=52 Bom 219.

pay money—Held that document in question did not contain such covenant.

A usufructuary mortgagee as such has no right to institute a suit for sale of the mortgaged property, but must only continue to enjoy the same till redemption. If in such a mortgage deed, there is an express personal covenant to pay the money, apart from words merely indicating the time and the mode of redemption, a suit for sale may be instituted, but not otherwise.

What was stated in a usufructuary mortgage was that on payment of the balance of the principal money the mortgagee should receive it and make over the property to the mortgagors. There was also a provision that in case of default in the redemption of the mortgage on due date the mortgagee should continue in possession and enjoyment of mortgage property till realization of mortgage-money:

Held: on a construction of the document that it did not contain personal covenant to pay the mortgage-money: *Case law referred*.

[P 615 C 1]

(b) **Transfer of Property Act (1882), Ss. 58 (d) and 72—Usufructuary mortgage—Lease executed by mortgagor—Arrears of rent stipulated to be paid at time of redemption and to be charge on mortgaged property—Such charge can be enforced by sale of mortgaged property.**

Although a usufructuary mortgagee is not entitled to sue for sale of mortgaged property for balance of principle amount in the absence of an express personal covenant in the mortgage deed, still where the mortgagor executes a lease to the mortgagee and agrees to pay any arrears of rent at the time of redemption and there is a further definite clause in the lease-deed by which a charge is created on the mortgaged property for the arrears of rent unfettered by the restrictions contained in the mortgage-deed as to time and mode of redemption, the mortgage-property can be sold to enforce the charge. [P 616 C 2]

(c) **Landlord and Tenant—Claim for arrears of rent—In absence of agreement to pay interest, interest cannot be allowed—Interest.**

Where no contract for the payment of interest on arrears of rent is set up in the plaint, the claim for interest is clearly unsustainable and must be disallowed. [P 617 C 1]

(d) **Hindu Law—Joint family—Usufructuary mortgage—Several leases executed by several members to mortgagee for convenience—Whole mortgaged property made responsible for realisation of arrears of rent due by any member—Charge for arrears of rent is binding on family of mortgagors as a whole.**

A mortgage deed provided that the mortgagee should lease out different portion of the mortgaged property to several members of the family, as such a course would be convenient for maintaining themselves out of the usufruct, at the same time paying rent to the mortgagee which would represent the interest due to him on the principal amount. Under the mortgage deed the whole of the mortgaged property was made responsible for realization of the arrears of rent due by any member of the family in respect of the lease taken by him:

Held: that the charge created in respect of the arrears of rent was binding on the family of the mortgagors as a whole. [P 617 C 2]

B. Sitarama Rao and K. P. Sarvothamma Rao—for Appellant.

K. Y. Adiga and K. Srinivasa Rao—for Respondents.

Sundaram Chetty, J.—Plaintiff is the appellant. He sued for the recovery of a sum of Rs. 37,065-9-11 by sale of the mortgaged properties on the strength of a usufructuary mortgage deed, Ex. A, which according to the plaintiff's contention contains a personal covenant to pay, whereby he is enabled to sue for the sale of the mortgaged properties though the mortgage deed is styled as a usufructuary mortgage. The learned Subordinate Judge dismissed the suit by reason of his findings on issues 3 and 4. On a construction of the terms of a mortgage deed, he has held that there was no personal covenant to pay the mortgage amount and the suit for sale of the mortgaged properties is not therefore maintainable. This is the main question argued in this appeal. The suit mortgage deed Ex. A is an unduly long document and a full translation of it is given in the judgment of the lower Court. For the purpose of deciding the point at issue, the following extract from the document would suffice:

"As we represented to you that there is some extra income in the property, till the term stated here below, you should give us credit to a sum of Rs. 6,625 from the principal amount and you have agreed thereto out of concession to us. Deducting the said sum of Rs. 6,625, on payment (when paid) in one lump sum on the kalavadhi Vishu Sankramana of Dundeebhi year (1922-23) of the balance of Rs. 4,000 as also any arrears of rent that may remain due with your consent from any member of our family who may take the property on rent from you on the responsibility of the property, you shall receive the same and make over the property and documents as also the receipts which you obtain from the creditors. If we fail to pay the aforesaid amount on the due date as stated above, thereafter, unless we pay on kalavadhi Vishu Sankramana of any year, we have no right to ask you to receive the amount and surrender possession during any other time of any year, and from the date of default on the due date until we discharge all rights under this deed, you shall not only enjoy the properties but shall also be entitled to appropriate the income towards the interest due to you on the principal amount and we shall have no right to claim any excess income from you. If you do not consent to allow any arrears of rent against the members of our family, this deed shall be no bar to your right of recovering the same on the responsibility of the said properties. If in addition to the aforesaid sum of Rs. 1,500 left in anamath with you to pay the aforementioned creditors, any excess sum is found due to them and is paid by you, the excess

so paid and if the assessment be enhanced at the time of the survey, the sum so enhanced also, together with interest at 8 per cent per annum from the respective dates of payment, we are liable to pay on the responsibility of the ildarwar property (property mortgaged usufructually), and we shall pay at the time of the final discharge of the amounts under this deed (when the accounts in respect of this deed are finally settled) the said sum also."

This deed was executed on 11th September 1892 and it is specifically stated in the body of the deed that possession of the properties was handed over to the mortgagee on sap ildarwar (usufructuary mortgage pure and simple). A period of 30 years is fixed for redemption, and by reason of the enjoyment of the properties by the mortgagee for that period, the entire interest due on the principal sum of Rs. 10,625 for the said period of 30 years and also a portion of the principal amount, namely Rs. 6,625, must be taken to have been paid off. At the end of that period the balance of principal remaining due is only Rs. 4,000. Provision is also made in this deed for the grant of portions of the mortgaged property on lease to any member of the family of the mortgagors and the arrears of rent remaining due are also payable along with the balance of the principal amount on the specified date at the end of the 30 years' term. In the case of a usufructuary mortgage, there must be delivery of possession to the mortgagee coupled with an authorisation to retain such possession until repayment of the mortgage money, and receive the rents and profits in lieu of interest or in part payment of the mortgage money. An usufructuary mortgagee as such has no right to institute a suit for sale of the mortgaged property, but must only continue to enjoy the same till redemption. If in such a mortgage deed, there is an express personal covenant to pay the money, apart from words merely indicating the time and the mode of redemption, a suit for sale may be instituted, but not otherwise. Even to sue for the mortgage money under S. 68, T. P. Act, it must be shown that by the terms of the deed the mortgagor has bound himself to repay the same. So far as the claim for the recovery of the balance of principal, namely Rs. 4,000, is concerned, we are unable on a proper construction of the terms contained in the deed, to read any personal covenant to pay the same. Any such covenant should be

clear and unconditional in the undertaking to pay.

Several decisions were cited on either side in the course of the arguments and we find that each case turns upon the construction to be placed on the particular wording of the document. The usufructuary mortgage deed which was considered in *Luchmeshar Singh v. Dookh Mochan Jha* (1) contained a clause :

"Having paid the principal money in the month of Chait 1297, we shall take back the document and the land."

The learned Judges held that "such a provision is merely what is generally known as a proviso for redemption which fixes the minimum time within which the mortgagor can redeem."

In respect of an exactly similar clause contained in a usufructuary mortgage deed, our High Court held that it did not amount to a personal covenant to pay: *Hakeem Patte Muhammad v. Davood* (2). The same view was held in a later case on the construction of an almost similar provision: *Rangayya Pillai v. Narasimha Iyengar* (3). In another case decided by the Calcutta High Court, where the covenant was

"when I or my heirs shall pay, I shall take back this deed and enter on the land," it has been held that this does not amount to a personal covenant to pay but it is only a conditional statement which would not entitle the mortgagee to insist on giving up possession and recovering the money by sale of the property. The terms of the clause in the deed in question in the present case relating to the payment of the balance of the mortgage money are in our opinion very similar to the clauses which were the subject of consideration in the cases referred to above. The cases relied on by Mr. Seetharama Rao for the appellant are in our opinion distinguishable from the present. In the mortgage deeds dealt with in *Ramayya v. Gururva* (4) and *Udayana Pillai v. Senthivelu Pillai* (5) there was a clear and unambiguous personal covenant to pay. In the latter case the covenant ran as follows :

"On the expiry of the term I shall pay the said Rs. 200 and redeem the lands."

In the former case, it is worded thus:

"It is settled that we should pay the principal amount to you in three instalments within this period."

1. (1897) 24 Cal 677.

2. (1917) 39 Mad 1010=30 I C 569.

3. AIR 1919 Mad 847=47 I C 852.

4. (1891) 14 Mad 232.

5. (1896) 19 Mad 411=6 M L J 210.

Such being the wording of the clause, there was no difficulty in holding that there was a personal covenant to pay. In those deeds there was a further clause that in default of such payment the mortgagee should continue to enjoy the property in the aforesaid manner till redemption. In view of the fact that there was a clear and unequivocal personal covenant to pay the money, as an independent provision, the learned Judges held that the effect of the subsequent clause for continuance of enjoyment in case of default in such payment, was not to nullify the previous covenant to pay on a certain day. These decisions would be authorities in favour of the plaintiff's contention in the present case if Ex. A does contain a clear and unconditional personal covenant to pay as in those cases. Not only is such a personal covenant to pay absent in Ex. A, but there is also a provision that in case of default in the redemption of the mortgage on the due date at the expiry of the term, the mortgagee should continue in possession and enjoyment of the property appropriating the income towards the interest due on the balance of the principal amount. As observed by the lower Court, this provision is presumably for the benefit of the mortgagee because he has the advantage of enjoying the entire mortgaged property in lieu of interest due on only a portion of the principal sum, namely Rs. 4,000. This may sound something like a penal provision in case of default in the payment of the entire mortgage money at the end of the stipulated term of 30 years. In the Full Bench decision in *Sivakami Ammai v. Gopala Savundram Ayyan* (6) the clause was :

"I shall pay you the said mortgage amount of Rs. 3,000 in Chithrai kalavathi of the year 1883 and take back this deed of mortgage with possession."

This was held to be a clause containing a covenant to pay. Even in the later Full Bench decision in *Kangaya Gurukul v. Kalimuthu Annari* (7) the clause was almost similar :

"Thereafter, on the 30th Panguni, Bhava year causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall (redeem) or (recover back) our land."

These decisions do not materially help the appellant in this case. One other decision relied on by him is the

one reported in *Rangaswami Ayyangar v. Veeraraghavachari* (8). This seems to be in support of his contention rather than the other decisions. The particular clause from which the personal covenant to pay was inferred is as follows:

"Having paid the amount of the principal by 7th July 1917, having endorsed on the said deed, I shall enjoy the said land."

But in Ex. A, there are no words, such as "we shall take back and enjoy the lands," "we shall redeem and take back the lands." What is stated therein is, that on payment of the balance of the principal money the mortgagee should receive it and make over the property to the mortgagors. That is only a proviso for redemption in which the duty of the mortgagee after redemption of the mortgage is expressly specified. On a careful consideration of the specific terms in Ex. A, we agree with the view of the lower Court and hold that there is no personal covenant to pay the balance of the mortgage money so as to entitle the plaintiff to claim the relief, namely, sale of the mortgaged property for the realization of this amount.

So far as the arrears of rent due in respect of the leases granted to the members of the family are concerned, there is no doubt a provision in the deed that those sums are also payable along with the balance of the principal amount at the time of redemption. But there is a further definite clause which clearly entitles the mortgagee irrespective of such a provision, to recover those arrears on the responsibility of the mortgaged property. It means that he can enforce the charge created on the property in respect of those arrears of rent, unfettered by the restrictions contained in this deed as to the time and mode of redemption. The mortgaged properties having been made security for the recovery of those arrears of rent under this deed, there is no bar to the enforcement of the charge in the present suit by asking for the sale of those properties.

The amount of arrears of rent together with interest at 12 per cent per annum claimed by the plaintiffs as per Sch. B is Rs. 22,030.7.4. We may first dispose of the question as regards the claim for interest. There is no provision in Ex. A for payment of any inte-

6. (1890) 17 Mad 131=4 M L J 50.

7. (1901) 27 Mad 526 (FB).

8. A I R 1924 Mad 513=76 I C 1003.

rest on the arrears of rent, though there is specific provision for payment of interest at 8 per cent per annum on two other items of debt. No contract for the payment of interest on arrears of rent is set up in the plaint. That being so the claim for interest is clearly unsustainable and must be disallowed. If the amount of interest is eliminated from the claim, what is due for arrears of rent alone is Rs. 12,547-15-0. The learned Subordinate Judge has found that the particulars of the arrears of rent as given in Sch. B are correct, except as to the value of rice given therein. The quantities of rice which remained due as arrears of rent are mentioned in that schedule and they are in conformity with the settlement made by the several defendants showing the quantities of rice which remained due to the plaintiff as arrears of rent. It is said that there are some inaccuracies in the accounts when compared with the lease deeds and receipts. This is not clearly made out, though there was some cross-examination of the plaintiff on this point. It is unlikely that when the lessees chose to settle the accounts with the mortgagee, they would have subscribed their signatures in token of such settlement without satisfying themselves as to the correctness of the figures mentioned therein. As regards the prices of rice claimed by the plaintiff, as noted in Schs. B-1 to B-10, the lower Court has made a deduction of 10 annas per mura, and subject to this deduction the prices noted therein have been allowed. We accept that finding. The plaintiff would therefore be entitled to Rupees 12,547-15-0 less the sum calculated at 10 annas per mura on the total quantity of rice due as arrears of rent, namely, Rs. 1,122-8-0.

It is urged on behalf of the respondents that the arrears of rent due by the several members of the family could not be made a legitimate charge on the mortgaged property. The lower Court is of this opinion and seems to proceed on the footing that the leases provided for in the mortgage deed Ex. A should be those taken by any member of the family as representing the whole family. But there is nothing in the terms of the mortgage deed to restrict the nature of the leases contemplated in the mortgage deed in the aforesaid manner. This in-

tention as would appear from the whole trend of the mortgage deed is that the mortgagee should lease out different portions of the mortgaged property to several members of the family, as such a course would be convenient for maintaining themselves out of the usufruct, at the same time paying rent to the mortgagee which would represent the interest due to him on the principal amount. Under the mortgage deed the whole of the mortgaged property is made responsible for the realization of the arrears of rent due by any member of the family in respect of the lease taken by him. Such an arrangement appears to have been brought about in the interests of all the members of the family without prejudice to the rights of the mortgagee.

We cannot therefore regard the charge created in respect of the arrears of rent as not binding on the family of the mortgagors as a whole. Moreover this very mortgage deed having been found to be valid and binding on the whole family in the former suit which was brought by some of the present defendants and others in which the mortgagee was arrayed as one of the defendants, it is not now open to the defendants to re-open the question of the validity and binding character of this mortgage by setting up a plea which might and ought to have been set up in the former suit: vide Exs. B and B-1. The learned Subordinate Judge has found on issue (1) that the question of the validity of the plaint mortgage is res judicata by reason of the former decision, but failed to give due effect to that finding when dealing with this objection, which is after all one of the grounds on which the validity and binding character of the mortgage can be questioned. We hold that the former decision operates as a bar to the trial of this particular ground of objection set up for invalidating the mortgage. Even on the merits this objection seems to be futile for the reasons already set forth.

There are two other items of the claim as per Schs. C and D. The amount of Rs. 6,729-4-1 is claimed to be due to the plaintiff on account of the enhanced assessment paid from time to time together with interest as provided for in the mortgage deed. A sum of Rs. 2,305-14-6 is claimed on account of the payments made in excess of Rs. 1,500 towards the

discharge of prior debts. The particulars for this claim are set forth in Sch. D. The lower Court has found the amount claimed in Schs. C and D to be correct and due to the plaintiff. But according to the terms of the mortgage deed, these sums are payable to the mortgagee at the time of redemption by the mortgagors, when the final account should be taken. For the reasons already stated, we hold that there is no distinct personal covenant to pay these sums and therefore the plaintiff has to continue in possession till the mortgage is redeemed by payment of these sums as also the sum of Rs. 4,000 which is the balance of principal still due. The present suit brought for the recovery of these sums by sale of the mortgaged properties is not sustainable.

In the result the appeal is partly allowed and a decree is given in plaintiff's favour for a sum of Rs. 11,425-7-0 (on account of the arrears of rent claimed in Sch. B) with subsequent interest thereon at 6 per cent per annum from the date of suit till the date fixed for payment and also proportionate costs in both Courts, and thereafter with interest at 6 per cent per annum on the aggregate amount. Time for payment is four months from this date. In case of default in payment the mortgaged properties will be sold, subject to the usufructuary mortgage lien of the plaintiff under Ex. A. Liberty is reserved to him to bring a portion only of the mortgaged properties to sale for the realization of this decree amount, free from such usufructuary mortgage lien. The respondent's costs in both the Courts proportionate on the value of the claim disallowed should be paid by the plaintiff.

P.R.S./K.S. *Order accordingly.*

* A. I. R. 1933 Madras 618

BEASLEY, C. J. AND BARDSWELL, J.

Secy. of State—Appellant.

v.

(Kocherlakota) Subba Rao — Respondent.

Letters Patent Appeal No. 142 of 1929, Decided on 23rd January 1933, against decree of Wallace, J., in S. A. No. 202 of 1926, reported in *A. I. R.* 1930 *Mad.* 349 (2).

(a) Madras Hereditary Village Officers Act (1895), S. 23 (1), Proviso—Order of sus-

pension by Collector—No appeal lies nor has Revenue Board revisional powers.

The Revenue Board has no power of revision under S. 5, Regulation 1 of 1803, nor any inherent power, outside the Acts and Regulations, to interfere with and enhance the order of suspension which had been passed by the District Collector. [P 619 C 1]

(b) Madras Hereditary Village Officers Act (1895), S. 7 — Collector when passing order under S. 7 is not Court.

A Collector, when passing a punitive order under S. 7, Act 3 of 1895, is not a Court subject to the High Court's jurisdiction. He cannot indeed when he passes a punitive order against a Village Officer be taken as acting as a Court at all. He is acting then departmentally as an Executive Officer and so too the Board of Revenue, when it deals on appeal with such orders, is an executive authority and not a Court: *AIR 1922 Mad 337, Ref.* [P 620 C 1]

* (c) Specific Relief Act (1877), S. 42—Suit for declaration that order of dismissal of karnam passed by Revenue Board is invalid and ultra vires, though without consequential relief, is maintainable—S. 42 is not exhaustive as regards declaratory suits.

Section 42 is not exhaustive of declaratory suits. And a suit which is in substance to have the true construction of statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect, even though without consequential relief, is maintainable. [P 620 C 2]

Hence a suit for a mere declaration without any consequential relief that an order of dismissal of the plaintiff as karnam passed by the Revenue Board in an appeal from the District Collector's order of suspension is invalid and ultra vires is maintainable as the question involved is the right interpretation of Regulation 1 of 1803 and Act 3 of 1895 and the consequent power of the Revenue Board to entertain such an appeal and to pass such order: 22 *Mad* 270 (P C), *Foll*; *Case law reviewed.* [P 622 C 1]

*Government Pleader—*for Appellant.

*A. Satyanarayana—*for Respondent.

Bardswell, J.—The appellant is the Secretary of State. The respondent was the karnam of a village in the Kistna District. He was dismissed on 4th October 1921 by the Revenue Divisional Officer of Ellore for having got appointed as talayari a young boy whom he made use of as his own servant. On appeal the District Collector, on 2nd December 1921, modified his punishment to one of suspension for a year. He then, very ill-advisedly, presented a second appeal to the Board of Revenue. He had, in fact, no right of appeal as under the proviso to S. 23 (1) of Madras Act 3 of 1895 there can be a second appeal to the Board, on a matter of punishment only in the case of a dismissal of a Village Officer. Nonetheless the appeal was entertained by the Board which, apparently without hearing the present

respondent, set aside the Collector's order of suspension and restored the original order of dismissal. The respondent then filed O. S. No. 699 of 1922 in the Court of the District Munsif of Kovvur praying for a declaration that the order of the Board of Revenue was invalid and ultra vires.

The District Munsif granted a decree as prayed for, but on appeal the Principal Subordinate Judge of Masulipatam dismissed the suit, holding that the Board of Revenue had acted in the legitimate exercise of revisional powers which it derived from S. 5, Madras Regulation 1 of 1803. On Second Appeal (202 of 1926) Wallace, J., has restored the decision of the District Munsif holding that S. 5, Regulation 1 of 1803, did not give to the Board the power of revision which the first appellate Court had found that it possessed thereunder, neither did the Board have any inherent power, outside the Acts and Regulations, to interfere with and enhance the order of suspension which had been passed by the District Collector in this case. He had also held, in agreement with the two lower Courts, that the suit was maintainable.

That there was no right of appeal is conceded and cannot, indeed, be disputed in the face of the plain language of the proviso to S. 23 (1) of Madras Act 3 of 1895. The Board of Revenue should not therefore have entertained the respondent's appeal. It is however contended by the learned Government Pleader that the Board was in fact acting in the exercise of its revisional powers, though it did not in any way indicate that it was so doing, and that it got such powers from S. 5, Regulation 1 of 1803 which section has never been abolished. Wallace, J., has dealt with their contention in his judgment and I would, with all respect, express myself as in entire agreement both with the conclusion which he has come to and the reasons that he has given therefor. S. 5, Regulation 1 of 1803, runs thus :

The Board of Revenue have had, and are hereby declared to have, authority to superintend and control all persons employed in the executive administration of the public revenue; all zamindars or proprietors of land paying revenue, and all farmers, securities, raiyats or other persons concerned in or responsible

for, any part of the revenue of Government as far as the said superintendence and control may relate to the executive administration of the revenue under the regulations now enacted, or to be hereafter enacted. As has been pointed out by Wallace, J., the section gives to the Board no punitive powers over Village Officers' but such power is given to it by S. 33 of the same Regulation, which empowers it to

"punish neglect in the Subordinate Officers of Revenue according to the powers vested in them for that purpose."

Under Regulation 29 of 1802 it was laid down that karnams could only be dismissed from their offices by the sentence of a Court of judicature. Power to dismiss karnams was given to the Board of Revenue by S. 7 (3), Regulation 2 of 1806, while by Regulation 6 of 1831 the power theretofore exercised by the Board of Revenue over karnams in raiyatwari tracts was transferred to Collectors subject to the approval of the Board, and by Act 2 of 1869, S. 7 (3), Regulation 2 of 1806 was repealed. Finally there came Madras Act 3 of 1895, in which there is no mention of any revisional power being vested in the Board of Revenue, while its appellate powers in matters of punishment are stated as being those of hearing first appeals against punitive orders passed by the District Collector in the first instance and second appeals in the circumstances already noted.

It is argued for the appellant that, though there have been express provisions as to the powers of the Board in matters of punishment, yet it still has authority to deal with questions of punishment in revision under S. 5, Regulation 1 of 1803, though such authority is not expressly given to it by that section. That contention however is not justified by the wording of the section itself, while the fact that powers of punishment have always been given by specific provision indicates that such powers belonged to a separate category from those of general superintendence and control.

The learned Government Pleader has referred by way of analogy to S. 107, Government of India Act, and has quoted *In re Chinnayya Gounder* (1), which, in agreement with what was stated in a previous decision of this Court, points

out that the two things required to constitute appellate jurisdiction, in which revisional jurisdiction is included, are the existence of the relation of superior and inferior Courts and the power on the part of the former to review decisions of the latter. But the same decision holds that a Collector, when passing a punitive order under S. 7, Act 3 of 1895, is not a Court subject to the High Court's jurisdiction. He cannot, indeed when he passes a punitive order against a Village Officer be taken as acting as a Court at all. He is acting then departmentally as an Executive Officer as is, indeed, pointed out in *In re Chinnayya Gounder* (1), and so too the Board of Revenue, when it deals on appeal with such orders, is an executive authority and not a Court. And so the analogy of S. 107 cannot apply. Especially is it impossible to hold that the Board can have the authority which it claims to dismiss a karnam in revision in circumstances such as those in the present case.

Under Regulation 29 of 1802 it had no power to dismiss a karnam in any circumstances, and as that Regulation was still in force in 1803, S. 5, Regulation 1 of that year, could not give it any such power. Nor could it have it on the passing of Regn. 2 of 1806 as it then became the sole authority by which a karnam could be dismissed. It could only possibly have it after the passing of Regn. 6 of 1831 when its power over karnams in raiyatwari tracts was transferred to Collectors and, for it to have it then, these would have to be read with S. 5 of Regn. 1 of 1803, an implication that was not there when the Regulation was first passed. Such an idea cannot be seriously entertained. I have no doubt but that the order of the Board now under consideration was passed without jurisdiction and was ultra vires.

The next question that arises is that of whether the suit is maintainable. The respondent sued for a mere declaration without any consequential relief and it would appear that he could not at the time of suing ask for any such relief. The argument for the appellant is that his case does not come under S. 42, Specific Relief Act, and that therefore the suit did not lie. In the opinion of Wallace, J., the respondent was not suing as a person entitled to any legal

character or to any right as to any property so that, if S. 42 was exhaustive of declaratory suits, the suit would not lie, but he has followed the view which has generally been taken by this Court that that section is not exhaustive and has therefore upheld the findings of the lower Courts that the suit could be maintained. In this connexion reference has first of all to be made to the Privy Council decision in *Robert Fisher v. Secy. of State* (2). That had to do with a suit which was in substance to have the true construction of a Statute declared and to have an act done in contravention of the Statute, rightly understood, pronounced void and of no effect. The Privy Council points out that this is not the sort of declaratory decree which the framers of the Specific Relief Act had in their mind, while at the same time holding that even if that Act applied there could be no objection, in the circumstances, on the score that further relief was not prayed for. In that case there had been an order, passed under Madras Act 1 of 1876, for separate registration and assessment. The Government directed the Collector to cancel this order and it was this action of Government which was found to be ultra vires. Under Act 1 of 1876 any person who is aggrieved by an order, whether granting or refusing separate registration, has to seek his remedy by a suit and it may be noted that the suit is to be one for a declaration that the separate registration ought or ought not to have been made as the case may be. That point however does not seem to have been considered.

This ruling has been followed by this Court, as an authority for the proposition that S. 42 is not exhaustive of declaratory suits, in a number of cases which have been stated by Wallace, J., in his judgment. The latest of these cases is *Ramaswamy v. Pitchayya* (3). There has however to be considered a later decision of the Privy Council in *Sheoparsan Singh v. Ramanandan Prasad Narayan Singh* (4). The plaintiffs in that case had prayed for a declaration that a will, probate of which had been granted, was not genuine and the Privy

2. (1899) 22 Mad 270=26 I A 16=7 Sar 459 (PC).

3. AIR 1920 Mad 665=58 IC 585=43 Mad 410.

4. AIR 1916 P C 78=33 IC 914=43 I A 91=43 Cal 694 (PC).

Council pointed out that under S. 42 a plaintiff has to be entitled to a legal character or to a right as to property and that the plaintiffs could not predicate this of themselves as they described themselves in the plaint as entitled to the estate in case of an intestacy whereas as things stood, there was no intestacy, since the will had been affirmed by a Court exercising appropriate jurisdiction. The suit was indeed nothing more than an attempt to evade or annul the adjudication in the testamentary suit. The suit was held to fail at the very outset because the plaintiffs were not clothed with a legal character or title which would authorize them to ask for the declaratory decree sought by their plaint. This decision, which does not consider *Robert Fisher v. Secy. of State* (2) and was passed in very different circumstances from those of the earlier decisions and of the case now under notice, has been interpreted by a Bench of this Court in *Surayya v. Subbamma* (5) as having turned on the fact that the will which was sought to be avoided had been affirmed by a Court exercising appropriate jurisdiction and that, as the propriety of that decision could not be impeached in the subsequent proceedings, the plaintiffs could not sue, not being reversioners. I would with respect agree with this view of the decision.

In *P. C. Thevar v. Samban* (6) however it has been held to be quite clear from this later Privy Council decision that apart from S. 42 the Courts have no power to grant a merely declaratory decree, and agreement has been expressed with the view taken as to that by Pollak and Mulla in their commentary. In *Muhammad Fahimul Huq v. Gayat Ballav Ghosh* (7) it was held that there was no substance in the contentions that S. 42 was not exhaustive and that apart from statutory authority the general law entitles the plaintiff to a declaration. That was a case in which a mere declaration was prayed for though consequential relief was clearly available. This decision, though one of 1922, does not refer to *Sheoparsan Singh v. Ramanandan Narayan Singh* (4), neither does it refer to *Robert Fisher v. Secy. of*

State (2). In *Bholanath Sankar Deo v. Lachmi Narayan* (8) a Bench stated without reference to any authorities that British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by S. 42. What was asked for was a declaration of what appeared to be a self-evident proposition. In *Kahilash Chandra v. Jogesh Chanara* (9) the Calcutta High Court quoted from the decision in *Sheoparsan Singh v. Ramanandan Narayan Singh* (4):

"a plaintiff coming under that S. 42 must . . . be entitled to a legal character or to a right to property,"

and held that as the then plaintiff did not correspond to this description his suit was not maintainable. He was the shareholder of a company who sued for a declaration that certain persons were no longer directed. In this case the *Robert Fisher v. Secy. of State* (2) decision was not considered. In *Bai Stri Vaktuba v. Agar Singhji Rai Singhji* (10) a decision of 1910, it is stated as having been long established that the general power vested in the Courts in India under the Civil P. C. to entertain all suits of a civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute, but it was held that S. 42 applied to the particular case then under notice. Reference was made to *Robert Fisher v. Secy. of State* (2) but the only comment on it was that the Judicial Committee were not considering exhaustively in it the different cases in which declaratory decrees might be passed. From all these decisions it would appear that *Robert Fisher v. Secy. of State* (2) has never been overruled neither has any different interpretation been given to it from that which it has always had in this Court. That decision, in that it is one of the Privy Council, has to be followed here in any case to which it can apply. As pointed out by Wallace, J., it is similar to the case now under consideration. As already noted it was held to be in substance one to have the true construction of a statute declared and to have an act done in contravention of the

5. AIR 1920 Mad 361=53 I C 498=43 Mad 4.

6. AIR 1928 Rang 143=110 I C 595=6 Rang 188.

7. AIR 1923 Pat 475=74 I C 403=2 Pat 391.

8. AIR 1931 All 83=136 I C 84=53 All 316.

9. AIR 1928 Cal 868=116 I C 724.

10. (1910) 34 Bom 676=7 I C 945.

statute, rightly understood, 'pronounced void and of no effect. Here it is a question of the right interpretation of a Regulation (1 of 1803) and of an Act (3 of 1895). Wallace, J., has held it to be clear that the respondent-plaintiff's case must in the nature of the case be purely a declaratory one, and the appellant has not taken the point that it was open to him to ask for any further relief. He has unquestionably the hereditary right to be karnam and that right has only been taken from him by the order which he seeks to have declared invalid and he has not been barred from it by the decision of any Court. He has set out the fact that he is hereditary karnam in the first paragraph of his plaint and so I would be disposed to hold that he is suing as a person entitled to a legal character. In my opinion it has been rightly held that the suit is maintainable and I would therefore dismiss this appeal with costs.

Beasley, C. J.—I agree.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 622

MADHAVAN NAIR AND JACKSON, JJ.

(*Velugubantla*) *Papamma*—Plaintiff—Appellant.

v.

Ravula Ramaswami and another—Defendants—Respondents.

Appeal No. 276 of 1930, Decided on 22nd November 1932, against decree of Sub-Judge, Rajahmundry.

Civil P. C. (1908), S. 17 and O. 1, R. 3—Distinct causes of action against several defendants can be combined in same suit if there is some common question of law or fact.

Under O. 1, R. 3, a plaintiff can in the same suit combine distinct causes of action against several defendants provided that the relief claimed should arise from a series of acts or transactions and that there is some common question of law or fact arising in the suit. [P 632 C 2]

The plaintiff sued to enforce a mortgage executed by defendant 1 with reference to certain land and his share in a mill situated at Ramachandrapuram. The machinery of the mill was subsequently removed to Cocanada where a new mill was constructed with the same materials. Before the removal, the mill lay within the jurisdiction of the Rajahmundry Sub-Court. The plaintiff sought a decree against the lands and defendant 1's share in the mill at Cocanada in the place of that at Rajahmundry. Defendant 3 obtained a decree against defendant 1 in a suit for money in the Ramachandrapur District Munsif's Court and in execution attached defendant 1's share in the mill at Cocanada. Defendant 4 obtained a money decree against defendant 3 and in execution thereof attached the

decree obtained by defendant 3 and proceeded to sell the property, whereupon the plaintiff intervened as a claimant asserting her right to the property and objecting to the attachment. Her claim was dismissed. In the present suit the plaintiff asked the Court to set aside this summary order also along with the other reliefs claimed by her. The contention of defendants 3 and 4 was that the Rajahmundry Court had no territorial jurisdiction to try the suit in so far as they were concerned, that they were not necessary parties and that the causes of action against defendant 1 and that against defendant 3 were distinct:

Held: that a common question of fact did arise in the suit, viz. whether the new mill formed the subject-matter of the mortgage as contended for by the plaintiff; or whether it was a different property to which the mortgage would not apply as contended for by defendant 3, that there was no misjoinder of parties and causes of action in the present suit and that there could be no objection to the application of S. 17, Civil P. C., to the present case: *A I R 1926 Mad 911* and *A I R 1928 Mad 820, Rel on.*; *21 I C 438, Expl.* [P 624 C 1]

P. Satyanarayana Rao—for Appellant.

T. M. Krishnaswami Ayyar and D. Narasu Raj—for Respondents.

Madhavan Nair, J.—The plaintiff's suit is to enforce a mortgage deed dated 4th June 1924, executed by defendant 1 with reference to certain lands mentioned in Sch. A to the plaint, and his share in the mill referred to in Sch. B situated at Ramachandrapur. The machinery of the mill was subsequently removed to Cocanada where a new mill was constructed with the same materials. This new mill is mentioned in Sch. C. Before the removal, the mill lay within the jurisdiction of the Rajahmundry Sub-Court. The plaintiff now seeks a decree against the lands and defendant 1's share in the mill at Cocanada in the place of that at Rajahmundry. Defendant 2 is an assignee of the Sch. C property. Defendant 3 obtained a decree against defendant 1 in a suit for money, O. S. No. 192 of 1925, on the file of the Ramachandrapur District Munsif's Court and in execution, attached defendant 1's share in the mill at Cocanada. Defendant 4 obtained a money decree against defendant 3 and in execution thereof attached the decree obtained by defendant 3 and proceeded to sell the property, whereupon the plaintiff intervened as a claimant asserting her rights to the property and objecting to the attachment. Her claim was dismissed. In the present suit the plaintiff asked the Court to set aside this summary

order also along with the other reliefs claimed by her.

Defendant 3, who is a resident within the limits of the Cocanada Sub-Court, contends that, in so far as he is concerned, the Rajahmundry Sub-Court has no territorial jurisdiction to try the suit. His contention was that the cause of action with respect to the declaration asked for, is the attachment made at his instance, and the order passed by the Cocanada District Munsif's Court on the claim petition put in by the plaintiff, and that this arose only within the limits of the Cocanada Sub-Court. This contention was the subject-matter of issue 4 :

"Whether as pleaded by defendant 3, this Court has no jurisdiction to try the suit against him."

The learned Subordinate Judge accepted the contention of defendant 3 and dismissed the plaintiff's suit as against him and defendant 4 holding that as neither of the conditions required under Cl. (2), S. 20, Civil P. C., viz. (1) that permission of the Court should be obtained before joining him (defendant 3) in the suit ; or (2) that he should have acquiesced before being sued at Cocanada, had been complied with, the suit was not maintainable as against him. Consequently the suit against defendants 3 and 4 was dismissed while against the other defendants it was decreed. The present appeal is directed against the decree dismissing the suit as against defendants 3 and 4. S. 17, Civil P. C., states that

"where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate."

The appellant's learned counsel relies on this section and states that as the property in the suit is situated within the jurisdiction of two different Courts, viz. Rajahmundry and Cocanada, the appellant can institute the suit either at Rajahmundry or at Cocanada and that therefore the suit instituted at Rajahmundry cannot be dismissed though defendant 3 is resident at Cocanada. On the side of the respondent, it is contended that defendant 3 is not a necessary party to a suit on the mortgage against defendant 1, that the cause of action against the latter and the enforcement of the mortgage is quite distinct from the cause of action against

defendant 3 which is the setting aside of the summary order on the claim petition : see *Venkatasubla Rao v. Vigneswaradu* (1) and that such causes of action cannot be combined in one and the same suit and that to a case like the present, S. 17, Civil P. C., is inapplicable. This main plea of defendant 3 as alleged in his written statement is that "no claim against the Cocanada property can exist under the suit mortgage,"

i.e. that the property against which he got an order of attachment is quite different from the property covered by the mortgage and that his title to the property in question is paramount to that of the plaintiff. In such a case it is true that defendant 3 is not a necessary party under O. 34, R. 1, to a suit instituted on the mortgage by the plaintiff, but this plea does not dispose of the matter. The essential question is whether the two causes of action alleged against defendants 1 and 3, distinct though they may be, can be combined against them in one and the same suit. The law applicable will be found in O. 1, R. 3, Civil P. C., which runs as follows :

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

Under this provision a plaintiff can in the same suit combine distinct causes of action against several defendants provided that the relief claimed should arise from a series of acts or transactions and that there is some common question of law or fact arising in the suit. This has been laid down in *Govindaraja Mudaliar v. Alagappa Thambiran* (2). In that case it was pointed out that :

"while on the one hand we should not allow the Court to be embarrassed by the joinder of a number of totally unconnected controversies in one suit, we should not unduly restrict the scope of the rules regarding the joinder of parties and cause of action, so as to lead to unnecessary multiplicity of suits": see also *Muthuswamy v. Ponnagya* (3).

In the present case what we are specially concerned with is the question whether a common question of facts or law arises between the parties. The

1. A I R 1928 Mad 840=110 I C 554.

2. A I R 1926 Mad 911 = 49 Mad 836 = 97 I C. 212 (F B).

3. A I R 1928 Mad 820=51 Mad 815 = 110 I C. 613.

common question alleged to arise is one of fact. The question is, whether the Sch. C property forms the subject-matter of the mortgage as contended for by the plaintiff, or whether it is a different property to which the mortgage will not apply as contended for by defendant 3. This question, we think, is one common to both the parties. If a separate suit is to be instituted against defendant 3, this will be the very question that will have to be decided in that suit. The plaintiff in order to succeed in this suit against defendant 1 will have to show that the mortgage can attach itself to Sch. C property. The question to be decided being the same, we cannot see why that question cannot be decided between the two parties in this suit itself. If the appellant's contention is accepted, it is obvious that a second suit in which the same question will be raised will be avoided. In our opinion there is no misjoinder of parties and causes of action in the present suit. That being so, there can prima facie be no objection to the application of S. 17, Civil P. C., to the present case. No authorities except the dissenting judgment of Coxe, J., in *Bal Gobind Singh v. Gaja Lakshmi Dasi* (4), has been cited in support of the proposition that S. 17, Civil P. C., applied "only when there was one cause of action with respect to property situated in different districts and not to cases when the causes of action were in themselves distinct."

But the learned Judge's view of O. 1, R. 3, Civil P. C., is different from the view of this Court and it also differed from the judgment of Ray, J., which prevailed in that case. We would for the above reasons hold that the Rajahmundry Court has jurisdiction to try the present suit against defendant 3. The decree of the lower Court in so far as it has dismissed the suit against defendants 3 and 4 is set aside. The lower Court will now try the suit and dispose of it according to law dealing with all the points arising on the issues between plaintiff and defendants 3 and 4. The costs will abide the result. The court-fee will be refunded.

P.R.S./K.S.

Suit remanded.

* A. I. R. 1933 Madras 624

PANDALAI, J.

Subba Naicker—Plaintiff—Appellant.

v.

Solaiappa Naicker and others—Defendants—Respondents.

Second Appeal No. 1743 of 1928, Decided on 2nd March 1933, against decree of Sub-Judge, Tuticorin.

* Evidence Act (1872), S. 41 — Order in lunacy is binding on parties thereto or those claiming under them — Unless such order is superseded, alienation by lunatic, even during lucid interval, is null and void—Deed.

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41, Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of civil Court. When a person has been found a lunatic by inquisition so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The Court will not recognize such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null and void: *In re Walker*, (1905) 1 Ch 160 and *In re Marshall*, (1920) 1 Ch 234, *Appl.* [P 625 C 1, 2]

T. V. Muthukrishna Ayyar and A. Swaminatha Ayyar—for Appellant.

S. Ramaswami Iyer and R. Krishna-swami Iyengar—for Respondents.

Judgment.—This suit was brought on a mortgage dated 10th August 1917 by the plaintiff as assignee from the mortgagee, defendant 6. Defendants 1 to 3 are the mortgagors. Defendant 4, since deceased, was the father of the mortgagee and defendant 5 is the son-in-law of defendant 4. The questions in dispute in this case arose from an order by the District Judge of Tinnevely adjudging defendant 6 a lunatic by an interim order dated 20th October 1919 which was confirmed after security given on 16th January 1920 by which defendant 4, his father, was appointed guardian of the person and manager of the property of defendant 6. The assignment by defendant 5 of the mortgage was dated 11th June 1923, i. e. some three and a half years after the order in lunacy and while it was still in force. Defendant 6 soon after the assignment, i. e. on 17th July 1923, applied to have the order against himself set aside and it was set aside on 31st August 1923 on the ground that he had ceased to be insane.

The dispute in the case was based upon two contentions. First, defendant 5

contended that the same mortgage right had been assigned to him by the deceased defendant 4 acting as the guardian of his lunatic son in March 1919, and that therefore defendant 6 was himself incompetent to assign it a second time. This assignment both the lower Courts have rejected as affording any valid defence because defendant 4 was not authorized to transfer the property of his son even though the latter were a lunatic because at the time of the alleged assignment he had not been appointed manager of the property and in fact had not even applied to be so appointed. The other defence of the mortgagors, defendants 1 to 3 was that the plaintiff's assignment gave him no right to sue because it was executed at a time when the lunacy order was in force and when the management of the lunatic's property was entrusted to defendant 4 who was appointed manager by the Court. On this question the District Munsif has really not said anything definite because he did not consider the question in that way. But he seemed to have considered that the order in lunacy was itself, incorrect because it appeared to him to have been procured to defeat a suit brought against defendant 6 by a creditor on a promissory note. On that ground he held that defendant 6 was never really insane and that therefore the plaintiff's assignment was valid. As to this however although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41, Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a civil Court.

On that ground, to put it at the lowest, it is not open to defendant 6 now to contend that the order finding that he was a lunatic on the date of the order was incorrect and the plaintiff who claims by a subsequent alienation of defendant 6's property is in the same circumstances. The plaintiff being therefore bound by the order as far as it goes, the real question is how far it does go. On the one hand the appellant says that in spite of the order it is open to a subsequent alienee from a lunatic so found on inquisition to show that at the time of the alienation the lunacy did not exist. On the contrary the respondents contend

that a subsequent alienee is not entitled to give such proof because the alienation by the lunatic who has been found such by inquisition is of no effect whatever as the management of the property is by Court entrusted to the hands of the manager. This is really the only question in the appeal although several matters have been extensively argued. On this point there seems to be no Indian authority directly in point. The cases in *Debi Charan v. Raghuber Dayal* (1), *Bishambaranath v. Parbati* (2) and *Court of Wards v. Kupulmun Singh* (3), which are cited, are really of no use to the point. But English authority is clear and conclusive. In *In re Walker, (A lunatic so found)* (4), the Court of Appeal held, that :

"when a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The Court will not recognize such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null and void."

All the authorities on the subject were there cited in argument and are dealt with by the Lord Justices. This conclusion was arrived at even though Vaughan Williams, L. J., said :

"We should have been glad if we could have found a means of according such powers (removing restrictions from lunatics dealing with their property in their lucid intervals) consistently with the protection of lunatics, but we have not been able to find any such means."

And Cozens Hardy, L. J., citing Lord Coke said :

"And therefore after the office found thereof, the alienation, gift, etc., of him who is non compos mentis are in equal case with the alienation or gift of an idiot."

He referred to the authorities which were cited to show that an issue as to the state of mind of the lunatic when the deed in question was executed might be set down for trial and explained that in every one of them the deed in question had been executed before, not after, inquisition found :

"It cannot be right that the Crown, or the Committee who represents the Crown' (here the Court) should have the control and management of the lunatic's estate, and at the same time

1. (1912) 16 I C 835.
2. AIR 1919 Lah 45=52 I C 609=88 P R 1919.
3. (1873) 10 Bng L R 364=19 W R 163.
4. (1905) 1 Ch 160.

that she should have power to 'dispose of her estate as she thinks fit.'

This case was followed in *In re Marshall*, [*Marshall v. Whateley* (5)]. Learned counsel for the appellant has stated that he is not aware of any authority to the contrary. Such being the state of the authorities in England I am unable to see why the law should be different in the exercise of lunacy jurisdiction under the Lunacy Act. This case no doubt arises from the mofussil and the authority of the Act is not traceable to the law which the Supreme Court began to administer on its establishment. The only remark possible upon the decisions I have referred to is that they refer to a system of law which had its origin in the Lord Chancellor's jurisdiction over lunatics and the jurisdiction of the mofussil Courts over lunatics is entirely dependent upon Indian legislation. But I see no sufficient ground in this circumstance not to apply the rule enunciated in the English decision. On this ground the plaintiff's suit was rightly dismissed. The second appeal must be dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*
5. (1920) 1 Ch 284=89 L J Ch 204=122 L T 673=64 S J 241. -

* A. I. R. 1933 Madras 626

BEASLEY, C. J. AND BARDSWELL, J.
(*Degapudi*) Pulla Reddi—Appellant.
v.

Rabala Pattabhirama Reddi and others
—Respondents.

Civil Misc. Appeal No. 241 of 1931,
Decided on 23rd February 1933, against
order of Dist. Judge, Nellore, D/- 17th
December 1930.

* Limitation Act (1908), S. 18—Fraud
under S. 18 may be of any person not neces-
sarily of decree-holder—Civil P. C. (1908),
O. 21, R. 90.

The words of S. 18, Lim. Act, are sufficiently
wide to include any person for, e.g. auction-
purchaser whose fraud has kept from the know-
ledge of another person his right to institute a
suit or make an application: *A I R* 1925 *Cal*
1227, *not Foll*; 17 *Cal* 769; 1 *C W N* 67 and *A I R*
1926 *Cal* 229, *Ref.* [P 627 C 1]

P. V. Rajamannar—for Appellant.

B. Somayya—for Respondents.

Beasley, C. J.—The facts out of which
this appeal arises are as follows: The
judgment-debtor is the appellant and a
decree in O. S. No. 22 of 1924 which was
a suit upon a promissory note was passed
against him. His property was brought

to sale in execution of the decree and
was purchased by respondent 3 in the
sale held on 11th July 1927. It is
alleged that this purchase by respon-
dent 3 was benami for respondents 1
and 2, the decree-holders. On 13th
August 1927, the sale was confirmed and
then on 9th July 1928 the appellant
under O. 21, R. 90 and Ss. 47 and 151,
Civil P. C., put in an application to set
aside the confirmation of that sale.
This application had to be made within
30 days and clearly, but for S. 18,
Lim. Act, if it is to be applicable to
this case, was barred. The appellant
alleged that his application was not
barred by reason of the fact that he
only discovered the fraud within the
30 days of the making of the application
and that under S. 18, Lim. Act, time
does not run until the fraud is dis-
covered. Hence the appellant alleged
that his application to set aside the
confirmation of the sale was not barred.

The question before us now is whether
S. 18, Lim. Act, applies to the case
where a person alleges the fraud not of
a decree-holder but of some other person
a party to the sale, such as the auction-
purchaser here. In the lower Court the
application was dismissed in limine
because the Court held that S. 18, Lim.
Act, does not apply to auction-purcha-
sers. Upon this point there has been
no decided case at all except *Azizannessa*
v. Dwarika Prasad (1), a decision of a
Bench of the Calcutta High Court con-
sisting of Chotzner and Graham, JJ.
In that case this question directly arose.
Beyond that decision there is no deci-
sion at all upon the point although in
Mohendro Narain Chaturaj v. Gopal
Mondul (2), *Kailash Chandra Halder v.*
Bissonath Paramanic (3) and *Nabin-*
chandra Halder v. Bipin Chandra
Halder (4) there are observations which
support the argument put forward on
behalf of the appellant before us today.
But since in those cases this question
exactly did not arise, they are mere
observations although very useful ones.
So far as this High Court is concerned,
there is no reported decision upon the
question. What we have got to consider
here is whether the words of S. 18,

1. *AIR* 1925 *Cal* 1227=86 *IC* 745.

2. (1890) 17 *Cal* 769.

3. (1897) 1 *C W N* 67.

4. *AIR* 1926 *Cal* 229=87 *I C* 555.

Lim. Act, are sufficiently wide to include any person whose fraud has kept from the knowledge of another person his right to institute a suit or make an application. The words of the section are:

"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded . . . the time limited for instituting a suit or making an application (a) against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the person injuriously affected thereby."

If the words of the section are to be followed, then any person whose fraud has kept from another person the knowledge of his right to institute a suit or make an application is within the provisions of that section. There has been no discussion of the merits of the case in the lower Court. But it seems to me that if the appellant here is able to show that the auction-purchaser in this case committed such a fraud as brought about the circumstances which appear in the first part of the section then his application to have the confirmation of the sale set aside is not barred because time would run only from his discovery of such fraud. For these reasons this appeal must be allowed with costs and the case remitted to the lower Court for disposal according to law.

Bardswell, J.—I agree.

P.R.S./K.S.

Appeal allowed.

*** A. I. R. 1933 Madras 627**

BEASLEY, C. J. AND BARDSWELL, J.

Modali Ademma—Petitioner.

v.

Lanka Venkata Subbayya and another—Opposite Parties.

Civil Revn. Petn. No. 734 of 1929, Decided on 24th February 1933, against order of Dist. Munsif, Markapur, D/- 30th October 1928.

* Civil P. C. (1908), O. 21, R. 5 — Decree transferred to another Court for execution—Latter Court can entertain execution application even though copy of decree has not been received by it.

When once order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution and the decree-holder need not wait till a copy of the decree is received by the Court to which the decree is transferred: 35 *Mad* 588, *Foll.*; and *AIR* 1928 *Mad* 496, *Diss. from*.

[P 627 C 2; P 628 C 1]

Kesturi Seshagiri Rao—for Petitioner.
L. S. Veeraraghava Ayyar—for Opposite Parties.

Beasley, C. J. — This civil revision Petition raises an interesting question of practice. It has been put before us by our learned brother Krishnan Pandalai, J., on account of a conflict of opinion of two single Judges, one of Krishnaswami Ayyar, J., in *Arimuthu Chetty v. Vyapuri Pandaram* (1) and the other of Jackson, J., in *Nanjunda Chettiar v. Nallakaruppan Chettiar* (2). Our learned brother Krishnan Pandalai, J., was inclined to agree with the earlier decision. The question is, when does an order of transfer of a decree take effect so as to enable the Court to which the decree is transferred to entertain applications for execution? This is a matter of some importance in some cases, and it is so in this case because, if the view in *Arimuthu Chetty v. Vyapuri Pandaram* (1) is to prevail, then the petitioner's application for execution was not barred by limitation; and in my view, the question of limitation has an important bearing in coming to a decision upon this point. In *Arimuthu Chetty v. Vyapuri Pandaram* (1) the view expressed is that even though a copy of the decree has not been received by the executing Court, the decree-holder is entitled to apply to the Court for execution. Jackson, J., in *Nanjunda Chettiar v. Nallakaruppan Chettiar* (2) takes the contrary view. In the former case Krishnaswami Ayyar, J., says:

"I am not at all sure, having regard to the provisions of Rr. 6, 7 and 8, O. 21, that the Court to which a decree is sent for execution is authorized to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution."

Jackson, J., considers that, as the Court to which the decree is sent for execution has no authority to execute it until it is received, it has no authority to entertain the application for execution. In my opinion the two things do not necessarily go together. For one thing a judicial order dates from the time when the order is made and therefore the transfer of a decree to another Court for execution dates from the date

1. (1912) 35 *Mad* 588=8 *IC* 852.

2. *AIR* 1928 *Mad* 496=109 *IC* 404.

when the order of transfer is made. There is another matter to be considered in this connexion and it is this: that, if the view taken in *Nanjunda Chettiar v. Nallakaruppan Chettiar* (2) is the correct one, then the following position will arise. The decree holder after the order of transfer is once made by the Court passing the decree cannot thereafter apply to that Court for execution. That Court has finished with the matter and by its order of transfer has transferred the decree to another Court. In the meanwhile what is the decree-holder to do? It may take some days to transmit the decree and the record and during that time what is to become of the rights of the decree holder? He has no rights at all which he can avail himself of if the correct view is that taken by Jackson, J., in *Nanjunda Chettiar v. Nallakaruppan Chettiar* (2). They are in a state of suspense and during the interval between the despatching of the decree by the transferring Court and the receipt of it by the executing Court, the decree-holder is powerless to do anything. That may bring with it the following unfortunate result. The decree-holder has a period of time given to him during which to execute his decree and after that time has expired he is barred by limitation. It seems to me that, if the executing Court cannot entertain an application by a decree holder for execution until the receipt of the decree and the order for transfer has been passed two or three days previously, the period of limitation given to a decree-holder is thereby reduced because although within time at the date of the order of transfer he may be out of time at the date of the receipt of the decree by the executing Court and I know of no case where a period of limitation once given to a person can be abridged, though there are numerous cases where the period is extended. This seems to me the answer to this question. In my opinion, the view taken in *Arimuthu Chetty v. Vyapuri Pandaram* (1) is the correct one. That being so, this civil revision petition must be allowed with costs.

Bardswell, J.—I agree.

P.R.S /K.S.

Petition allowed.

A. I. R. 1933 Madras 628

BEASELY C. J. AND BARDSWELL, J.
Imperial Bank of India, Madras—
Defendant—Appellant.

v.

*S. Krishnamurthi and another—*Plain-
tiffs—Respondents.

Original Side Appeals Nos. 84 and 97 of 1931, Decided on 1st March 1933, from decree of Stone, J., D/- 31st July 1931.

(a) **Succession Act (1925), S. 273—Banker knowing fiduciary character of customer, paying him money for purposes inconsistent with his fiduciary character and duty is not entitled to indemnity given by S. 273.**

A banker who receives into his possession money of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty. [P 631 C 1]

If indeed, the banker has knowledge of the misapplication of trust money received by his customer and paid to him, he is just as much liable for the amount as if he had himself been nominated a trustee of the money and it had come into his hands as such and he is not entitled to the indemnity given in S. 273.

[P 630 C 1]

(b) **Trusts Act (1882), S. 20 — Purchase of house is not investment in security.**

The money invested in the purchase of a house is not an investment authorised by S. 20, Trusts Act. [P 630 C 2]

(c) **Will—Specific direction as to investment of money — Administrators cannot invest in any other manner without Court's sanction.**

Where there is a specific direction as regards the investment of the money in the testator's will the administrators are not entitled to invest the money otherwise than as directed by the testator without the sanction of the Court.

[P 630 C 2]

*O. T. G. Nambiar—*for Appellant.

*S. Krishnamachari and K. Thiruvengkatachari—*for Respondents.

Beasley, C. J.—This is an appeal by the Imperial Bank of India, defendant 2 in the suit. The facts out of which the suit and this appeal arise are as follows: The plaintiff is the son of the Sanjeevi Rangiah Naidu who on 14th December 1913 made a will bequeathing to the plaintiff, his younger son, the sum of Rs. 3,121-10-3 which had been deposited by him in the appellant in fixed deposit dated 24th July 1913. In his will the testator appointed Chellammal his sister and R. Lakshmiah Naidu, his brother-in-law and the plaintiff's maternal uncle, the guardians of the plaintiff. It was further provided that these two guardians were to receive the accrued in-

terest earned by the sum of money in fixed deposit already referred to once a year for the maintenance and education of the plaintiff till he attained majority when he would be entitled to receive the whole amount on fixed deposit from the Bank. The plaintiff's father died on 20th January 1914, and the two guardians applied to this High Court for the grant to them of letters of Administration with the will annexed. The grant was ordered on 10th February 1916, on the necessary security being furnished. One of the sureties of whom there were three was the husband of defendant 1 in the suit. The plaintiff was supported by Chellammal during her lifetime but she died in 1924 and thereafter the other guardian Lakshmiah Naidu would have nothing to do with the plaintiff or his support. The plaintiff attained majority in April 1928, and discovered in 1929 that the sum of money in fixed deposit at the Imperial Bank had been withdrawn by Lakshmiah Naidu, and on 18th March 1916, together with one year's interest from the date of the deposit by the testator of this money and that Lakshmiah Naidu had drawn it out on the pretext of investing it on more advantageous terms as to interest in house property or some other form of investment.

In other words, the plaintiff discovered that the whole of the amount bequeathed to him by his father had gone. Lakshmiah Naidu died in September, 1929; and on 1st February 1930, the security bond having been assigned over to the plaintiff by the Registrar of the High Court, he filed this suit against the widow of one of the sureties and in consequence of her written statement he made the appellants also defendants. Before stating some further facts, it is necessary to refer to the will. In addition to the provisions already referred to there is the direction that the money in fixed deposit is to be transferred and renewed in the name of the minor son (the plaintiff). The testator's intention therefore was that the money which he had invested on fixed deposit and which at the time of his making the will was still in fixed deposit should be transferred to the name of the plaintiff and the fixed deposit renewed. As a matter of fact on maturity according to the rules of the Bank the money was transferred

to current account so that on 24th July, 1914 this money ceased to be in fixed deposit and was placed in current account. It is not necessary to state some very important facts. On 17th January 1914, three days before the testator's death, Lakshmiah Naidu and Chellammal, the two guardians appointed under the will, wrote through a *vakil* to the Secretary of the appellant Bank calling the Bank's attention to the amount in fixed deposit standing in the name of the testator and stating that the testator had executed a will directing that the amount standing in fixed deposit should be renewed and should be paid to the minor on his attaining majority and that in the meanwhile the interest alone was to be drawn by the executors. It was also stated that the testator's eldest son was attempting to draw out this money without any authority and the Bank was warned that the money was not to be transferred or otherwise dealt with till the guardians produced probate of the will. On 15th December 1915, the guardians again wrote to the Bank saying that they had petitioned the High Court for probate and stating "the late Rangiah Naidu says in his will they (the guardians of his minor son) the donees of this amount are entitled to receive the accrued interest from the Madras Bank once a year for the maintenance and education, etc., of the minor son till he attains majority when my minor son is entitled to receive the full amount of the fixed deposit in the Bank of Madras."

"We the guardians of the minor want to withdraw the amount from your Bank now alone after getting the probate so as to purchase a house or to deposit the amount where we can get higher rate of interest for the benefit of the minor. We shall be highly obliged to you if you will kindly let us know at an early date whether there is any objection for our withdrawing the amount after producing the necessary probate from the High Court of Judicature at Madras."

To this letter the Bank replied by letter of the same date:

"We want probate of will required (registered?) before we can advise you on the subject of your letter."

On 18th March 1916, the two guardians again wrote to the Bank enclosing for the Bank's perusal the Letters of Administration with the will annexed which they had obtained and asking for permission to withdraw the money from the fixed deposit together with the accrued interest for the use and benefit of the plaintiff who is correctly described as a minor. Then follows some corres-

pondence with regard to a claim made by the guardians to interest after the date of the maturity of the deposit. This claim the Bank refused to recognise as interest ceased to be paid after maturity the amount being then transferred to the current account. As I have already stated, the Bank at the request of Lakshmiah Naidu paid over to him the money then in the current account of the testator on 18th March 1916; and it is clear that they did so because he requested them to do so, so that he might invest the amount in the purchase of house property. This is clear from the Bank's letter of 28th April 1916, which says:

"You received payment as you stated you wished to invest the amount in house property."

The letter of 15th December 1915, written by the two guardians states that the money was required

"to purchase a house or to deposit the amount where we can get higher rate of interest for the benefit of the minor."

These are all the facts to which it is necessary to refer. It is not clear from the plaint whether the claim against the appellant bank is for damages for negligence or whether it is founded on an alleged breach of duty by them. This is probably due to the fact that the appellants were made party defendants after defendant 1's written statement had been filed and no amendment of the plaint was made. The appellants plead that they are under no liability because they are protected by S. 273, Succession Act, which gives a full indemnity to all debtors paying their debts and all persons delivering up property to the person to whom probate or Letters of Administration have been granted. The learned trial Judge, Stone, J., however negatived that plea holding that, as the bank had knowledge of the fiduciary capacity of the administrators and of the trust in favour of the plaintiff created by the will and that the administrators were dealing with the trust money in a manner inconsistent with that trust, they were not entitled to the indemnity given by S. 273, Succession Act. The question is, does the indemnity given by that section cover the acts of the appellants? It is clear that the appellants knew of the trust created by the will. They had the Letters of Administration with the will annexed before them and must have been aware

of what was set out in the remarks column of the schedule, namely:

"The guardians have right to receive only the interest accrued on the sum once in a year for the support of the minor until the minority expires."

Quite apart from the fact that they knew that the testator's intention was that the money should be transferred to the minor and renewed in fixed deposit in his name, they knew also that the administrators were only to draw the interest on that money. There is no evidence at all that the appellants would not have renewed the fixed deposit in the minor's name and it was for them to show that they would not have done so. On the contrary, from the correspondence, the reasonable inference to draw is that they would have done so but for the request of administrators for the withdrawal of the money. For what purpose was the money to be withdrawn? For the purpose of purchasing house property or for investment returning a higher rate of interest. Before us a contention was raised on behalf of the appellants that under S. 40, Trusts Act, trustees have a discretion to call in any trust property invested in any security and to invest it in any other security mentioned in S. 20 and from time to time vary any such investments for others of the same nature, and it is argued that the investment put forward by the administrators in their letter to the bank was one authorized by S. 20. This argument proceeds upon the footing that the money was to be invested in a first mortgage of immovable property. That is an erroneous assumption because the letter states that the money was to be invested in the purchase of a house. That is not an investment authorized by S. 20, Trusts Act. There is nothing in the letter to the bank to show that any investment was contemplated in any security authorized by S. 20 of the Act. On the contrary there is a specific direction as regards the investment of the money in the testator's will (and in my view) the administrators were not entitled to invest the money otherwise than as directed by the testator without the sanction of the Court. It seems to me that the appellants with full notice of the fact that the administrators were intending to commit a breach of trust paid out the money to them. What is

the position of the appellants? In Hart's Law of Banking (Edn. 3) at p. 189 it is stated as a general proposition

"that a banker must not knowingly be a party to the application of trust moneys to any purposes inconsistent with the trusts affecting them,"

and later on under "notice of trust" it is stated:

"A banker who receives into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty."

"If indeed, the banker has knowledge of the misapplication of trust money received by his customer and paid to him, he is just as much liable for the amount as if he had himself been nominated a trustee of the money and it had come into his hands as such,"

and the cases of *In re Wall, Jackson v. Bristol and West of England Bank Ltd.*

(1) and *Foxton v. Manchester and Liverpool District Banking Co.* (2) seem to me

to be ample authority for the propositions already stated. For these reasons

therefore in my view, the appellants are not protected by S. 273, Succession Act,

and were properly held liable by the learned trial Judge whose judgment must

be upheld. This appeal must therefore be dismissed with costs.

O. S. A. No. 97 of 1931.

With regard to the plaintiffs' appeal (O. S. A. No. 97 of 1931), it is contended that the learned trial Judge should have awarded interest against defendant 1 at the rate of 6 per cent from 1924 until judgment and further that he should have awarded interest at 4 per cent against the respondent bank. With regard to the former contention, I can see no ground whatever for awarding against defendant 1 any higher rate of interest than that which the bank would have paid had the money been invested according to the provisions of the bill on fixed deposit. This I understand at the material times was 4 per cent. That is the interest to which the plaintiff was entitled and it seems to me that he cannot claim a higher rate of interest than the fund would have earned had there been no breach of trust. But with regard to the respondent bank's position, I am unable to see any grounds whatever for distinguishing their case from that of defendant 1. What are the damages

1. (1885) 1 T L R 522.

2. (1881) 44 L T 406.

which have been incurred by the plaintiff as a direct consequence of the bank's action in assisting in the administrators' breach of trust. He has lost the whole of his capital and he has lost the interest for a number of years on that capital. No claim is made for any interest prior to 1924 because up to that date he was being maintained. If the administrators had been guilty of a breach of trust, the money in fixed deposit would have been earning till the plaintiff attained his majority interest at 4 per cent. That interest the plaintiff has lost and the loss in my opinion was directly due to the action of the administrators and of the bank. Therefore, in my opinion, this appeal succeeds as regards the appellant's contention that the bank must be ordered to pay interest at 4 per cent from 1924, and fails as regards the claim for the award of a higher rate of interest than 4 per cent against defendant 1. Respondent 2 will pay the appellant's costs of this appeal, and the appellant will pay the costs of the appeal of respondent 1.

Respondent 1 in O. S. A. No. 84 of 1931 will pay the court-fee of the original side suit and of the O. S. A. No. 97 of 1931 to Government and add them to his costs recoverable from the Imperial Bank in both appeals.

Bardswell, J.—I agree.

P. R. S./K. S.

Order accordingly.

* A. I. R. 1933 Madras 631

Full Bench

BEASLEY, C. J., RAMESAM AND
CORNISH, JJ.

Tunugantla China Venkatappayya—
Appellant.

v.

Chilankuri Punnayya and others—Res-
pondents.

Miscellaneous Appeal No. 403 of 1927,
Decided on 19th January 1932, against
order of Dist. Judge, Guntur, D/ 26th
August 1926.

(a) Provincial Insolvency Act (1920), S. 35
— Order under can be reviewed if conditions
laid down by O. 47, R. 1, Civil P. C., are exist-
tent—Civil P. C. (1908), O. 47, R. 1.

In the case of an order under S. 35 the District
Judge has complete jurisdiction to review his
prior order, provided that the conditions re-
quired by O. 47, R. 1, Civil P. C., for the exer-
cise of such jurisdiction are existent: *A I R 1926*
Mad 942, Dist. [P 632 C 2]

* (b) Civil P. C. (1908), O. 47, R. 1—**Mistake of law cannot be apparent on face of record**—(Per Waller, J., Pandalai, J., differing).

Per Waller, J.—A mistake of law cannot be apparent on the face of the record. It may be apparent from a contrary decision of a superior Court, but that is not a part of the record: *A I R 1924 Mad 98, Diss. from.* [P 633 C 1]

Per Pandalai, J. — There is a difference between wrongly understanding or applying the law and not being aware of conditions legally necessary for exercising a power given by law. In a loose sense both may be said to be merely erroneous on a question of law, but only in the former case is there a decision in any proper sense; the latter case may be due to inadvertence, and at least analogous to error apparent on the record: *A I R 1924 Mad 98* and *A I R 1929 Rang 70, Expl.* [P 633 C 2]

* (c) Civil P. C. (1908), O. 47, R. 1—**Collusive adjudication—Proof of claim by collusive creditor rejected by Official Receiver—Appeal to District Judge—District Judge annulling adjudication—There is error on face of record and District Judge has power to review—Provincial Insolvency Act (1920), S. 35.**

The insolvent was anticipating failure in a suit brought against him by a genuine creditor and arranged with a bogus creditor to have an insolvency petition filed before the decree could be passed. The creditor subsequently fell out and the alleged bogus creditor put in his proof of claim before the Official Receiver. The Official Receiver rejected it. He accordingly presented a petition asking that the order of the Official Receiver rejecting his proof might be reversed and that the petitioner's debt might be ordered to be included in the schedule of creditors. A counter-petition was put in by another creditor contending that the order of the Official Receiver rejecting the petitioner's claim was correct and that the debt of the petitioner was a bogus one. This counter-petitioner prayed for a dismissal of the petitioner's claim with costs. The District Judge besides dismissing the petition annulled the adjudication:

Held: that the only question before the District Judge was whether or not the Official Receiver's order dismissing the petitioner's proof was correct and that all the District Judge was asked to do by the petitioner was to reverse the Official Receiver's order and by the counter-petitioner to dismiss the petitioner's request. The District Judge not only dismissed the petitioner's petition, but he proceeded to do that which neither party had prayed the Court to do, namely to annul the adjudication. There was therefore an error apparent on the face of the record and the District Judge had the power of review under O. 47, R. 1. [P 635 C 1]

K. Kameswara Rao—for Appellant.

G. Lakshmanan—for Respondents.

Order of Reference.

Waller, J.—This case arises out of a fraudulent and collusive adjudication in insolvency. The insolvent was anticipating failure in a suit brought against him by a genuine creditor and arranged with a bogus creditor to have an insol-

veny petition filed before the decree could be passed. This was done, but later the original creditor fell out and another bogus creditor stepped into to continue the proceedings. He put in his proof before the Official Receiver, who rejected it. An appeal was preferred to the District Judge, which was dismissed. Not only that, the adjudication was set aside as well and an order was passed placing the money derived from the sale of the insolvent's property at the disposal of the Court which was executing the genuine creditor's decree. Now this order was open to two objections. The first was that the Court had no power to annul the adjudication suo motu; that could be done only on the application of the debtor or some other interested person. The second was that no provision was made for the protection of other genuine creditors, such as the present appellant, who were left with no prospect of getting any satisfaction for the debts they had proved in the insolvency. The appellant could and should have appealed against this order. That was his safe course. Instead, however, of adopting it he put in an application for review, which the District Judge dismissed. In doing so, he followed a decision reported in *Venugopalachariar v. Chinnulal Sowcar* (1), and held that he had no power to review an order annulling an adjudication.

The decision relied on by him was concerned with the annulment of adjudications as the result of a debtor's failure to present or prosecute an application for discharge. In such cases, the annulment is under S. 43 of the Act. In the present case it was under S. 35. The District Judge had therefore complete jurisdiction to review his prior order, provided that the conditions required by O. 47, R. 1, Civil P. C., for the exercise of such jurisdiction were existent. That brings us to the main question before us, whether any of those conditions did exist. The final authority on the interpretation of the rule is to be found in *Chajju Ram v. Neki* (2). A Bench of this Court has remarked that the facts of that case "are not very clear." With great respect one thing

1. *A I R 1926 Mad 942=97 I C 706=49 Mad 935.*

2. *A I R 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (PC).*

seems to be perfectly clear and that is that a Full Board of the Judicial Committee decided that a wrong exposition of the law was no ground for review under the rule. The Bench of this Court above referred to in *Murari Rao v. Balwanth Dikshit* (3) came to the opposite conclusion. The facts were these. A District Judge dismissed a suit, holding that sister's sons of the last male owner were entitled to succeed to his estate in preference to the nearest agnates. An application for review was presented on the ground that the previous ruling of this Court, which had not been cited in the argument, had laid down the law differently. The District Judge allowed the review and, in appeal, his order was upheld by the High Court, which thought that there was an error of law apparent on the face of the record, which could be reviewed. As I understand *Chajju Ram v. Neki* (2) the Judicial Committee laid down that a mistake of law was no ground for review. There may, of course, be cases such as *Brindaban Chandra v. Damodar Prosad* (4), where a subsequent and contrary exposition of the law by the Judicial Committee was invoked as a ground of review. That might be described as the discovery of new and important matter, which no amount of diligence could have brought to the knowledge of the applicant earlier.

But in *Murari Rao v. Balwant Dikshit* (3) the ruling relied on was not subsequent and, so far from there having been any diligence, there was negligence in not citing it. So that, on the authority of *Chajju Ram v. Neki* (2) there would seem to have been no ground for review whatever. Speaking for myself, I cannot understand how a mistake of law can be apparent on the face of the record. It may be apparent from a contrary decision of a superior Court, but that is not a part of the record. I am of opinion that *Murari Rao v. Balwant Dikshit* (3) was wrongly decided and would refer to a Full Bench the following question:

"Had the District Judge power under O. 47, R. 1, Civil P. C., to review his order of 10th July 1926, on the ground of error of law, that is to say, non-compliance with S. 35, Provincial Insolvency Act?"

What I conceive the Privy Council to have decided is that a mistake in law did

not fall within the category of mistakes apparent on the face of the record or anything analogous to it.

Pandalai, J.—In *Chhajju Ram v. Neki* (2) the reviewing Court granted a review on the ground of the first decision "proceeded upon an incorrect exposition of the law." Their Lordships held that this was not covered by the words "any other sufficient cause" in O. 47, R. 1, because these words must be limited to "grounds at least analogous to those specified immediately previously." In the present case the order of Mr. Walsh annulling the adjudication can hardly be described as proceeding on any incorrect exposition of the law but on account of ignoring S. 35 which requires that an application is a condition of such order and there was none. There is I submit a difference between wrongly understanding or applying the law and not being aware of conditions legally necessary for exercising a power given by law. In a loose sense both may be said to be merely erroneous on a question of law but only in the former case is there a decision in any proper sense; the latter case may be due to inadvertance, and at least analogous to error apparent on the record. Whether a particular erroneous order, due to not being aware, say, of a particular section of a Code, may justly be called error apparent on the face of the record must depend on the nature of each case depending on the obviousness of the mistake which it is to be presumed no Judge would commit if properly advised. This is I think the ground on which *Murari Rao v. Balwant Dikshit* (3) and *Maung Sein Myi v. Maung Tun Pe* (5) are to be explained. I am inclined to treat the order of Mr. Walsh of 10th July 1926, either as an instance of error apparent on the face of the record or one analogous to it which is all that the Privy Council decision requires to give the Court the power of review. If the above order was liable to review, the order of 26th August 1926, dismissing the application for review on the ground of want of jurisdiction is also erroneous. As my learned brother takes a different view, I agree that the question may be referred to a Full Bench. This appeal against order coming on for hearing in

3. A I R 1924 Mad 98=76 I C 342=46 Mad 955.
4. A I R 1925 Cal 304=85 I C 65.

5. A I R 1929 Rang 70=114 I C 687=6 Rang 794.

pursuance of the above order before a Full Bench, the Court expressed the following.

Opinion.—The question referred to us is in consequence of a difference of opinion between Waller and Pandalai, JJ., and is as follows:

"Had the District Judge power under O. 47, R. 1, Civil P. C., to review his order of 10th July 1926, on the ground of error of law, that is to say, non-compliance with S. 35, Provincial Insolvency Act?"

The facts upon which this question is based are as follows: The insolvent got himself fraudulently and collusively adjudicated. In order to defeat a claim in a suit filed against him by a genuine creditor he arranged with a bogus creditor to have an insolvency petition filed before the decree could be passed and he was accordingly adjudicated an insolvent. Later on however the original creditor dropped out and another bogus creditor stepped in to continue the proceedings. He put in his proof of claim before the Official Receiver who rejected it. He appealed to the District Judge and his appeal was dismissed. In dismissing the appeal the District Judge annulled the adjudication. Then another creditor filed a petition under O. 47, R. 1, Civil P. C., in the District Court praying for a review of the order passed by the District Judge on appeal and on 26th August 1926, the District Judge passed the following order:

"I see no reason to review my order; moreover according to the latest decision in *Venugopalachariar v. Chinnu Lal Sowcar* (1), the insolvency Court cannot revise an order annulling an adjudication except under S. 10 (2). The petition is dismissed with costs."

Against this order the creditor presented a civil miscellaneous appeal to this Court. Our learned brothers Waller and Pandalai, JJ., before whom the appeal was argued, differed upon the question as to whether or not the District Judge had power under O. 47, R. 1, Civil P. C., to review his order. Waller, J., is of the opinion that although S. 35, Provincial Insolvency Act, gives no power to the insolvency Court to annul an adjudication suo motu and the District Judge was wrong in annulling the adjudication, his error did not fall within the category of mistakes apparent on the face of the record or anything analogous to them. Reliance is placed by him upon *Chhajju Ram v. Neki* (2), a decision of the Privy Council.

In that case the Privy Council were dealing with the third class of cases within R. 1, O. 47, Civil P. C., giving power to review on any other sufficient reason being shown. It was held that the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously in the rule and that a decision which proceeded upon an incorrect exposition of the law was not covered by the words "any other sufficient reason." Pandalai, J., takes a different view. In his opinion there is a difference between wrongly understanding or applying the law and not being aware of conditions legally necessary for exercising a power given by law. He says:

"I am inclined to treat the order of Mr. Walsh of 10th January 1926, either as an instance of error apparent on the face of the record or one analogous to it which is all that the Privy Council decision requires to give the Court the power of review."

Upon this difference of opinion the matter has been referred to us. We are of opinion however that the question, as framed, does not correctly raise the point necessary for the decision of this appeal. If the District Judge has the power of review in this case it is because of some mistake or error apparent on the face of the record, and in our view the question is not to be tested by any consideration of whether the District Judge in making the order annulling the adjudication was in error because S. 35, Provincial Insolvency Act, does not entitle the insolvency Court to do so suo motu but requires an application to be made as a condition of such order. What we have to consider here is what it was the District Judge was asked in the appeal before him to do. The alleged bogus creditor had put in his proof of claim before the Official Receiver. The Official Receiver rejected it. He accordingly presented O. P. No. 37 of 1926 to the District Court, Guntur. In that petition he asked that the order of the Official Receiver rejecting his proof might be reversed and that the petitioner's debt might be ordered to be included in the schedule of creditors. A counter-petition was put in by one Chilukuri Punnayya, one of the creditors, in which it was contended that the order of the Official Receiver rejecting the petitioner's claim was correct and that the debt of the petitioner

was a bogus one. This counter-petitioner prayed for a dismissal of the petitioner's claims with costs.

It must be observed therefore that the only question before the District Judge was whether or not the Official Receiver's order dismissing the petitioner's proof was correct and all that the District Judge was asked to do by the petitioner was to reverse the Official Receiver's order and by the counter-petitioner to dismiss the petitioner's request. These are facts apparent on the face of the record. There is another fact apparent on the face of the record and that is that not only did the District Judge dismiss the petitioner's petition but he proceeded to do that which neither party had prayed the Court to do, namely, to annul the adjudication. It is therefore apparent that on a petition in an insolvency asking for a certain remedy, he dismissed the insolvency petition itself. These facts apparent on the face of the record do not, in our view, render necessary any examination of the Insolvency Act or any consideration of whether the District Judge ignored S. 35 of the Act. It is therefore unnecessary to consider the matter from the point of view whether there was here a wrong exposition of the law. In our view of the matter it is unnecessary for the appellate Court to apply the test which is raised in the question referred to us because there was here an error apparent on the face of the record and the District Judge, therefore had the power of review under O. 47, R. 1, Civil P. C. The case will therefore go back to the appellate Court to be considered in the light of our opinion.

P.R.S./R.K.

Case remanded.

* A. I. R. 1933 Madras 635

SUNDARAM CHETTY, J.

Muhammad Sheriff Sahib—Defendant—Appellant.

v.

Sayyed Kasim Saheb and others—Plaintiffs—Respondents.

Second Appeal No. 1022 of 1931, Decided on 24th March 1933, against decree of Dist. Judge, Madura, in A. S. No. 41 of 1930.

* Mortgage—Benamidar mortgagor—Transferee from heirs of benamidar can sue for redemption and mortgagee is estopped from

denying right of mortgagor—Benamidar and Estoppel.

The sons of a benamidar mortgagor transferred their rights under the mortgage on the death of their father and the transferee sued for redemption. The mortgagee denied the right of the mortgagor and consequently of the transferee :

Held : that he was estopped from taking this plea, that the benamidar was a trustee for the real owner, that the sons succeeded to the right of trusteeship, and that the suit of the transferee was not liable to be dismissed even though the real owner's heirs gave evidence that he was not willing to maintain this suit.

Held further : that the remedy of the real owner on establishing his right stood unaffected ; A I R 1919 Cal 314 and AIR 1918 PC 35, Rel. on; A I R 1920 Rang 130 and 31 Mad 461, Ref.

[P 36 C 1]

T. L. Venkatarama Ayyar—for Appellant.

K. V. Sesha Iyengar—for Respondents.

Judgment.—In this second appeal, the only question arising is whether the mortgagee is estopped from denying the right of the mortgagor to the mortgaged properties on the date of the mortgage. The lower appellate Court held in favour of such an estoppel. This can be supported on the analogy of S. 65, Cl. (a), T. P. Act. However Mr. T. L. Venkatarama Ayyar, the learned Advocate for the appellant, urges that his plea must be construed to be a plea, whereby he wants to show that the mortgagor who executed the mortgage deed was only a benamidar for one Virappa Mudaliar, the real owner. He says, that the appellant (the mortgagee's son) is not estopped from setting up such a plea. The decision in *Kuppuskonan v. Thirugnasambandam Pillai* (1) is in support of this contention, if what is stated therein as regards lessor and lessee is extended to a mortgagor and mortgagee. Now, assuming that he is not estopped from making out this plea, and also granting that such a plea has been proved, what is the position? This suit which is for redemption can be maintained by the benamidar as he was the executant of the mortgage deed. A benamidar for the mortgagee can sue for sale on the mortgage bond: *Surendranatha Mitra v. Kshitindra Mohan Mitra* (2). But here, the suit was filed by the transferee from the heirs of the alleged benamidar. The question is whether anything survives to the heirs or their assignees after the death of the benamidar. In the decision

1. (1908) 31 Mad 461.

2. AIR 1919 Cal 314=53 IC 59.

of the Privy Council in *Raja of Deo v. Abdullah* (3) their Lordships, dealing with the status of a benamidar, have observed at pp. 918 and 919 (of 45 Cal) that he would be a trustee for the real owner, and his son could succeed to his trusteeship. This shows, that the heirs of the benamidar, would, by reason of some interest devolving on them, be entitled to maintain a suit of this kind. The present suit is not liable to be dismissed.

It is argued that the alleged real owner's heir has given evidence in this case, from which it can be inferred that she is not willing to the suit being maintained by the plaintiff. Reference is made to *Maung San v. Maung Chan Tha* (4) a decision of a single Judge. I am not inclined to hold, that by reason of anything which can be inferred from that evidence, the plaintiff can be non-suited. The remedy of the real owner, on establishing his or her right, stands unaffected. In the result this second appeal is dismissed with costs of respondent 1.

P.R.S./K.S. *Appeal dismissed.*

3. AIR 1918 P.C. 35=45 I.C. 770=45 I.A. 97=45 Cal 909 (P.C.).

4. AIR 1930 Rang 130=121 I.C. 806=7 Rang 797.

A. I. R. 1933 Madras 636

WALSH, J.

Moidin Kunhammad and others—Defendants—Appellants.

v.

Ahmad Kutti Abdulla—Plaintiff—Respondent.

Second Appeal No. 287 of 1929, Decided on 15th March 1933, from decree of Sub. Judge, South Malabar, D/- 3rd April 1928.

(a) Provincial Small Cause Courts Act (1887), S. 35 (h) (ii)—Whether cutting of trees under mistake of fact falls under S. 35 (h) (ii): *Quære*.

Quære.—Whether the cutting of trees under a mistake of fact does or does not fall under S. 35 (h) (ii), Provincial Small Cause Courts Act: *Case law referred.* [P 637 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 35 (h) (ii)—Logs of timber placed in custody of Court—Removal from Court on Court's order by one of the parties—Suit for timber or for their value removed from Court valued less than Rs. 500—Suit is triable as Small Cause Suit and no second appeal lies—Civil P. C. (1908), S. 102.

Logs of timber, which had been felled down were placed in custody of Court and after the criminal case was over the defendant was asked

to take them away from the Court. Thereupon plaintiff sued for the logs themselves or for their value and the cause of action was based on the defendants having wrongfully taken them away from Court as ordered by Court. The value was less than Rs. 500:

Held: that taking the timber from Court by order of Court was not an offence, that the suit was triable as a Small Cause suit and that no second appeal lay: *A I R 1925 All 130, Ref* [P 637 C 2].

K. P. Ramakrishna Aiyar—for Appellants.

K. Kutti Krishna Menon—for Respondent.

Judgment.—This is a suit to recover Rs. 378 7-7, being the value of certain logs of timber or the logs themselves. The plaintiffs' suit was dismissed by the learned District Munsif, but on appeal, the learned Subordinate Judge has given a decree in his favour for Rs. 174. Against this decree, the second appeal has been filed. A preliminary objection has been raised that the value of the suit being below Rs. 500 no second appeal lies under S. 102, Civil P. C. It is contended for the appellants that the suit is one falling under S. 35 (h) (ii), Sch. 2, Provincial Small Cause Courts Act, and is therefore not triable by a Small Cause Court. S. 35 (h) (ii) runs as follows

"for an act which is, or, save for the provisions of Ch. 4, I. P. C., would be an offence punishable under Ch. 17 of the said Code."

To see whether this clause applies, we must take the plaint, a summary of which is extracted in the judgment of the trial Court. To put it briefly the plaintiff alleged that he took a certain land on lease to fell timber under a registered karar from K. M. Narayanan Nambudripad, that he cut some of the logs of timber in the plaint schedule which did not contain the property marks of V. Rajagopalachari, that the other logs were cut by the prior lessee V. Rajagopalachari, that he purchased the logs from him, that he had dragged this timber and stacked it in karimbu paramba in which he had acquired a right from Govindan Nair and another under a certain letter on 14th August 1918, that on 18th July 1920 the defendants came with a number of men to forcibly remove it, that the plaintiff complained to the Subdivisional Magistrate of Malapuram on 20th July 1920, that in pursuance of his complaint the Paudikad police came and found that a melchappa

had been affixed on the logs, that seeing that there would be a breach of the peace, the police took them from the plaintiff's custody and entrusted them to V. Kunhavara on kaichit, that while the matter was pending before the Sub-divisional Magistrate the defendants took away some logs of timber from Kunhavara, that plaintiff complained to the Subdivisional Magistrate and to the police, that the police took them into custody again and entrusted them to the same Kunhavara, that the criminal case was heard by the Stationary Sub-Magistrate, C. C. No. 435 of 1920, that the defendants were convicted, that on appeal the conviction was set aside, that the Stationary Sub-Magistrate ordered that the logs of timber should be released to the defendants, that on 17th April 1921 he petitioned to the Subdivisional Magistrate that the logs of timber should not be released to the defendants, that the Subdivisional Magistrate dismissed his petition saying that the matter should be settled by a civil suit, that the defendants have no right to or the possession of logs of timber, that the logs belong to him, that they may be attached and sold and that he should be given a decree for the amount.

The question, whether the cutting of trees under a mistake of fact does or does not fall under S. 35 (h) (ii), Provincial Small Cause Courts Act, appears to be a disputed one, and the decisions are conflicting on this point. The earliest case quoted is *Dilbahar Hossain v. Sadaruddin Choudhuri* (1), where it was held that a suit to recover the value of trees cut down by the defendant under a bona fide claim of right does not fall under Art. 35 (ii), Sch. 2, Provincial Small Cause Courts Act. The next case is *Kunwarpal v. Madan Mohan* (2), which took the same view. The next case is *Ganesh Das v. Suraj Pal Singh* (3), where it was held that a suit for damages arising out of unlawful attachment and sale in execution of a decree against a third party of trees belonging to the plaintiff is not a suit within the cognizance of a Court of Small Causes. The last case is *Raghubar Dayal v. Mulwa* (4), where it was held that the

cutting of trees under a bona fide claim of right, or as a result of the dispute, is not necessarily a criminal offence and will not bring the case under Art. 35 (ii), Sch. 2, Small Cause Courts Act. Consequently three cases of Allahabad High Court are in favour of the respondent's contention, while one is against it. However, fortunately in this case it is not necessary to go into that matter at all.

The cause of action is based by the plaintiff not upon the defendants having forcibly taken away the logs of timber from his possession, but upon the defendants having wrongfully taken them away from the Court as ordered by Court and there is no question that this is not an offence under any circumstances. In a much weaker case reported in *Shiam Sunder Ram v. Ram Hat* (5) it was held that even taking the disputed properties away by one of the parties from the mediator while the matter was pending decision as to ownership, would not amount to an offence and so would not fall under Art. 35 (h) (ii). There can be no question in this case that to take property away from Court in accordance with the Court's order is not an offence apart from any exceptions created by Ch. 4, I. P. C. Therefore the suit was triable as a Small Cause suit being under the value of Rs. 500. No second appeal lies. The preliminary objection prevails and this second appeal is dismissed with costs. The Memorandum of Objections is not pressed and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

5. A I R 1925 All 130=81 I C 1029.

* A. I. R. 1933 Madras 637

CURGENVEN AND SUNDARAM CHETTY, JJ.
(*Velichetti*) *Satyanarayana* and others
—Defendants—Appellants.

v.

Sajja Venkanna and others — Plaintiffs—Respondents.

Appeal No. 108 of 1927, Decided on 20th March 1933, against decree of Sub-Judge, Narsapur, D/- 30th December 1926.

* (a) **Hindu Law—Widow—Father getting some properties from widow and relinquishing his reversionary right — Son inheriting such property is not estopped from suing for**

1. A I R 1923 Cal 568=77 I C 77.
2. A I R 1923 All 423=71 I C 645.
3. A I R 1924 All 537=78 I C 371=46 All 233.
4. A I R 1927 All 283=100 I C 36=49 All 440.

remaining property as nearest reversioner after death of widow—Evidence Act (1872). S. 115.

V got some properties from a widow and in consideration relinquished his reversionary rights in the remainder. On his death his son succeeded to such property. After the death of the widow the son who was the nearest reversioner of the last male holder sued for the remaining properties :

Held : that he was not estopped as he was suing directly as a reversioner : *A I R 1919 Cal 603, Rel on. ; A I R 1923 All 204, Dist.*

[P 638 C 1, 2]

* (b) Hindu Law—Widow—Alienation—No recital as to purpose of loan—Attestation by reversioner is not presumptive proof of necessity.

A deed of alienation by a widow was attested by the reversioner. There was no recital of the purpose for which the money was required :

Held : that attestation could not be taken to be presumptive proof of necessity. [P 638 C 2]

A. Satyanarayana—for Appellants.

Ch. Raghava Rao—for Respondents.

Curgenv, J. — The appellants are alienees from a widow, plaintiff 1 having sued as the nearest reversioner to the estate of the widow's husband, Sajja Brahmadu. The alienations were three in number. Taking them in the order in which the argument has proceeded, Ex. 3 is a will and involves items 1, 6 and 12, Sch. A and Sch. B. Under this will defendant 13, who does not appeal, acquired properties. The argument is attempted that by virtue of two transactions, evidenced by Exs. J and I, plaintiff 1 is estopped from questioning these alienations. Taking it that these two transactions were in fact one and that plaintiff 1's father Venkayya got some items from the widow in consideration of relinquishing his reversionary right to the remainder, and taking it further that plaintiff 1 himself has inherited those items which the father received, we think that the lower Court is right in holding that there is no case of estoppel. The only reported authority appears to be *Rames Chandra v. Sasi Bhusan* (1). In that judgment the learned Judges point out that the plaintiffs do not claim through their father, who entered into the transaction, but directly as reversioners to the estate of the last male holder and that they could not therefore be precluded by any rule of estoppel from disputing the validity of the alienation, nor are they affected by the circumstance that they had after the death of their

1. AIR 1919 Cal 603=53 I C 654.

father taken by inheritance the land transferred by way of gift to him. Such a circumstance, they say, clearly does not operate as an acquiescence or ratification.

We may add that no question of estoppel would seem to be in question because plaintiff 1 has not made any representation upon which the other party acted, nor does he claim through any one who did make any such representation. It would only be by the application of some such principle as that plaintiff 1 cannot approbate and reprobate a transaction, at the same time that he would be precluded from questioning these alienations but no such rule of law has been brought to our notice. The case in *Bahadur Singh v. Ram Bahadur* (2) is not in point because it was not a case of a reversioner. We think therefore that this part of the lower Court's judgment must be upheld. Defendant 13 is also concerned as alienee under Ex. 2, a sale deed executed by the widow in 1908 of items 4, 5 and 6 in Sch. A for a sum of Rs. 400. The recital in this document is that the widow wanted the money for the purpose of going on a pilgrimage to Benares. Defendant 13 himself as D. W. 3 has stated that she did not go until 1915, whereas the sale was in 1908, and this is more or less borne out by D. W. 5 who says she accompanied his party in 1914. In view of this wide discrepancy of time it is not easy to hold that the money was obtained for the bona fide purpose of going to Benares or indeed was spent on that purpose. Nor, as the lower Court points out, has it been shown that the widow was unable to meet the cost otherwise. We think that it has arrived at a correct decision regarding this alienation.

There remains the appeal of defendants 8 to 10, who purchased item 11, Sch. A for Rs. 200. The sale deed is attested by Venkayya, plaintiff 1's father. There is no evidence to show with what knowledge or intention he did this and no question of estopping plaintiff 1 can arise. Nor can the attestation be taken to be presumptive proof of necessity because the document contains no recital of the purpose for which the money was required. We must find also in this case that the alienation does not bind the re-

2. AIR 1923 All 204=71 I C 405=45 All 277.

versioner. The result accordingly is that the appeal is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 639

VENKATASUBBA RAO AND CURGENVEN, JJ.

M. V. K. Venkataraman and others—
Defendants—Appellants.

v.

S. Sivagurunatha Chettiar and others—
Plaintiffs—Respondents.

Civil Appeals Nos. 360 and 361 of 1925, Decided on 5th January 1932, against decrees of Sub-Judge, Negapatam.

(a) Hindu Law — Religious endowment — Power of shebait to incur debt is analogous to that of manager of infant heir.

The power of the shebait of an idol's estate to incur debts is analogous to that of the Manager of an infant heir. The power can only be exercised in case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. The test is: is the debt in the particular instance one that a prudent owner would incur in order to benefit the estate? If the answer is in the affirmative a bona fide lender is not affected by the precedent mismanagement of the manager. The lender of course cannot support a charge grounded on a necessity, which his own wrong has helped to cause. Unless therefore he is shown to have acted mala fide, the lender will not be affected, though it be proved that with better management the necessity in question would not have arisen: 2 I A 145 (P C) and 6 M I A 393 (P C), *Rel.on.* [P 643 C 1]

(b) Hindu Law — Alienation by limited owner—Necessity—Meaning explained.

Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient: A I R 1922 P C 356, *Rel on.* [P 643 C 1]

(c) Hindu Law—Limited owner—Compromise in good faith for benefit of the estate is binding on estate.

A compromise made bona fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the estate quite as much as a decree on contest. [P 643 C 1]

(d) Hindu Law — Alienation by limited owner—Duty of lender pointed out.

If the lender makes proper inquiries and acts honestly, he is protected, although it turns out that in point of fact there was no real necessity. [P 643 C 2]

(e) Hindu Law—Religious endowment — Alienation for keeping up daily worship is necessity.

Money borrowed for keeping up the daily worship of the temple is for an actual and existing necessity even though the shortage of money is due to bad management. [P 643 C 2]

(f) Hindu Law, — Alienation by limited owner—Legal necessity explained.

The incurring of legal expenses for establishing a valuable right and the paying off of the revenue due to the Government are necessities recognised by the law. [P 644 C 1]

(g) Hindu Law — Religious endowment — Trustee can purchase provisions on credit.

The conduct of a trustee in purchasing provisions on credit is not necessarily wrongful: A I R 1930 Mad 1009, *Ref.* [P 644 C 1]

(h) Decree—Decree in another suit cannot be set aside in absence of fraud or collusion.

Where a suit is filed to set aside a decree in a former suit, it cannot be done in the absence of fraud or collusion and the Court cannot reopen and review the judgment. [P 644 C 2]

(i) Hindu Law — Religious endowment — Pledgee of temple property advancing money to avert threatened sale in execution of decree need not go into merits of decree.

A pledgee of temple property who advances money to avert a sale in execution of a decree is not bound to go further back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale. [P 644 C 2]

*S. Varadachariar, R. Rajagopala Aiyangar and N. S. Srinivasa Iyer—*for Appellants.

*S. Nagaraja Iyer, T. R. Ramachandra Iyer, S. Muthiah Mudaliar, K. P. Panchapakesa Aiyar and K. Narasimha Ayyangar—*for Respondents.

Venkatasubba Rao, J.—The two suits out of which these appeals arise relate to certain transactions entered into by the trustees for the time being of the Velur Devasthanam. A few facts concerning that institution and its trustees may be conveniently set forth at the outset. The Velur Devasthanam is a well-known and wealthy Siva Temple at Vaideeswarankoil and its affairs are managed by the Matathipathi of the Dharmapuram mutt; in other words, the head of that mutt is the ex officio trustee of the Devasthanam. The first Matathipathi with whom we are concerned is Sivagnana I who assumed that office in the year 1890. He continued to be the Matathipathi till 1903 when he relinquished his right in favour of Manickavachaga I. It must be mentioned that in 1900 Sivagnana I had appointed Manickavachaga I as Junior Pandarasannadhi and between 1900 and 1903 there were quarrels which led to proceedings in Court between these two persons. Finally, as I have said, in 1903 Sivagnana I relinquished his rights and Manickavachaga I became thereafter his successor. The latter's trusteeship thus commenced in the year

1903; but Sivagnana 1, some time later, tried to re-assert his rights with the result, that a suit was filed. With that suit we are not concerned and it is sufficient to state that Sivagnana I died in 1906. Manickavachaga I continued to be the Matathipathi till his death in 1914. He was succeeded by Sivagnana 2, who, it may be noted, had been Kattalai Thambiran from 1903. From his accession in 1914 he continued to be the Matathipathi till 1918 when he died. These are the three trustees to whose acts reference will have to be made in the course of this judgment.

I may with advantage also refer to what is called a scheme suit filed in connexion with this Devasthanam. In 1911, a suit was filed (O. S. No. 10 of 1911) against the then trustee Manickavachaga I for his removal, for appointment of new trustees and for the framing of a scheme. In that, certain transactions entered into by the trustee, including those which form the subject-matter of the present two suits, were impeached. The findings arrived at in that action as has been conceded, do not concern us. The Sub-Court in O. S. No. 10 of 1911 passed a decree appointing the present plaintiffs 1 and 2 and Sivagnana 2 (Manickavachaga I having in the meantime died), the trustees of the temple. Against that decree, an appeal was filed to the High Court. In the meantime, the present two suits (O. S. Nos. 8 and 9 of 1924) were filed by plaintiffs 1 and 2. The High Court decided the appeal from the scheme suit decree in 1919. They directed that the Pandarasannadhi should be the sole trustee and removed the other two trustees appointed by the sub-Court. The present two suits were, as I have said, filed by the other two trustees, alone and the Pandarasannadhi, the third trustee, was impleaded as one of the defendants, the reason being that he supported and justified the acts challenged in the suits. When the High Court in the scheme suit made him the sole trustee his position in regard to these two actions became somewhat anomalous. They were ostensibly filed in the interests of the institution, but he figured in them as the defendant and not as the plaintiff. Apparently, when this was brought to the notice of the High Court, the plaintiff 4 was ap-

pointed the Receiver to conduct these two suits. They were filed in 1917 and during the 14 years that have now elapsed, four Pandarasannadhis have died and the trustee now on the record is the 5th in succession from Manickavachaga I, the original trustee-defendant.

The objects of the two suits is mainly to get rid of certain decrees passed against the Devasthanam. Appeal No. 361 of 1925 relates to transactions of the Devasthanam with A. P. R. S. Soma-sundaram Chetty and his father Subramaniam Chetty. I shall refer to these creditors as A. P. R. S. for the sake of convenience. O. S. No. 8 of 1924, out of which this appeal arises, has been brought on behalf of the temple to set aside the decree in O. S. 48 of 1909, obtained by A. P. R. S. against the temple. The transaction which was the subject of O. S. No. 48 of 1909 is connected with certain earlier transactions, which must first be set forth. In 1900, certain jewels of the temple were attached for the arrears of kist payable in respect of the temple lands. A. P. R. S. at the request of the then trustees paid the kist amounts due, namely Rs. 114,41-5-7 and got the jewels released from attachment. In consideration of this payment, these jewels were pledged by the temple to A. P. R. S. and a document was executed evidencing the pledge dated 29th May 1900 (Ex. 14). The learned Judge has found, and I agree with him, that it has been proved beyond doubt, that this transaction is binding on the temple. On 17th April 1901 three transactions came into existence.

(1) The pledge of 1900 was renewed for Rs. 11,527. The document of pledge is not forthcoming, but that is immaterial. (2) A promissory note for Rs. 12,800 was executed by the temple in favour of A. P. R. S. (Ex. 3). The consideration is made up of three items: (a) Rs. 6,133 8-0, being the amount found due in respect of an earlier promissory note dated 8th June 1900 (Ex. 2); (b) Rs. 1,666-8-0 being the aggregate of two sums Rs. 500 lent on 17th August 1900, and Rs. 1,000 on 16th September 1900, together with interest; and (c) Rs. 5,000 paid to the temple in cash. The total of these three sums is Rs. 12,800 for which Ex. 3 was executed.

(3) To provide for the discharge of the sums due under the aforesaid two transactions, the temple executed a lease in favour of A. P. R. S. (K-2). It recites that the total amount due under the document of pledge and the promissory note is Rs. 24,327. A rent is fixed for the land leased and it is stipulated that after certain deductions the balance of the rent is to be adjusted, first against the interest due under the promissory note, next against the interest due under the pledge document, then the principal under the promissory note and lastly the principal under the pledge. All these three transactions, as I have said, were entered into on the same date, 17th April 1901. On 5th April 1904, A. P. R. S., complaining that his possession under the lease K-2 was disturbed, filed O. S. No. 24 of 1904 claiming against the temple Rs. 6,000 as damages. The parties entered into a settlement and at their request the suit was dismissed on 9th July 1904 as settled out of Court.

The transactions now reach a further stage. I have just said that A. P. R. S. filed O. S. No. 24 of 1904 on 5th April 1904. On the 9th of the same month, a settlement was arrived at (presumably the one to which I have just referred) between the temple and A. P. R. S. The accounts of all the transactions outstanding till then were settled on that date, and it was found that Rs. 26,000 was due by the temple to A. P. R. S. This was split up into two sums and made the subject of two separate documents. One was a pledge of jewels for Rs. 10,000 (Ex. 14-A, dated 9th April 1904), the other was a mortgage bond for Rs. 16,000 (Ex. 1, also of the same date). The evidence given in the case and accepted by the lower Court shows that in respect of the jewel pledge of 1901, a sum of Rs. 13,587 was found due of which Rs. 10,000 was included, as I have said, in Ex. 14-A. The remaining Rs. 3,587 went to make up along with the sum due on the promissory note of 1901 the sum of Rs. 1,600 which was made the subject of Ex. 1. It is unnecessary to pursue here the history of Ex. 14-A, for that was later on discharged, as I shall show when dealing with the connected appeal. We are concerned now with the mortgage bond for Rs. 16,000. A. P. R. S. filed O. S. No. 48 of 1909 to enforce that mortgage

and it was compromised by the temple trustee having agreed to pay Rs. 18,300. For that amount a compromise decree was passed and toward it, various sums amounting to about Rs. 17,500 were paid from time to time by the temple to A. P. R. S. The present suit (O. S. No. 8 of 1924) has been brought for a declaration that the compromise decree in O. S. No. 48 of 1909 is not binding on the temple and for the recovery of the sums paid to A. P. R. S. under that decree, namely, Rs. 17,500 together with interest thereon. The lower Court has found that the mortgage (Ex. 1) is partially binding on the temple, that is to the extent of Rs. 3,587 already referred to and interest thereon but that it is not binding as regards the rest of the consideration. Accordingly it has been found that the decree in O. S. No. 48 of 1909 is similarly binding only to that limited extent; as regards the balance of the amount, the decree has been set aside and A. P. R. S. has been directed to pay back to the temple the total of the excess sums received.

In short the finding of the lower Court amounts to this, that whereas the pledge of 17th April 1901 is binding on the temple the promissory note of the same date is not. It is the latter part of the finding that the appellants (the representatives of A. P. R. S.) challenge. We must therefore examine in detail the transaction evidenced by the promissory note for Rs. 12,800 dated 17th April 1901 (Ex. 3). As I have said, this amount is made up of three items of consideration, the first of which is that covered by the promissory note. Ex. 2, dated 8th June 1900. (After discussing the evidence; his Lordship held that Ex. 2 was binding on the temple and proceeded). I shall now deal with the second item of consideration for Ex. 3, Rs. 1,666-8 0, the total of the two sums of Rs. 500 lent on 17th August and Rs. 1,000 on 16th September 1900. (After considering the evidence, his Lordship held that these debt were also binding on the temple and proceeded). I must now deal with the third item of consideration for Ex. 3, namely, Rs. 5,000. According to the recital in it, that sum was borrowed for three purposes: (a) for the expenses of the Privy Council Appeal; (b) for paying off the Sircar kist; (c) for discharging the decree debt due

to Annamalai Chettiar. (After discussing the evidence and circumstances, his Lordship held that Ex. 3 was also binding on the temple and proceeded). From what I have stated it follows that the temple is bound by the transaction to which this appeal relates; but of the three appellants before us, the first and the second have died and their legal representatives have not been brought on record. So far as they are concerned, the appeal abates and must be dismissed. The lower Court's decision is set aside to the extent to which it affects the third appellant. The suit is dismissed as against him with costs throughout. A memorandum of objections has been filed against that part of the lower Court's decree which is against the temple, but it has not been seriously pressed there being no substance in it and is dismissed with costs.

I have so far shown that the lower Court's decision in O. S. No. 8 of 1924 cannot be supported. I shall now pass on to the connected appeal (Appeal No. 360 of 1925) arising out of O. S. No. 9 of 1924. The object of that action is to get rid of the decree passed against the temple in O. S. No. 44 of 1915 as modified by the High Court in Appeal No. 119 of 1916. O. S. No. 9 refers to four sets of jewel, those set out in Schs. A, B, C, and D to the plaint. The complaint is that these jewels were wrongfully pledged by the temple with one Krishniah Chetty, otherwise known as Krishnier, by which name I shall refer to him in this judgment. The latter in the alleged exercise of his rights as pledgee sold away the jewels in Sch. D and filed O. S. No. 42 of 1915 claiming the amount due in respect of the jewels in Schs. A, B, and C. In that suit, the trial Court passed a decree in his favour for about Rs. 26,000 but the High Court raised the sum to Rs. 44,000. A declaration is sought that that decree is not binding upon the temple. As regards the jewels in Sch. D, the prayer is, that they may be either directed to be returned or a decree may be passed for their value.

The learned Subordinate Judge has disallowed the claim in respect of jewels in Schs. A and C; but has declared that the decree in O. S. No. 42 of 1915 is not binding on the temple to the extent of

the pledge of the B schedule jewels; as to the pledge of D schedule jewels he has also declared that it is not binding and passed a decree for their value. Krishnier, the creditor, attacks in this appeal the finding of the lower Court as to the jewels in Schs. B and D. Although therefore with the A schedule jewels we have no concern, I may, as the judgment of the lower Court repeatedly refers to this transaction, state that it arose out of the pledge of 9th April 1904, for Rs. 10,000 in favour of A. P. R. S., which in its turn is traceable to the earlier pledge in his favour, dated 29th day of May 1900 (Exs. 14-A and 14 respectively already referred to). The temple borrowed from Krishnier on 31st August 1904, Rs. 8,000 and that sum having been paid to A. P. R. S., the jewels were transferred to Krishnier, which he thereafter held on pledge. These are the jewels set forth in Sch. A and as the pledge of those jewels has been held to be binding, we are not concerned with it in the appeal; nor are we concerned, as I have said, with the jewels in Sch. C. I remark that there is no cross-appeal by the temple as regards these two sets of jewels.

Of the jewels in the remaining two Schedules turning first to the pledge of the D schedule jewels, the evidence bearing on it may be briefly summarised. (After summarising the evidence bearing on pledge of D Schedule jewels and also B Schedule jewels, the judgment proceeded). I have not the slightest hesitation in holding that the temple is bound by this transaction. The lower Court's decision in this appeal is also reversed except to the extent that as indicated above the amount due to Krishnier shall carry simple and not compound interest. As the appellants have practically succeeded, they shall have their costs throughout.

I shall now show that the conclusions at which I have arrived are in conformity with the principles to be extracted from the authorities bearing on the subject in *Prosunno Kumari Debaya v. Gulab Chand Baboo* (1), the Judicial Committee points out that the power of the shebait of an idol's estate to incur debts is analogous to that of the manager of an infant heir. What the extent of

1. (1874) 2 I A 145=4 Beng L R 450=23 W R 253=3 Suther 102=3 Sar 449 (P.C.).

the latter's power is, appears from the judgment in *Hanooman Prasad v. Babooee Munraj Koonwaree* (2). Their Lordships point out, that the power can only be exercised in case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. The creditor is thus not concerned with the more remote causes that led to the necessity, but it is the actual immediate need of the estate that is the true criterion. As the Privy Council points out, the test is, is the debt in the particular instance one that a prudent owner would incur in order to benefit the estate? If the answer is in the affirmative a bona fide lender is not affected by the precedent mismanagement of the manager. The lender of course cannot support a charge grounded on a necessity, which his own wrong has helped to cause. Unless therefore, he is shown to have acted mala fide, the lender will not be affected though it be proved that with better management the necessity in question would not have arisen. In *Ramsuvaran Prasad v. Shyam Kumari* (3) it is pointed out by their Lordships that the word "necessity", when used in this connexion has a somewhat special, almost technical, meaning. Necessity does not mean actual compulsion, but the kind of pressure which the law recognizes as serious and sufficient. Incidentally this case refutes the theory that a compromise of a pending suit by a limited owner stands on no better footing than an alienation pure and simple. A compromise, their Lordships observe, made bona fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the estate quite as much as a decree on contest.

But this is a point which as I have already said need not be pursued. Once again turning to the question as to what constitutes necessity, we find the point very lucidly dealt with in *Niladri Sahu v. Chaturbhuj Das* (4). In that case the money lent by the appellant was used to satisfy the loans incurred for the

services of the idol and to carry out a certain building project. The Courts in India held that the constructing of the buildings could not be regarded as necessities of the mutt. Then they went on to hold, all the money of the mutt having been absorbed in the buildings erected, the shortage of funds for keeping up the religious worship, could also not come under the head of legal necessity. The Judicial Committee, disagreeing with this view, found as a fact, that the expenses incurred under both categories were justifiable. Having recorded this finding, they proceed to declare the law on the point in no uncertain terms. After citing *Prosunno Kumari Delaya's* case (1) for the proposition that the power to incur debts must be measured by an existing necessity, they point out that it is the immediate, not the remote cause, the causa causans of the borrowing that has to be considered. Let it be granted that the remote cause of the mutt's need was the profligate expenditure of the shebait, that is, his getting into debt by the building project. But it is not such remote cause that matters, but the existing necessity, the immediate cause of the borrowing. Judged by this test, the debt was held to be binding on the trust. *Vibhudapria Thirtha Swamiar v. Lakshmindra Thirtha Swamiar* (5) is another case, where the same principle is recognized and affirmed by the Judicial Committee. So much where actual necessity can be proved; but it is a settled rule, that if the lender makes proper inquiries and acts honestly, he is protected although it turns out that in point of fact there was no real necessity: *Hanooman Prasad's* case (2). In the light of these principles let me just glance at the transactions which I have already dealt with in detail. The first two items of consideration for Ex. 3 (the promissory note in favour A. P. R. S.) were borrowed for keeping up the daily worship of the temple.

That was an actual and existing necessity. Granting that the shortage of money was due to bad management (which clearly had not been made out), that being the remote and not the immediate cause, would make no difference. Granting again that necessity, in fact,

2. (1872) 6 M I A 393=18 W R 81=2 Suther 29=1 Sar 552 (P.C.).

3. AIR 1922 P C 356=69 I C 71=49 I A 342=1 Pat 741 (P.C.).

4. AIR 1926 P C 112=98 I C 576=53 I A 253=6 Pat 139 (P.C.).

5. AIR 1927 PC 131=101 I C 545=54 I A 228=50 Mad 497 (P.C.).

has not been proved (which is not the case), even then, the creditor would be protected, as after reasonable inquiry he was satisfied that there was compelling necessity and acted honestly. Item 3 of consideration for Ex. 3 stands more or less on a similar footing. The incurring of legal expenses for establishing a valuable right and the paying off of the revenue due to the Government, are necessities recognized by the law. So also is the satisfying of a decree passed against the temple for money borrowed. In regard to each of the three items of consideration for Ex. 3, I have found first, that there was necessity, secondly, that the lender made due inquiries and acted honestly and thirdly, that the money lent was properly applied (that having been conceded). Then passing on to Krishnier, the creditor in the second suit, first, as regards the pledge of Sch. D jewels, the amount was raised for paying off a grocer who had supplied commodities. That the money was actually paid to the grocer cannot, as I have said, be disputed; nor can it be doubted that the creditor acted upon a representation made to him that the money was required for that purpose.

It has been feebly contended that it is outside a trustee's power to make purchases on credit. Why would a trustee be put in this respect on a different footing from any other person? It seems opposed to good sense to deny him the ordinary right which every prudent manager of his own property enjoys. It has not been shown that in this particular case the trustee in buying the provisions on credit exercised his discretion wrongly. Apart from the reason of the thing, there is some authority for the view that the conduct of a trustee in purchasing provisions on credit is not necessarily wrongful: *Venkatabalagurumurthi v. Balakrishna Odayar* (6).

Now, passing on to the pledge of Sch. B jewels, the facts connected with that transaction require a further principle to be noticed. As I have shown, the loan raised on that pledge merged in a decree of Court. That decree was obtained against the successor of the trustee who actually raised the loan. It should be observed (to use the words of the Judicial Committee in a similar case), that the matter does not come

before us by way of appeal from the decree sought to be impeached, but upon fresh suit to set it aside. The former decree is entitled to the force due to judgments of competent Courts. The determination of the issue is resjudicata and in the absence of proof of fraud or collusion, the Court cannot reopen and review the judgment founded upon it: see *Prosunno Kumari Debaya v. Gulab Chand* (1). I have held that the decree was properly obtained and the Judge's reasons for disregarding it are unsound. Assuming that, notwithstanding the decree in O. S. No. 429 of 1915, the original transaction itself can be examined, there is no reason, as I have said, for holding that it is not binding on the temple. The object of raising the loan was, as I have pointed out, to avert a forced sale of the jewels which were directed by a decree of Court to be sold. In such a case, what is the creditor's duty? In *Muddu Thokare v. Kantoo Lal* (7) it was held by the Judicial Committee that a bona fide purchaser of property put up for sale in pursuance of a decree of Court was protected within the principle of *Hunooman Prasad's* case (2). Such a purchaser was surely not bound to go further back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale. These remarks, it cannot be said, apply with less force to Krishnier, merely because he does not happen to be an execution purchaser but a pledgee whose money was used for averting the threatened sale.

In the result, applying the tests laid down in the authorities cited above I must hold that the transactions to which these two appeals relate are binding on the temple. In regard to each of these transactions, what my decision is I have already stated. In Appeal No. 360 of 1925 we make an order under R. 46, sub-R. (2), Practitioners' Fee Rules, Appellate Side Rules, that two sets of fees be allowed to the appellants.

Curgenven, J.—My learned brother whose judgment I have had the advantage of reading, has dealt so fully with the transactions involved in these appeals, and I am so entirely in agreement with his views, that I can find little to add

7. (1873) 1 I A 321 = 22 W R 56 = 14 Beng L R 187 = 3 Sar 330 (P C).

to what he has said. Following the principles now well-established by decision of the Privy Council, the creditors of the temple whose interests the plaintiffs represent, must be held to be protected if it appears that immediate necessity existed for contracting the loans, irrespective of the merits of the course of action which gave rise to the necessity. There seems no doubt that, over the period during which the primary debts were incurred, the temple was financially in low water. The accounts for the period 1900-03 are not forthcoming, a circumstance which must tell against the temple rather than against its creditors, but there is evidence that the temple lands suffered in 1900 from floods, and that little income was received from them. From 1893 up to 1902, as the agreement Ex. L shows, litigation had been going on between the temple and a number of the tenants who were asserting occupancy rights. This litigation had cost the temple Rs. 40,000 and a sum of Rs. 60,000 of rent, much of it time-barred, was in arrear. The K series of leases, which originated during this period, were designed to provide for liabilities already incurred. A wasteful dispute was meanwhile proceeding between the two Pandarasannadhis, Sivagnana 1 and Manikavachaga 1, which led to Court proceedings doubtless financed to some extent at least with temple funds. All these circumstances go to support the truth of the evidence, given by several of the defence witnesses, that the income available for ordinary purposes had fallen far short of the unavoidable expenditure. I think that if, in such circumstances, and whether or not they were induced by faults of management or misapplication of funds, the trustee had recourse to borrowing in order to meet current needs, or to avert the loss of temple property, the loans so incurred must be held to be binding.

In A. S. No. 361 of 1925 arising out of O. S. No. 8 of 1924, the central transaction with which we are concerned in appeal is the promissory note for Rs. 12,800 (Ex. 3), whereby on 17th April 1901 three antecedent debts were superseded. My learned brother has analyzed these components, and I agree with him in differing from the learned Subordinate Judge as to the effect of the evidence relating to them. The promissory note

Ex. 2 was executed jointly by both Sivagnana and Manikavachaga, and the evidence of D. Ws. 3, 4 and 6, together with the recital in the note (misquoted by the Subordinate Judge) is sufficient proof that the debt was incurred for a necessary purpose. I see no reason to disbelieve the statement of defendant 1 (D. W. 4) that he was told by the Pandarasannadhi that if the money was not furnished the temple would be unable to meet the current expenses. There is no ground for disallowing this item. Similar considerations apply to the second item of Rs. 1,666-8-0, composed of two sums of Rs. 500 and Rs. 1,000 respectively, borrowed for nadumuthal expenses. The third item was a sum of Rs. 5,000 borrowed on the date of execution of the promissory note Ex. 3. My learned brother has pointed out the defects in the learned Subordinate Judge's treatment of this item. Half the amount has been accounted for as required in the litigation between the temple and its tenants, which was brought to a close in the following year by Ex. L. I agree that this and the other charges thus provided for must be held to have been for purposes which cannot now be repudiated on behalf of the temple. It is then said that the settlement in 1904 for a total amount of Rs. 26,000 was excessive, having regard to the terms of the lease evidenced by Ex. K-2 which was designed to reduce the indebtedness under Exs. 3 and 14. A sufficient answer seems to be, in the first place, that no reason has been shown why the Pandarasannadhi should have allowed his creditor unduly to exploit his position by exacting unconscionable terms; and, in the second, that in the absence of the temple accounts we have really no materials upon which to form a judgment. It lay upon the plaintiffs to displace the inference that the settlement of 1904 fairly arose out of the antecedent indebtedness, and they have certainly failed to discharge the burden. It follows, in my view, that the compromise decree for Rs. 18,000 cannot be successfully attacked.

In A. S. No. 360 of 1925, arising out of O. S. No. 8 of 1924, we are concerned with the pledge of jewels comprising Schs. B and D of the plaint. The former pledge originated in a desire to save these jewels from sale in execution by

re-pledging them, and there is evidence that funds were not at the time forthcoming to pay off the decree. It may well be that the interests of the temple would have been best served in the long run by sacrificing the jewels and terminating the debt. But we must look at the transaction not in the light of the subsequent failure to effect redemption but as it would naturally appear to a creditor whose assistance was sought to save a portion of the temple property. There is some difference of opinion as to the sentimental importance of a forced sale of temple jewels, but even taking it that no serious objection on this score existed, it seems to me that the purpose for which the money was required was of a kind binding upon the institution. That being so, it follows that the decree in O. S. No. 42 of 1915, of which Sch. B jewels formed the only portion now in dispute, cannot be successfully attacked. As regards Sch. D pledge, the sum of Rs. 1,000 thereby raised was immediately required to pay for temple supplies, and it seems to be enough that this money was, so far as appears, devoted to this purpose, and the plaintiffs are not entitled to put the creditor to the proof that, with better management, the bill could have been met from current income. I agree with what my learned brother observes as to the subsequent history of this transaction. I concur in the orders proposed in these appeals.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 646

BEASLEY, C. J. AND BARDSWELL, J.

Kondepati Ayyanna—Plaintiff—Appellant.

v.

Secy. of State and others—Defendants—Respondents.

Letters Patent Appeals Nos. 42 to 51, 93 to 96 and 108 of 1929 and 11 of 1930, Decided on 14th February 1933, against judgment of Phillips, J., D/- 15th February 1929.

Madras Irrigation Cess Act (7 of 1865), S. 1 (b) — Surplus water from Government lands stored in small ponds or natural depressions and used for irrigation — Government is entitled to levy charge for use of such water and no easement to use such water can be acquired — **Easements Act (1882), S. 7, Illus. (j).**

The surplus water of the Government land flowed into plaintiff's land either by distribution channels or by drainage from the Government

lands and was then stored in either small ponds or mere natural depressions and with such water plaintiff irrigated his lands for which water tax was levied:

Held: that the small ponds and depressions were reservoirs within the meaning of S. 1 (b) and as the water was taken from Government lands it was liable to be charged with water tax:

[P 647 C 2; P 648 C 1]

Held further: that there was neither an implied engagement nor acquisition of an easement in favour of plaintiff as it was only a case of water overflowing from higher land to land lying lower down: *Case law referred.*

[P 649 C 1]

S. Varada Chariar and V. Suryanarayana—for Appellant.

Government Pleader and P. V. Rajamannar—for Respondents.

Bardswell, J.—The suits under appeal have had a long history. The plaintiffs who are raiyats in the Gundepalli Zamindari, brought them for a declaration that defendant 1, who is the Secretary of State represented by the Collector of Kistna, is not entitled to levy water tax on the lands cultivated by them, for a refund of such tax already collected for three faslis and for other reliefs. The trial Court and the first appellate Court found in their favour, but on second appeal Oldfield and Seshagiri Ayyar, JJ., held that the suits had not been properly dealt with and remanded them for fresh disposal on issues that were then framed. After the remand the first two Courts again both found for the plaintiffs but, on second appeal, Phillips, J., dismissed the suits. These Letters Patent Appeals are against his decision. The lands of the plaintiffs are situated in the village of Chodavaram, a zamindari village. That village adjoins the Government village Ananthapalli the lands of which are irrigated from a channel known as the Ananthapalli channel. That channel takes off from the Yerrakalva, a natural stream which is maintained by Government. The surplus water of the Ananthapalli lands flows into Chodavaram either by distribution channels or by drainage from the Ananthapalli lands and is then stored in what are either small ponds or mere natural depressions. The question that arises is whether or not the Government is entitled to levy a charge for the use of the water by the appellants-plaintiffs. It is a matter of the interpretation of S. 1, Madras Act 7 of 1865. In that Act as originally passed, S. 1 ran as follows:

"Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by Government, it shall be lawful for the Government to levy, at pleasure, on the land so irrigated, a separate cess for the use of the water, which cess shall be additional to any land assessment that may be leviable on the said lands as unirrigated or punja; and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied, and alter or amend the same from time to time."

By an amending Act 5 of 1900, this section down to the words "constructed by Government" became Cl. (a), S. 1 and there was introduced a new Cl. (b) which runs thus:

"(and also) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and (in the opinion of the revenue officer empowered to charge water cess, subject to the control of the Collector, the Board of Revenue and the Government) such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land;"

after which follow the rest of the original section with some modifications that do not now concern us. The part of Cl. (b) about the opinion of the revenue officer, etc., as to the irrigation being beneficial, was introduced by Madras Act 8 of 1914, and there is no question here of the opinion not having been expressed or of its being one that can be questioned in a Court of law. The question is simply one of whether, allowing that the irrigation was beneficial, a charge for the use of the water can be made. As has been pointed out by Phillips, J., what has to be decided is not whether the water belongs to the Government; but whether it comes from a river or stream that belongs to Government. In this case it comes from the Ananthapalli channel which admittedly belongs to Government while that channel takes off from the Yerrakalva at a part where that stream flows through Government land, so that it has to be taken as "belonging to Government" in the sense given to those words in the Privy Council decision in *Secy of State v. Subbarayudu* (1). In *Secy. of State v. Swami Naratheeswarar* (2), there is a decision by a Bench of this Court in a case where water flowed from what was ad-

mittedly a Government source into a taruvai (sheet of water) of which two-fifths belonged to the plaintiff, as inamdar, while the rest belonged to Government. The portion of the taruvai owned by the inamdar was a deeper portion and he was compelled to raise wet crops on dry land because so much of water came into the taruvai from the Government source as to cause it to overflow. In spite of this and in spite of the fact that some of the water in the taruvai was rain water, it was held that he was liable to pay the water cess under S. 1 (b). Phillips, J., has followed this decision but Mr. Varadachari contends that it is no longer good law. He refers to the Full Bench decision *Chinnappan Chetty v. Secy. of State* (3) but, as has been pointed out in the judgment on second appeal the question then for consideration was that of whether when a river flows first through raiyatwari tracts, then through a zamindari and then again through a Government village it was not a river belonging to Government at the place where it passes through the zamindari. This is not such a case. In *Subbarayudu v. Secy. of State* (4), Ramesam, J., has suggested a doubt as to the correctness of the decision in *Secy. of State v. Swami Naratheeswarar* (2) in the following passage which has been quoted by Phillips, J. :

"One might concede that where water from the Government source directly irrigates the inam, the inam is certainly liable to pay water cess, but where the water from the Government source naturally flows into a tank or stream within the inam and then the water is used for irrigation it is only natural rights that are being enjoyed and therefore the inam is not liable for water cess."

So far however as these remarks refer to tanks, they appear to be contrary to the language of S. 1 (b) which expressly makes liable to charge water which flows from a Government source into a reservoir and is thereafter used for irrigating any land under cultivation. A tank is certainly a reservoir and the natural ponds and depressions in which water is stored in the cases now under notice would equally come under that category. As has been pointed out by Venkatasubba Rao, J., in an unreported decision, *Hyder Ali Saheb v. Secy. of State* to

1. AIR 1932 P C 46=136 I C 413=59 I A 56=55 Mad 268 (P C).

2. (1911) 34 Mad 21=6 I C 199.

3. AIR 1919 Mad 412=49 I C 673=42 Mad 239 (F B).

4. AIR 1927 Mad 988=105 I C 864=50 Mad 961.

which Ramesam, J., himself was a party in *S. A. Nos. 1519 and 1520 of 1927*.

"The Irrigation Cess Act provides that when water of a certain description is used for irrigating any land, it shall be lawful for the Government to levy cess for such water. The Act is not concerned with the question, whether the water has or has not become the property of the person using it."

I do not find anything in *Secy. of State v. Subbarayudu* (1) that has any bearing upon what appears to be the plain meaning of Cl. 1 (b) as to water that flows into a reservoir from a Government source whether by direct or indirect flow, percolation or drainage. The Privy Council decision in the *Urlam* case, *Suryaprasada Row v. Secy. of State* (5), has no bearing on this particular point. The tax then which has been imposed on the appellants-plaintiffs for the use of water would appear to be correct and in accordance with S. 1 (b), Madras Act 7 of 1865, unless it can be shown that their case falls under the first proviso to which I have now to refer. That proviso runs thus:

"Provided that where a zamindar or inamdar or any other description of landholder not holding raiyatwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

In their complaints the plaintiffs have set up mamool rights in accordance with a definite arrangement and "the immemorial usage." The definite arrangement or agreement of 1843 which was set up has been found against, but the learned Subordinate Judge, on first appeal after the remand, has held that in the circumstances the presumption of a lost grant could be reasonably inferred. Phillips, J., has remarked that only before the Subordinate Judge, when the suits had reached their fifth Court, was the theory of lost grant raised, and that it was a new theory which could not be allowed to be taken at so late a stage. It certainly does not appear to have been taken when the suits first came before this Court on second appeal as the issues that were then framed raised the question of whether the plaintiffs were entitled to irrigation free of charge on any of three grounds, (a) the agreement of 1843, (b) any agreement entered into at the per-

manent settlement, (c) by virtue of any easement.

The agreement of 1843 has, as stated already, been found against while the plaintiffs have not and could not base their claim on any sanad at the time of the permanent settlement, as at that time the upper village of Ananthapalle did not belong to Government, but was included in the Nuzvid Zamindari. The right of easement has been found against on first appeal though the trial Court held that that right had been established. Phillips, J., has accepted the view of the learned Subordinate Judge as to this without comment. Mr. Varadachari contends that at any rate the matter of long user has to be considered and that this has been set up in the plaint, while in the written statement of 9th January 1915 there has been a denial of customary right. In making the denial the written statement urged that the allegations in the plaint on the subject were very meagre, the reference being to what is stated in the plaint as to the claim of the plaintiffs being based on the "arrangement and the immemorial usage." It is also pointed out that the District Munsif who first tried the suits found that the plaintiffs were entitled to free irrigation in respect of the suit lands as they had cultivated them from time immemorial and had not extended their area of cultivation. It cannot therefore be said that the point of the plaintiffs having obtained right from long user was taken and considered only at a late stage of the suits. Mr. Varadachari argues that from the fact of long user which has certainly gone on for 60 years and more it should be taken that there was at least an implied engagement by the Government for the appellant-plaintiff to have the use of the water. He has referred in this connexion to *Secy. of State v. Maharja of Bobbili* (6), and *Secy. of State v. Subbarayudu* (1), but neither of these decisions is upon facts corresponding to those now under notice.

The former was a case of water being taken from a channel part of which flowed through the land of a zamindar whose right to take water from that part of it which flowed through his land was in question. The latter was one of tak-

5. AIR 1917 P C 42=41 I C 98=41 I A 166=40 Mad 886 (P C).

6. AIR 1919 P C 52=54 I C 154=46 I A 302=43 Mad 529 (P C).

ing water from a river by a party having riparian rights. In the former case, too, it was found that the former owners of the Palakonda zamindari, to whose position the Government had succeeded, had agreed to the taking of water from the channel through five sluices by the zamindar of Bobbili whose right so to take water was in question in the suit. Here there has been no such agreement. As has been pointed out by the Subordinate Judge who decided the first appeal, the agreement Ex. A, which the plaintiffs set up and which he did not find to be genuine, was not between one zamindar and another, but between the kapus and the karnams of one village and the zamindar of the other. Even if Ex. A were genuine what was agreed to by the kapus and karnams could not bind their zamindar, neither could it bind the Government which succeeded to his position; while the fact that the plaintiffs have set up this agreement of 1843 implies that there had been nothing in the way of an engagement prior to that year. Is there anything in the circumstances from which it can be inferred that there has been an implied engagement at any later time? I think not. For one thing it is very doubtful whether the charge could have been made under S. 1, Act 7 of 1865 and before the addition of S. 1 (b) by Act 5 of 1900, in which case during the period from 1865 to 1900 the Government in not imposing the tax was not foregoing the making of a charge which it was entitled to make.

Certainly it was only by the introduction of S. 1 (b) that its right to make the charge was made clear and the tax appears first to have been imposed in fasli 1321, that is 1911-12. And further, as is shown in para. 7 of the first appellate judgment, there has not been a continuous and consistent use of the water by the plaintiffs or their predecessors by the aid of which they could raise their crops and which could be deemed beneficial. In some years there has been sufficient water for the raising of crops and in some years there has been an excess of it. When such is the case I do not see how there can be either an implied engagement or the acquisition of an easement. Nor is it a case of natural flow. It is a matter of water overflowing from higher lands to lands lying lower down. The supply of water is precarious

and when, in the circumstances, the plaintiffs cannot be held to have obtained any prescriptive right, they cannot insist on its coming down in any sufficient quantity to enable them to raise crops or even on its coming down at all. It is not at all the case of water flowing naturally down a river or stream or any naturally formed water course. Mr. Varadachari has referred us to Illus. (j) to S. 7, Easements Act, but that does not seem to have any application to the circumstances of this case. In my view the decision of the learned Judge under appeal is correct. These appeals must therefore be dismissed with costs.

Beasley, C. J.—I agree.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 649

WALSH, J.

N. R. M. Govindarajulu Naidu—
Defendant—Appellant.

v.

Secy. of State—Plaintiff—Respondent.

Second Appeal No. 201 of 1929, Decided on 30th March 1933, against decree of Dist. Judge, Trichinopoly, D/- 16th July 1928.

(a) **Madras Revenue Recovery Act (2 of 1864), S. 36—Sale for default under Abkari Act does not give property free of encumbrance as sale for recovery of arrears of revenue—Madras Abkari Act (1 of 1886), S. 55.**

Although a sale for default under the Abkari Act is held in the manner of one for recovery of arrears of land revenue under Act 2 of 1864, the property is not sold free of encumbrance as it is in a land revenue sale. [P 650 C 2]

(b) **Madras Revenue Recovery Act (2 of 1864), S. 36—Confirmation by Collector is not necessary for completion of sale.**

A sale under Act 2 of 1864 does not require the confirmation of the Collector in order that it may be complete: *A I R 1932 Mad 582, Dist.*

[P 650 C 2]

(c) **Madras Revenue Recovery Act (2 of 1864), S. 36—Sale under Abkari Act—Purchaser ignorant of encumbrances—Default by purchaser to make deposit—Re-sale subject to encumbrance for lesser price—Difference in prices less amount of encumbrances only can be recorded—Madras Abkari Act (18 of 1886), S. 55.**

On default to pay monthly rental, shop of the contractor was sold and it was bid for Rs. 1,805. There was some encumbrance upon the shop of which the purchaser was ignorant. He committed default in making the deposit. The shop was subsequently resold subject to the encumbrance but fetched only Rs. 20. In a suit by Government against former purchaser for the difference:

—*Held*: that the property sold at the re-sale was not the same as the property purchased by

the appellant at the first sale, that the difference in price was not the amount which the Government was entitled to recover but that the correct amount which could be recovered from the appellant was the difference between what he bid at the first sale and the price fetched at the re-sale with any encumbrance amounts due at the time of the re-sale added to the latter figure: *Case law referred.* [P 652 C 1]

M. S. Vaidyanatha Iyer—for Appellant.

Government Pleader—for Respondent.

Judgment.—An abkari contractor committed default in payment of the monthly rental due to the Government. The Government sustained loss on re-sale of the shop and they therefore put up the house of the defaulter for sale. The defendant bid for Rs. 1,805 at the auction and the property was knocked down to him. He did not however deposit the necessary amount within the time mentioned in the conditions of sale or afterwards. The Government therefore re-sold the house. At the re-sale held on 18th August 1924, the sale price was only Rs. 20. The Government therefore brought this suit to recover from the defendant the loss caused by the re-sale, namely Rs. 1,805 minus Rs. 20 or Rs. 1,785 with interest at 6 per cent per annum from the date of the re-sale. The defendant admitted having bid for Rs. 1,805 but pleaded that the sale was vitiated by non-disclosure of material facts amounting to fraud; that while the property was heavily encumbered the selling officer told him that there was no encumbrance. He made certain other allegations as regards irregularity in the publication and the conduct of the sale. The findings of the trial Court were that both the Government Officers and the defendant were ignorant of the existence of the mortgage in favour of one Santhanam Ayyangar and since in the re-sale when the mortgage became known only Rs. 20 was bid for it was reasonable to hold that the defendant would not have bid for Rupees 1,805 if he had been aware of the mortgage.

As regards the legal effect, the learned District Munsif held that both parties having under a mistake of fact consented to the agreement, S. 20, Contract Act, applies, and he therefore dismissed the suit. On appeal the learned District Judge agreed that both parties were ignorant of the existence of the prior

mortgage on the suit property but held that the principle of caveat emptor applied and that therefore the Government was entitled to a decree as prayed for. Against this the defendant has preferred this second appeal. Certain admitted legal positions may be stated. Although a sale for default under the Abkari Act is held in the manner of one for recovery of arrears of land revenue under Act 2 of 1864, the property is not sold free of encumbrance as it is in a land revenue sale. It is also admitted that if the sale were a private one between two private parties, the buyer could compel the seller to discharge the encumbrance on the property which exists on the date of the sale if the property is sold free from encumbrance. It is also admitted that if it were a Court sale unless there was some misrepresentation by the selling officers or some default of the person who verified and signed under O. 21, R. 66 (3), the statement which should accompany an application for an order for sale, the purchaser would have to bear the loss of the non-mention of an existing mortgage. There is only one case in which he would have a remedy and that is if the judgment-debtor had no interest at all in the property.

The appellant takes two grounds. Firstly, that as the sale required confirmation by the Collector the contract was not completed and therefore the principle of caveat emptor does not apply. *Muthu Pillai v. Secy. of State* (1) is quoted in this connexion. But the learned Government Pleader has sent for the records of that case and it turns out not to have been a sale under the Revenue Recovery Act but a sale by the Government of certain poramboke land belonging to the Government. That sale was dependent on the confirmation of the Collector and it is clear that he had full liberty to confirm or refuse to confirm it as he chose. A sale under Act 2 of 1864 is entirely different. The power of the Collector to refuse to confirm the sale is confined to sales which he can set aside. The grounds of setting aside a sale are those set out in S. 37-A and S. 38 of the Act. The effect of holding that a contract of the sale held under Act 2 of 1864 is not completed until the Collector has confirmed

it would be practically to nullify the provisions relating to default by the purchaser to make the deposit or to complete the purchase, because he could take advantage of his own default and plead that there was no completed contract as the sale had not been confirmed by the Collector. The right of re-sale under S. 36 (4) arises on default whereas the question of confirmation arises only later. *Watson v. Davies* (2) quoted for the appellant in this matter is a case of a private sale and is therefore not in point. So far as this ground of appeal goes, I think it cannot be sustained. The second ground urged is that the property sold at the re-sale is not the same as the property purchased by the defendant at the first sale, and therefore the loss at the second sale is not the measure of the damages arising by the default of the defendant to complete his purchase at the first sale. For the appellant are quoted *Bajinath Sahai v. Moheep Narain Singh* (3), *Kali Kishore v. Guru Prasad* (4) and *Venkata Chellamaya v. Nilakanta Gurjee* (5). The reply to this point on behalf of the Government is on the following lines. The method of recovery in case of default with respect to an abkari contract being under Act 2 of 1864, the sale is regulated by the provisions of that Act and S. 36 of that Act describes the manner in which the sale is to be held, which is as follows :

“ In the sale of immovable property under this Act the following rules shall be observed : first, the sale shall be by public auction to the highest bidder. The time and place of sale shall be fixed by the Collector of the district in which the property is situated, or other officer empowered by the Collector in that behalf. The time may be either previous to or after the expiration of the fasli years. Second, previous to the sale the Collector, or other officer empowered by the Collector in that behalf shall issue a notice thereof in English and in the language of the district, specifying the name of the defaulter, the position and extent of land and of his buildings thereon; the amount of revenue assessed on the land, or upon its different sections; the proportion of the public revenue during the remainder of the current fasli : and the time, place, and conditions of sale. This notice shall be fixed up one month at least before the sale in the Collector's office and in the taluk cutchery, in

the nearest police station-house, and on some conspicuous part of the land.”

There is, it is argued no obligation here to publish the mortgages on the property or to make any statement that it is not being sold free of mortgages and the property re-sold in this case did not differ in description on any point from the description required under S. 36 (2). In reply to this, two points can, I think, be legitimately urged. Although the procedure for sale is that under the Revenue Recovery Act it is obvious that the circumstances of the sale are different and there is one very important difference, namely, that the sale for arrears of revenue under the Revenue Recovery Act is free of encumbrances whereas for an Abkari default, it is not. Although the Government may not be legally bound to notify in the sale of immovable property for default under the Abkari Act that it is subject to encumbrances the fact that the forms of sale proclamation are identical with those of the sale for revenue arrears is certainly apt to mislead the public into thinking that the sales are free of encumbrances. Though I do not say that this would make any difference in the legal aspect of the sale, it is perfectly obvious that S. 36 (2) is drawn up with reference simply to sale of land for arrears of Government kist, and it would be quite easy to think of cases where house property is sold for arrears under other Acts in which though the description as given in S. 36 (2) would apply to the property sold at both sales, the property would really be different. For instance, suppose in the case of a house the doors, windows etc., were not included in the second sale or suppose even that the house had been burnt down between the time of the first and the second sale, nevertheless the words of description in this section that is, the name of the defaulter, the position and extent of land, and of his buildings thereon, the amount of revenue assessed on the land, or upon its different sections, the proportion of the public revenue during the remainder of the current fasli, would all equally apply to what was being sold on the second occasion as well as to what was being sold on the first occasion. Therefore it appears to me that it cannot be argued that if the Government has followed

2. (1931) 1 Ch 455 at 468=100 L J Ch 87=144 L T 515.

3. (1889) 16 Cal 535 at 538.

4. (1898) 25 Cal 99 at 102=2 C W N 403.

5. A I R 1919 Mad 1014=43 I C 685=41 Mad 474.

the wording laid down in S. 36 (2), and of under that wording the description of the property remains the same for the second sale, it necessarily follows that the property sold at the re-sale cannot be different from that sold at the first sale. A property sold not subject to a mortgage is certainly a different property from one sold subject to a mortgage and the decisions in *Baij Nath v. Moheep Narain Singh* (3), *Kali Kishore v. Guru Prasad* (4) and *Venkata Chellamayya v. Nilakanta Gurjee* (5) proceed on this hypothesis.

Whether a difference in the property will make a deficit on the second sale, damages recoverable from the purchaser in the first sale or not, is a different matter, but the difference in the property itself is acknowledged in all these three cases. In *Bajinath Sahai v. Moheep Narain Singh* (3), it was held that even if the change in the property was owing to causes beyond the control of any person, the decree-holder must proceed against the defaulting purchaser by way of suit and not by way of an application under S. 293. In *Kali Kishore v. Guru Prasad Sukul* (4) at p. 102, it was held that :

"Before the defaulting purchaser can be made liable under S. 293, it must appear that the property which is the subject of the two sales is the same in every respect."

Venkata Chellamayya v. Nilakanta Gurjee (5), distinguishes *Kali Kishore v. Guru Prasad Sukul* (4), but only on the question as to the liability of the purchaser at the first sale. In that case the purchaser had himself diminished the value of the property by his own act and so could not claim that it should be re-sold under the same description. In *Nursing Dass v. Chuttoo Lal* (6), the sale was by a Receiver appointed by Court but both parties were in ignorance of a notice of the Board of Trustees for the improvement of Calcutta that the site might be acquired as a proposed public street, and the plaintiff refused to complete the purchase. He was held to be not liable for the decrease of price in the re-sale. This case was relied on by the trial Court, and is certainly in favour of the appellant though it was sought to distinguish it by saying that such a sale is not under a legal process like a Court sale or a revenue sale and

6. A I R 1923 Cal 641=74 I C 996=50 Cal 615.

that in the case of a sale under a legal process, there can be no remedies except the actual ones given by the procedure. It appears to me that a sale by a Receiver appointed by the Court is just as much a public sale as a sale in a default of abkari dues. The phrase "as if they were arrears of land revenue" in the Abkari Act has got to be read reasonably. If strictly construed, it would mean that the property is sold free of encumbrances which is admittedly not the case. I do not think therefore that the Government in order to deprive the appellant of his remedy can say that he is confined to what can be found in the processual law in Act 2 of 1864, while they have at the same time to admit that according to the terms of Act 2 of 1864 he should have got the house free of encumbrance altogether, which benefit he does not enjoy. It was even argued for the respondent that there was no contract at all between the appellant and the Government, and for this purpose certain remarks in *Thirumalaisami Naidu v. Subramanian Chettiar* (7) (at p. 1011 of 40 Mad.), were relied on. That was a decision regarding a sale in execution and the remedies, if any, of the purchaser as against the decree-holder. Those remarks, in my opinion, have no application to this case. In *Venkata Chellamayya v. Nilakanta Gurjee* (5), Wallis, C. J., says :

"By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, viz., the decree-holder and the judgment-debtor. These damages estimated by the ordinary rule consist of the deficiency, if any, in the price obtained at the re-sale as compared with the price at the first sale together with the expenses of the re-sale."

So also in *Gangabathula Kanthamma v. Manchiraju Reddi* (8), (at p. 136 of 46 M. L. J.), the following observations occur :

"Where in Court auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not in our view the judgment-debtor or the decree-holder, but the Court itself."

So that even in the case of a Court auction it would appear that there is something in the nature of a contract between the Court and the auction purchaser. In my opinion the property sold at the re-sale was not the same as

7. (1917) 40 Mad 1009=45 I C 109.

8. A I R 1924 Mad 476=78 I C 296=46 M L J 134.

the property purchased by the appellant at the first sale and the difference in price is not the amount which the Government is entitled to recover. The correct amount which can be recovered from the appellant is the difference between what he bid at the first sale and the price fetched at the re-sale with any encumbrance amounts due at the time of the re-sale added to the latter figure. The appellant did offer in Ex. 1 to pay the purchase price which he bid subject to the Government clearing the mortgage. As it cannot be ascertained from the materials on hand what the correct amount of the mortgage or mortgages was on the date of the re-sale, the first appeal will have to go down for final disposal after ascertaining this amount. The Government will then be entitled to the difference so found together with interest at six per cent per annum from the date of the re-sale and subsequent interest at six per cent per annum up to that date of payment. The Government will pay and receive proportionate costs of this appeal. Costs in the Court below will also be given proportionately to the result.

P.R.S./K.S.

*Order accordingly.***A. I. R. 1933 Madras 653**

BURN, J.

Ramasami Nayakar and others—Appellants.

v.

Venkatasami Naicker and others—Respondents.

Misc. Second Appeal No. 60 of 1929 and Civil Revn. Petn. No. 591 of 1929, Decided on 12th December 1932, from order of Dist. Judge, Tinnevelly, D/- 29th September 1928.

(a) Provincial Insolvency Act (1920), Ss. 53, 54 and 75—No second appeal lies in cases under Ss. 53 and 54.

No second appeal lies from an order passed on an application under Ss. 53 and 54: *A I R 1931 Mad 745, Ref.* [P 653 C 2]

(b) Provincial Insolvency Act (1920), S. 75—Order according to law supported by ample material—No revision lies.

Where the order of the lower Court is in accordance with law, no revision lies especially when there are ample materials to support the findings of the lower Court. [P 653 C 2]

(c) Provincial Insolvency Act (1920), S. 54—Transfer of practically whole of property to one creditor in order to secure not only past debts but also fresh loans—Transfer can be avoided.

Where the insolvent transferred practically the whole of his property to one creditor in

order to secure not only past debts but also fresh loans made at the time of alienation and the lower Court found on evidence that it was done with a view to prefer the particular creditor over others:

Held: that there was a fraudulent preference within the meaning of S. 54 and the transfer could be avoided: *A I R 1919 Mad 333, Dist.* [P 654 C 2; P 655 C 1]

*S. Varadachariar and K. R. Rama Aiyar—*for Appellants.

*T. M. Krishnaswamy Iyer and R. Krishnaswami Aiyangar—*for Respondents.

Judgment.—The Subordinate Judge of Tuticorin dismissed an application by the Official Receiver of Tinnevelly to set aside an alienation under Ss. 53 and 54, Provincial Insolvency Act. In appeal, the District Judge of Tinnevelly, reversed the decision of the Subordinate Judge and declared the alienation void as against the Official Receiver under both Ss. 53 and 54 of the Act. No second appeal lies in such a case: vide *Alagiri Subba Naick v. Official Receiver, Tinnevelly* (1), and therefore the C. M. S. A. No. 60 of 1929 must be dismissed.

C. R. P. No. 591 of 1929, is said to be based upon the same ground as C. M. S. A. No. 60 of 1929, though it is obvious that the considerations which arise in revision are not the same as those which arise in a second appeal. In revision under S. 75, Provincial Insolvency Act, it is only necessary to ascertain whether the decision of the learned District Judge is in accordance with law. As to this it can be said at once that considered simply as a technical matter, the order of the learned District Judge is strictly according to law. The alienation attacked is a simple mortgage executed on 29th June 1923, by certain persons who were adjudicated insolvents on a creditor's petition presented on 6th September 1923. The mortgage was in favour of three persons to whom the insolvents were heavily indebted. The learned District Judge has recorded findings that the mortgage was not fully supported by consideration, and that the alienees did not act in good faith when they took the transfer. He has also found that the insolvents in executing the mortgage acted with a view to prefer the mortgagees over their other

creditors. On these findings the mortgage is voidable under both Ss. 53 and 54, Provincial Insolvency Act and the order of the learned District Judge is the only order which according to law he could pass.

Mr. Varadachariar for the petitioners, the mortgagees contends, however, that the finding of the learned District Judge is vitiated by serious mistakes of facts, by a wrong view as to the onus of proof in a question under S. 54 and by a wrong view as to law governing an alienation made in favour of creditors when the alienation is accompanied by a fresh loan. He contends also that since the mortgage in question was executed by the insolvents in pursuance of an agreement entered into more than three months before the insolvency petition was presented, the transaction cannot be avoided under S. 54.

I am not satisfied that the learned District Judge made any mistake of fact of so serious a nature as to vitiate his conclusions. The most serious mistake alleged is that the learned District Judge went on treating the partnership between the insolvent Venkatasami and his brother-in-law, Ayyappa as if it were still subsisting in 1923, whereas in fact it had been dissolved in 1921. But as Mr. T.M. Krishnaswami Ayyar points out, the evidence as to the dissolution of partnership is extremely vague and unsatisfactory. No deed of dissolution was produced no accounts were produced to show what liabilities each incurred and what assets each took over. On the other hand, it was proved that both together borrowed Rs. 10,000 from a bank in Madura in April 1923, and in January 1923, Venkatasami and Ayyappa jointly borrowed Rs. 10,000 from the Imperial Bank at Tuticorin, each endorsing a pro-note for Rs. 5,000 executed by the other: vide Exs. E and E-1. In the settlement of debts which took place after the execution of the mortgage in question, it is alleged that Ayyappa took over Venkatasami's share in the debt due to the Madura Bank while Venkatasami took over Ayyappa's share in the debts due to the Imperial Bank. The learned District Judge emphasized the fact that Ayyappa though available did not go into the witness box to explain these and other transactions, nor did he produce his accounts. In these

circumstances I cannot see that the learned District Judge made any serious error in omitting to refer to the alleged dissolution of partnership between Venkatasami and Ayyappa. The whole matter is left extremely obscure. Other mistakes attributed to the District Judge are of very minor importance. The contention that the learned District Judge held a wrong view as to the onus of proof is based on para. 13 of the judgment where the learned District Judge observes as follows:

"These facts combined with the fact that the insolvents had practically no other tangible assets than the property hypothecated and that they owed Rs. 37,000 in addition to the debts the discharge of which is provided for in the mortgage made it highly incumbent on the mortgagees to satisfy the Court that the mortgage was a bona fide transaction."

I do not think this indicates a wrong view as to onus. It only indicates that in the opinion of the learned District Judge the onus which lay initially on the Official Receiver had been shifted to the mortgagees. It is contended relying upon the case of *Official Assignee of Madras v. T. B. Mehta & Sons* (2), that since the alienation was made in order to secure not only past debts but also fresh loans made at the time of the alienation, the alienation cannot be avoided as a fraudulent preference. The decision relied upon, *Official Receiver of Madras v. T. B. Mehta & Sons* (2), does not lay down any such proposition. It was found in that case that there was no transfer of all or substantially of the debtors' properties and that there was no view to prefer one creditor over others. In the present case the transfer was of practically the whole of the debtors' properties and the learned District Judge has found that there was a view to prefer the mortgagees over the other creditors.

Mr. Varadachari relies on *In re Softley* (3), for his proposition that the mortgage having been executed in pursuance of a prior agreement cannot be avoided as a fraudulent preference. The prior agreement is the yadast, Ex. J, said to have been executed on 2nd April 1923. I cannot see any similarity between Ex. J and the undertaking referred to in the English case quot-

2. AIR 1919 Mad 333=49 I C 968=42 Mad 510.

3. (1877) 20 Eq 746=44 L J B K 107=24 W R 68=33 L T 62.

A. I. R. 1933 Madras 655

CURGENVEN AND SUNDARAM
CHETTY, JJ.(Kompalli) Chenchuramayya and
others—Defendants—Appellants.

v.

Dama Venkatasubbayya Chetty—Plain-
tiff—Respondent,Appeal No. 202 of 1926, Decided on
18th January 1933, against decree of
Sub-Judge, Chittoor, in O. S. No. 41 of
1933.Civil P. C. (1908), O. 41, R. 4—Death of
two of appellants pending appeal—Legal re-
presentative of one brought on record but
application by representative of another
dismissed—Decree can be dealt with as a
whole against all appellants.During the pendency of an appeal, appellants
2 and 5 died. The legal representatives of ap-
pellant 1 were brought on the record, but an ap-
plication by an alleged representative of appel-
lant 5 was dismissed:*Held:* that the lower Court's decree could be
dealt with as a whole as it stood against all the
appellants under O. 41, R. 4 even though the
legal representative of appellant 5 was absent on
the record: *Case law referred.* [P 656 C 1, 2]

V. N. Shama Rao—for Appellants.

A. Rama Chandra Ayyar—for Respon-
dents.*Curgenv, J.*—The appeal is by the
defendants (except the 7th) against the
decree of the Subordinate Judge of Chit-
toor declaring the plaintiff's title to the
plots marked J and P in the plaintiff's
plan and directing formal delivery cou-
pled with an injunction restraining the
defendants from entering upon the land.
There are three contiguous villages, of
which Panguru and Jangalapalli are the
property of the plaintiff while the third,
Krishnampalli Agraharam, belongs to
the defendants, who are the joint Ag-
raharamdars. These villages have never
been surveyed, which adds considerably
to the difficulty of locating and identify-
ing any piece of land within them. The
plots in dispute are two blocks of forest
land, block P being situated according
to the plaintiff in Panguru and block J
in Jangalapalli, while the defendants
assert that they are comprised within
the limits of their own village Krish-
nampalli. Each side has filed a plan in
support of its allegations and these plans
are considerably at variance; but there
is no substantial disagreement as to the
general situation of the two blocks, and
it will be convenient to refer in discus-
sing the evidence to the plaintiff plan.

ed, nor between the general circumstan-
ces of that case and this. In Ex. J the
debtors did not offer anything definite
as security. They merely made a vague
promise to execute a mortgage but what
they would offer as security they did
not state. Moreover the decision of Sir
James Bacon, C. J., in the case quoted
begins with these words:

"This is a case which, as I conceive, must
come under S. 92, Bankruptcy Act, and not
under sub-S. 2, S. 6. I think the transaction in
question cannot under any circumstances be
treated as an act of bankruptcy. It was not a
transfer of the whole of the debtor's estate, and
no single fact has been stated; no argument has
been addressed to me which would induce me to
say that it was a fraudulent transfer of a part of
the debtors estate."

In the case I am now dealing with
the transfer was an act of bankruptcy.
It was a transfer of practically the whole
of the debtors' estate and there are
many facts which have induced the
learned District Judge to say that it
was a fraudulent transfer. Here is a
case of a simple mortgage executed by
the insolvents in favour of a relative
(respondent 3) and his two sons-in-law,
respondents 1 and 2. Except a quite
negligible fraction the whole of the deb-
tors' property is mortgaged for Rupees
46,500. Debts due to others to the ex-
tent of Rs. 37,000, are left unprovided
for. A loan of Rs. 16,000 is made, or
purports to be made, to the insolvent
Venkatasami at a time when his busi-
ness had actually come to a standstill.
Terms for repayment, which the learned
Subordinate Judge called "easy terms,"
but which were really quite impossible
terms, were arranged. There are ample
materials to support the findings of the
learned District Judge regarding the
lack of consideration, want of good faith
and a view to prefer. I find no ground
for interfering with the findings of the
learned District Judge in revision and
dismiss this petition with costs. Res-
pondent 1 will recover also the costs of
printing charges in C. M. S. A. No. 60
of 1929.

P.R.S./K.S. *Appeal and revision dismissed.*

Dealing first with block P, the learned Subordinate Judge has assigned the whole of it to Panguru village and therefore to the plaintiff. The finding has been attached with reference to issue 6, whether the plaintiff's claim in respect of that portion of P which the defendants now assert belongs to them is barred by res judicata by virtue of O. S. No. 112 of 1895 on the file of the District Munsif's Court of Tirupathi. The lower Court has dealt with this question in para. 14 of its judgment and has come to the conclusion that no identity can be traced between the subject-matter of that earlier suit and the present block P. We think however that with the help of the plan (Ex. 4) prepared by the Commissioner in that suit a positive conclusion can be reached. (After examining the plans, his Lordship held that the plaintiffs were precluded by res judicata from claiming the area within these boundaries; and that the defendants were similarly precluded from claiming any land lying further west and proceeded.) This disposes of appeal so far as plot P is concerned.

Plot J which in the plaint plan is the figure Q S K G, forms according to the plaintiff the western end of Jangalapalli, the southern boundary of which therefore will continue in a straight line up to the point K. (After discussing the boundaries and examining the plans his Lordship held that the plaintiffs were entitled to a decree in respect of this area. The judgment then proceeded.) During the pendency of the appeal, appellants 2 and 5 died. The legal representatives of appellant 2 have been brought on the record, but it has been found necessary to dismiss an application by an alleged representative of appellant 5. The point has been raised whether, with this appellant unrepresented on the record, we can deal with the lower Court's decree as a whole as it stands against all the sharers in the Krishnapalli Agraharam. We consider that O. 41, R. 4, Civil P. C. enables us to do this. If some among the defendants could appeal and the Court could upon such appeal reverse or vary the decree as a whole it seems to follow that where all the defendants appeal and the appeal of one or more abates by reason of death the Court should be able to exercise similar powers. If this were

not so, either the whole appeal must abate or the decree in its final form must be composed of incompatible elements, each a highly undesirable consequence. There is the direct authority of a Bench of this Court in *Soma Sundaram Chettiar v. Vythialinga Mudaliar* (1), that the Court has such a power. That was a suit by reversioners against alienees from a widow two of whom died pending the appeal. Since the alienees possessed separate interests the case was not as strong as that now before us, where the defendants are co-sharers. Nevertheless it was held that in order to avoid incongruity in judicial decisions on the same facts the Court was competent to set aside the decree as a whole and not merely in respect of the interest of those appellants whose appeal had not abated. This case was followed by Spencer, J., in *Chengamma Naidu v. Gangalu Naidu* (2), in a judgment which distinguishes the Privy Council case: *Raj Chander Sen v. Ganga Das Seal* (3) on the ground that that case affected the relations of the parties inter se and not as a whole.

The judgment of Spencer, J., was confirmed in *Letters Patent Appeal No. 96 of 1924* by Venkatasubba Rao and Jackson, JJ. The same view has been taken by two other High Courts: see *Ram Sevak v. Lamber Pande* (4) and *Chander Singh v. Khima Bhai* (5). The only cases cited to us contra are two of Calcutta: *Nairuddin Biswas v. Mamiruddin Laskhar*, A. I. R. 1928 Cal. 184 and *Hari Charan Moulik v. Kalipada Chakkaravarthi* (6). The learned Judges in the former case dissent from *Sundaram Chettiar v. Vythiling Mudaliar* (1) and in the latter case the Bench did not refer either to the provisions of O. 41, R. 4, Civil P. C. or any of the decisions noted above. We think therefore that judicial opinion is fairly agreed upon this point, and that the absence of a legal representative on the record does not incapacitate us from dealing with the appeal as a whole. We allow it with respect to the portion of plot P which we have defined above by its boundaries

1. (1917) 40 Mad 846=41 I C 546.

2. A I R 1925 Mad 235=82 I C 420.

3. (1904) 31 Cal 487=31 I A 71=S Ser 623 (P C).

4. (1903) 25 All 27=(1902) A W N 171.

5. (1900) 22 Bom 718.

6. A I R 1929 Cal 519=119 I C 814=56 Cal 622.

and we dismiss it with respect to plot J. The parties will pay their own costs in each Court.

The memorandum of objections asks for the award of the sums mentioned in para. 12 (b) of the plaint. The learned Subordinate Judge has awarded only Rs. 50 being the sum claimed for loss sustained by the plaintiffs on account of the trespass of the defendants, against defendant 7, who was *ex parte*. We think that the lower Court has given sufficient reasons for making this award against defendant 7 only. But what seems to dispose of any further claim is the statement at the end of para. 7 of the plaint that the block P was the only portion which had been invaded by the defendants. As regards the sum of Rs. 300 per annum claimed for loss of profits it may further be added that no proof of exclusion has been given. We dismiss the memorandum of objections with costs.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 657

BEASLEY, C. J. AND BARDSWELL, J.

Subbiah Pillai—Plaintiff—Appellant.

v.

Muthiah Pillai and others—Defendants—Respondents.

Letters Patent Appeal No. 243 of 1927, Decided on 17th January 1933, against judgment of Srinivasa Ayyangar, J., D/- 28th February 1927.

Chit fund—Subscriber purchasing chit at auction and executing security bond for regular payment of future instalments—Clause empowering stake holder to demand amount due for remaining instalments in lump sum on default of one instalment is not penal.

A subscriber in a chit fund purchased the chit at the first auction itself and executed a security bond in favour of the stake-holder for regular payments of future instalments as follows:

"If I fail to pay on the dates mentioned above, I shall pay the amount in default, together with interest there on at the rate of half a pie per rupee each day of default, within the succeeding one month. On default of even such payment, you can demand in a lump the amount due for the remaining instalments after deducting the amount paid till then, without reference to subsequent instalments."

Held: that the provision by which he bound himself down to be liable for the future instalments and on default to have demanded from him in a lump the future instalments was not a penal one: *A I R 1922 Mad 67, Rel on.; A I R 1925 Mad 177, Dist.* [P 658 C 1]

1933 M/83 & 84

T. M. Krishna Swami Ayyar and T. A. Ananta Ayyar—for Appellant.

T. L. Venkatarama Ayyar—for Respondents.

Beasley, C. J.—In this Letters Patent appeal the only point arising for consideration is upon a construction of Ex. A. This was a security bond executed by defendant 1 in the suit who was a subscriber in the chit fund in favour of the stake holder giving security for the amount of the instalments engaging to pay the sums as and when they fell due regularly. This chit was to run throughout sixteen half-yearly instalments. Defendant 1 was apparently the holder of half a chit and his subscription half-yearly was Rs. 125. He brought the chit at the very first auction and became entitled to Rs. 2,000. From this amount of Rs. 2,000 there was deducted Rs. 125, being the first subscription payable by him. That left a total amount of Rs. 1,875. In accordance with the rules of the chit, having bought the chit and received payment of the amount due to him defendant 1 had to execute a security bond in favour of the stake-holder and as the learned Judge in second appeal says the bond he executed was one of the usual documents. It appears to us to be the usual form of document executed with regard to chit funds. That is Ex. A. There is a provision in the deed with regard to the future instalments. Having bought the chit at the first auction there still remained fifteen subscriptions to be paid by him; and although a person buys a chit he is under the rules of the chit liable to go on paying and in fact must go on paying all the future instalments and on buying the chit he has to give security for the amount of the future instalments. This is how the matter is provided for in Ex. A.

"If I fail to pay on the dates mentioned above, I shall pay the amount in default together with interest thereon at the rate of half a pie per rupee per each day of default, within the succeeding one month. On the default of even such payment, you can demand in a lump the amount due for the remaining instalments after deducting the amount paid till then, without reference to subsequent instalments."

It is this provision which has given rise to the second appeal and this Letters Patent appeal. It was argued in second appeal that this was a penal provision and should be relieved against by the Court. It was held in the lower

appellate Court that it was a penal provision although that it does not seem to have been raised specifically in the trial Court. However that is a matter which may be allowed to pass. In second appeal, Srinivasa Ayyangar, J., held that the provision was a penal one. He says:

"Looking at the document it seems to me that the provision with regard to the whole amount becoming payable must be regarded as a provision to be held in terrorem over the party in order that thereby he may persuade himself to pay up the amount on the due date. Further in this case it is clear from a careful reading of the document that the debt itself according to the scheme of the document arises only on the due dates. It is not a debt due at present to be discharged subsequently on the dates agreed to or by instalments prescribed. I am satisfied that on a proper construction of the document each instalment on the due date and then alone accrues as a debt due and in that view there can be no doubt whatever that the provision with regard to the whole amount becoming payable on default must be regarded as a penal clause and should be relieved against."

He then quotes a decision of his own, *Ramalinga Adaviar v. Meenakshisundaram* (1), which it is argued on behalf of the respondents distinguishes this case from other cases by reason of the fact that in that case the subscriber had not received the full amount due to him as it is argued in this case he has not done when he bought the chit. Whatever the facts of that case may have been, the premises upon which the argument presented on behalf of the respondents is based do not exist here because in Ex. A itself defendant 1 states that he received Rs. 1875 and he gives particulars showing how that amount was made up. It is therefore quite clear that no arguments can be permitted and ought not to have been permitted in second appeal to the contrary. We have therefore here the position that defendant 1 received the whole amount due to him in respect of the chit which he bought. We have got to consider whether the provision by which he bound himself down to be liable for the future instalments and on default to have demanded from him in a lump the future instalments is a penal one. In my view it clearly is not. It is impossible to see how these chit funds could be successfully carried to a conclusion unless the subscribers are bound down to pay and made to pay the in-

stalments as and when they become due. If a subscriber defaults, then it is quite obvious that he can have demanded from him the full amount of the instalments which are due from him. In this case the subscriber (defendant 1) received the total amount due to him under the chit. This case seems to be covered both as regards the facts and the rules by the Bench decision of this Court in *Vaithianatha Ayyar v. Govindaswami Odayar* (2), with which I entirely agree. For these reasons, in my opinion, this provision was not a penal one and this Letters Patent appeal must be allowed with costs both here and in the second appellate Court. There will be the usual preliminary decree in favour of the plaintiff with costs and interest. We reduce the rate of interest to 12 per cent from the date of suit to the date fixed for redemption. Time for redemption 3 months. Interest at 6 per cent from the date fixed for redemption till realisation.

Bardswell, J.—I agree.

P.R.S./K.S. *Appeal allowed.*

2. A I R 1922 Mad 67=67 I C 995.

A. I. R. 1933 Madras 658

CURGENVEN, J.

Kotta Nagarattamma—Petitioner.

v.

Immadi Nagayya and others—Opp. Parties.

Civil Revn. Petn. No. 511 of 1932, Decided on 4th November 1932, from order of Dist. Judge, Masulipatam, D/- 11th March 1932.

Civil P. C. (1908), O. 44, R. 1, proviso—Issue of notices to interested parties is not necessary to decide whether application should be rejected—Where issue of notice is directed, appeal should not be rejected under proviso.

The very first step in dealing with an application to file an appeal in forma pauperis is to peruse the records and if necessary to reject the petition without issuing notice to any of the parties interested. The Court is not justified in issuing notice in order to make up its mind whether to reject the application. Hence when once issue of notices is directed, it must be presumed that the Court has applied its mind to this provision and has decided not to reject the appeal under it and the appeal should not be dismissed subsequently under the proviso: A I R 1928 Pat 118 and A I R 1929 Pat 27, Rel on,

[P 659 C 1, 2]

P. Satyanarayana—for Petitioner.

A. Venkata Chelam—for Opp. Party.

Judgment.—The petitioner on 7th October 1931, filed an appeal in forma

1. A I R 1925 Mad 177=85 I C 261.

pauperis. On 12th October 1931 the District Court ordered notice to the Government Pleader and to the respondents. Notices were accordingly taken. The Government Pleader did not oppose the application but various of the respondents filed counters. Eventually the case came on for hearing before a successor of the learned District Judge who had dealt with the case so far and on 11th March 1932 an order was passed dismissing the application. The ground stated for so dismissing it was that the judgment and decree did not comply with the terms of the proviso to O. 44, R. 1, Civil P. C. ; in other words, that there was no reason to think that the decree was contrary to law or was otherwise erroneous or unjust. I do not think that the learned District Judge was justified, at the stage which had been reached, in disposing of the petition under the terms of that proviso. The proviso itself requires that the Court shall reject the application unless upon a perusal of it and of the judgment and decree, it finds the conditions laid down are satisfied ; and that means, I think, and is always in practice taken to mean, that the very first step in dealing with such an application is to peruse the records and if necessary to reject the petition without issuing notice to any of the parties interested. It is impossible to contend on the terms of the proviso that the Court would be justified in issuing notice in order to make up its mind whether so to reject the application.

Accordingly it must, I think, be presumed that when the first learned Judge who dealt with the application directed the issue of notice, he had applied his mind to this provision and had decided not to reject the appeal under it. It could not therefore be open to his successor to reconsider this matter and come to a contrary conclusion. He should have taken the application up at the stage where it had been dropped by his predecessor and have continued it by inquiring into the pecuniary circumstances of the petitioner. There are several Patna cases which support this view. I may refer to *Raghunatha Prasad Sahu v. Mt. Rampiari* (1), which itself is based upon an earlier case, and *Mt. Bibi Sogra v. Radha Kishun*, A.I.R.

1929 Pat. 27. In this latter case the principle is expressed that:

"The applications having been admitted it has to be presumed that the Court which admitted the applications and ordered issue of notice was satisfied that the conditions requisite for the issue of notice were present, namely, that the Court saw good reason to think that the decree was contrary to law or to some usage having the force of law."

I agree with this view and accordingly I set aside the order of the lower Court and direct it to restore the original petition to file and proceed to dispose of it in the manner indicated. The respondents will pay the costs of this petition.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 659

PANDALAI, J.

Subramania Chetti—Plaintiff—Appellant.

v.

Mahalakshmi Ammal and others—Defendants—Respondents.

Second Appeal No. 493 of 1930, Decided on 28th March 1933, from decree of Dist. Judge, South Arcot, in A. S. No. 12 of 1928.

(a) **Deed — Construction — Settlement — Awarding of share of inheritance to illegitimate children by Sudra donor is not conclusive of the meaning attached to the word "santhathi"**—Words and phrases—*Obiter*.

Obiter.—The fact that a share of the inheritance is awarded to his illegitimate children by a Sudra donor or testator in certain cases is not necessarily conclusive of the meaning as to what he means when he talks of his santhathi.

[P 661 C 1]

(b) **Deed—Construction—Gift — Cases on construction of deeds in other cases are not of much use as authority — Donor to enjoy the properties during lifetime and after him his male santhathi or adopted santhathi to take them—Donor not to sell or mortgage during life time—Donor gets heritable estate.**

Cases on construction of deeds and wills are not of much use as authority in other cases because the language used in deeds and wills differs so much from each other.

A Tamil merchant executed a deed in favour of his son which ran as follows :

"As you are helpless and because of affection as you are my son, I have made settlement 'gift' to you of the undermentioned properties. You are to enjoy its income during your lifetime and after your time your male santhathi or adopted santhathi will take (it). Even if there be no male santhathi but only female santhathi such female santhathi will take (it). During your lifetime you have no right whatever to sell or to mortgage the above properties" :

Held : that the word "settlement" as used by the grantor meant a gift and that the son took a heritable if not absolute estate in the properties and was not a mere life tenant and that

1. A I R 1928 Pat 118=103 I O 645=6 Pat 687.

his santhathi took the properties as heirs on his death : 33 Cal 23, Ref. [P 662 C 1]

S. T. Srinivasagopalachariar and I. D. Srinivasachariar—for Appellant.

C. Padmanabha Iyengar and T. E. Ramabhadra Chariar—for Respondents.

Judgment.—The plaintiff appeals from a decree of the learned District Judge of South Arcot confirming a decree of the Additional Subordinate Judge of Cuddalore dismissing a suit for the recovery from the respondents of three items of property, a house, a shop and a godown the subject-matter of a settlement dated 9th June 1904, by one Muthuswamy Chetty, who died in 1916, in favour of his son by the first wife Somasundara Chetty who died in 1922, whereby the father Muthuswami Chetty settled the said properties on Somasundara Chetti, the son, according to the terms of that deed Ex. B. The appellant is Muthuswami Chetty's son by the second wife. Defendant 1 is a concubine who had been kept by Somasundara Chetti and defendants 4 to 7 are the sons of Somasundara by defendant 1, and defendants 3 and 8 to 11 are his daughters by the same person. Defendant 2 is the eldest son of defendant 1 who was born in the lifetime of her married husband and defendant 12 is her mother. The appellant's case in the first Court was that by the terms of the settlement Somasundara Chetti took only a life estate in the properties and that though, if Somasundaram had legitimate children they might have been entitled to the properties, defendants 4 to 7 being only illegitimate children do not take under the deed. Various other contentions were raised which it is unnecessary now to notice. The defence on the points mentioned above was: (1) that Somasundara Chetti took under Ex. B a heritable, if not, an absolute estate and not a mere life estate; and (2) that defendants 4 to 7 are within the meaning of santhathi of Somasundara to whom a direct gift is made under the deed.

The Subordinate Judge delivered a judgment of portentous length covering 28 pages of printed foolscap and 190 paragraphs. He had some grounds because before him frivolous contentions, which were subsequently given up, as to the paternity of the defendants, and into which therefore he had to go, were raised. Making full allowance for this,

the judgment of the first Court remains of such length as to cause inconvenience, if not, embarrassment to the appellate Court which had to deal with it. In appeal the learned District Judge dealt with the matter in a much more business like manner. He held that the settlement Ex. B was in favour of not merely Somasundara Chetti but also of his santhathi which the learned Judge construed as meaning descendants or heirs general thereby including illegitimate sons in the case of the present parties whom the learned Judge after an examination of their customs found to be Sudras, although they themselves claimed to be Vaisyas. On this ground he dismissed the appeal merely remarking on the other point that he found that the terms of Ex. B read as a whole make it quite clear that Somasundara got only a life estate under Ex. B.

In this appeal the learned advocate for the appellant addressed me on the question decided against him by the lower appellate Court whether on a right construction of Ex. B the illegitimate sons are included in the word "santhathi." It is an attractive line of investigation, if it should become necessary to decide it, whether, in view of the recent decisions of the Privy Council, notably *Vellaiyappa Chetti v. Natarajan* (1), when a Sudra Hindu executes a deed or a will using the word "santhathi," he must be understood as including the illegitimate as well as the legitimate offspring or heirs. Such a question has not hitherto arisen. For the appellant it is argued that whatever the status to which the illegitimate sons have been now elevated by reference to the Mitakshara and the ancient law books, the question is not one of legal status but one of construction of a deed which depends upon the modern meaning of the language of modern men and that when a Hindu, be he a Brahmin or a Sudra, speaks of his santhathi, there is no more reason for imputing to one an intention to include illegitimate children than in the case of the other, no more indeed in the case of either than in the case of an Englishman. The respect for marriage and the social position of legitimate children is no less among Hindu Sudras than among Brahmins and

1. A I R 1931 P C 294=184 I C 1084 = 58 I A 402=55 Mad 1 (PC).

Englishmen. As a mere question of construction, I should hesitate to say that a share of the inheritance being awarded to illegitimate children of Sudras in certain cases is necessarily conclusive of the meaning of a Sudra donor of property or testator as to what he means when he talks of his santhathi. As the matter is however of general importance, and as I am sitting alone, I am not inclined to express any deliberate opinion on the matter in this case.

There is however another point on which the case seems capable of decision without much doubt. That is the point which the learned District Judge held against the appellant and which the respondents have here raised as they were entitled to, namely, that Somasundara took under Ex. B, not an estate limited for his life but a heritable estate, if not an absolute one. It is enough for the respondents to show that Somasundara had a heritable estate. If he had, as undoubtedly defendants 4 to 7 are his illegitimate sons by a continuously kept concubine, they would inherit whatever he possessed and the plaintiff would be out of Court. On this point, I am unable to agree with the learned District Judge. The circumstances under which Ex. B came into existence are these: Muthuswamy Chetti was a prosperous trader at Cuddalore. His son Somasundara was apparently sowing wild oats. So, it became necessary for Muthuswamy Chetty to cut off Somasundara and he did so by paying him Rs. 5,000 in instalments and securing from him a release deed, Ex. A, dated 16th November 1903, which declares explicitly the receipt of the consideration and that Somasundara had no more any rights to the properties mentioned in the schedule, be they ancestral or self-acquired. There is some evidence that at or before that time Somasundara's married wife had left him and that he was taking to another man's wife, the present defendant 1, the wife of one Krishnaswamy Rao, who himself died in or about September 1904, by which time defendant 2 had been born some five months. Somasundara had reduced himself by his life practically to destitution and again approached his father for help and it was to help him that the father gave him the property and executed the deed, Ex. B.

The question is what is the interest taken by Somasundara in the properties concerned in Ex. B. They are properties comparatively speaking of little value, that is, compared to the position and resources of Muthuswami Chetti, consisting, as I have already said, of a house, a godown and a shop said to be in all worth Rs. 3,000. The interest taken under the deed depends upon the language of it. The material part, leaving out the preamble which recites the circumstances, is as follows :

"As you are helpless and because of affection as you are my son, I have made settlement 'gift' to you of the undermentioned properties. You are to enjoy its income during your lifetime and after your time your male santhathi or adopted santhathi will take (it). Even if there be no male santhathi but only female santhathi such female 'santhathi' will take (it). During your lifetime you have no right whatever to sell or to mortgage the above properties."

It is quite clear that Muthuswami Chetti did not contemplate the property coming back to him unless on failure of all santhathis of the donee male or female, natural or adopted. Undoubtedly he disposed of his entire interest in the property by authorizing Somasundara to take the income during his lifetime and after him his santhathi or heirs general, to adopt a convenient and short expression. He also stipulated that Somasundara was not to be reduced to a position to make another request of the same kind and he therefore forbade his son to sell or mortgage the property in his lifetime. Subject to that, the property was to be Somasundara's for his own enjoyment and that of his heirs for ever and ever. The question is, what is the interest taken by Somasundara in such a disposition? The restraint on alienation is only of sale and mortgage during the lifetime of Somasundara and it was not absolute and the language of the clause restraining alienation shows that Somasundara was to have, subject to that restraint, an interest not merely in the income but in the properties. What interest could that be, if that were not a heritable interest? I am asked to say that the words of disposition do not convey any interest in the property to Somasundara but only the right to take the income for his life. I do not so read the deed. It begins with the sentence: "I have made settlement of the undermentioned properties to you." The word "settlement" is an

English word for which the nearest equivalent in the Tamil language, if a Tamil grantor like Muthuswami Chetti had been asked to choose a Tamil word, would be gift. Obviously, it was not a sale; it was not a mortgage; and it really was a gift and nothing else.

A settlement in the English language has a technical sense under the Settled Land Acts where more than one successive interest is carved out of ownership. I cannot think that a Tamil merchant of Cuddalore intended to mean that, but he meant only that speaking in a general way he was giving his property. It is not that the gift is not to be subject to the terms of the deed. But the character of the disposition was undoubtedly a gift. It seems to me therefore that we start with the idea that Muthuswami Chetti was making a gift of certain property to his son Somasundara and the conditions that follow are the conditions of that gift. Those conditions are, to express them compendiously, that the donee was to enjoy the properties during his lifetime but must not sell or mortgage them and that after him his heirs generally would take the income with no doubt all rights of the owner. I have therefore come to the conclusion that on the language of Ex. B Somasundara took a heritable estate, namely the right to take the produce in his lifetime and during the lifetime of his descendants under a disposition which is described as settlement to Somasundara. Taking these together, the only conclusion possible is that Somasundara was not a life tenant, but he took a heritable, if not, an absolute estate. Cases on construction of deeds and wills are not of much use as authority in other cases because the language used in deeds and wills differs so much from each other. But of the several cases cited, I will refer only to one, that is *Basantakumari Debi v. Kamikshya Kumari Debi* (2), a decision of the Privy Council where a deed of gift of immovable property made by a Hindu in favour of his sister contained the following language:

"You shall pay the annual Government revenue and get your name registered . . . and enjoy possession during your lifetime. On your death your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale

will successively vest in your husband, sons, grandsons and others."

The last clause excluded the donee, the sister, from the power to make a gift or sale. The Privy Council confirming the decision of the High Court of Calcutta said:

"They are of opinion that Soondari Debi took an heritable estate. The words "on your death your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess" are sufficient to show that the heirs were to succeed as such, notwithstanding that those who would take as heirs are named in wrong order or (in other words) there is an inaccurate enumeration of them."

That is exactly the situation here. On the donee's death his santhathi, whether that expression includes illegitimate children or not, are to enjoy the property and those words are sufficient to show that the santhathi took as heirs and that Somasundara took an heritable estate. On this ground the decision of the learned District Judge was right and the appeal must be dismissed with costs.

P. R. S./K. S. *Appeal dismissed.*

A. I. R. 1933 Madras 662

WALSH, J.

Saphar Sitapati Rao — Plaintiff —
Petitioner.

v.

Chittaluri Sitabayamma — Defendant
— Opposite Party.

Civil Revn. Petn. No. 409 of 1932,
Decided on 25th October 1932, from
order of Sub-Judge, Rajahmundry,
D/- 21st December 1931.

Civil P. C. (1908), O. 47, R. 1 — Review
cannot be granted merely because judgment
or order proceeds on incorrect exposition of
law.

A Court has jurisdiction to decide a point of
law wrongly as well as rightly and a review
cannot be granted merely because the judgment
or order proceeds on an incorrect exposition of
law. [P 664 C 2]

Judgment-debtor who had filed an appeal got
order of stay conditional on his depositing cer-
tain amount. He failed to deposit within the
time allowed and when he deposited the amount
after such period, the decree-holder attached the
same as money due under decree. Thereupon
the judgment-debtor put in a petition asking the
Court to take security from the decree-holder
before handing over the amount to him as he
was a pauper. The Court passed an order that
it had no jurisdiction to take security from the
decree-holder; however the money was not paid
out and no revision was taken against the order.
Subsequently the judgment-debtor again put in
a petition asking the Court to take security
from decree-holder. The Court allowed the
petition this time:

2. (1906) 33 Cal 23=32 I A 181 = 10 C W N 1
(P C).

Held : that there was no error of law at all on the face of the record, as the Judge could have passed the same order even if he had taken a correct view of the law on the first petition and that the order allowing the petition should be set aside : *A I R 1922 P C 112, Rel on. : A I R 1924 Mad 98 and A I R 1928 Lah 919, Dist.* [P 664 C 1]

K. Umamaheswaran — for Petitioner.
V. Govindarajachari—for Opp. Party.

Judgment.—In this case we may omit from consideration all the proceedings connected with stay of execution under O. 41, R. 5, Civil P. C. The High Court granted stay of execution on the defendant depositing Rs. 1,300. She failed to do so in time. When the defendant did deposit it, plaintiff attached it as money due under the decree and the whole of the subsequent proceedings show that it was treated, as indeed it was bound to be, as money paid in execution of the decree. The defendant asked the Subordinate Judge in E. A. 726 of 1931 to take security for this sum of Rs. 1,300 before handing it over to the plaintiff. The order begins :

“This is a petition asking the Court to take security from the respondent for Rs. 1,300 deposited in Court in part satisfaction of the decree amount.”

It is clear therefore that this was an application under O. 41, R. 6, and it was entirely discretionary on the part of the Court to grant or refuse it. The reason alleged for taking security was that the plaintiff was a pauper. The learned Subordinate Judge unfortunately seems not to have grasped the distinction between proceedings in stay of execution under O. 41, R. 5, and proceedings when the decree was being actually executed. After referring to several of the stay proceedings which were really irrelevant, he stated :

“I doubt very much whether under these circumstances, this Court has jurisdiction to order security being taken from the respondent. Hence I dismiss the petition.”

This was on 6th November 1931. For some reason or other the amount does not appear to have been paid out. No proof has been adduced on the allegation that there was a revision petition against this order to the High Court and that it was dismissed, although this was mentioned in the counter-affidavit put in against the next petition. It is very unlikely that had there been such a revision petition dis-

posed of by the High Court and shown to the Court it would not have been mentioned by the learned Subordinate Judge in the order now appealed against. The number of the Civil Revision Petition is not quoted and there is no means of verifying it. I must take it then that it has not been proved that the Subordinate Judge's order of 6th November 1931 dismissing the petition to take security has been carried further or objected by way of revision ; or that any order in revision has been passed on it. On 27th November 1931 the defendant again put in an application under O. 41, R. 6, Civil P. C., again asking that security should be taken for Rs. 1,300 from the plaintiff as he was a pauper. No further reasons are given than what were stated in the previous petition. The application is not called one for review, but it is obviously such in substance. In the counter to this it was objected that the matter was res judicata owing to the previous order. The learned Subordinate Judge has dealt somewhat obscurely with the matter of res judicata in para. 2. He first points out that the present application is made under O. 41, R. 6, and that the scope of that section is quite different from that of O. 41, R. 5, with reference to stay of execution. In this of course he is perfectly correct. Then he goes on to say :

“No doubt on a previous petition I entertained the opinion that when once the High Court passed the order which had the ultimate effect of dismissing the stay petition, this Court had no jurisdiction to entertain an application for further stay (vide the order of this Court dated 6th November 1931). Whatever might be said as regards the jurisdiction of the Court to entertain a petition for stay of execution of the decree on account of the High Court having already passed orders on such an application, there can be no doubt, I think, as regards this Court having jurisdiction under O. 41, R. 6, to demand security from the decree-holder, in case it is found that he is not solvent enough to refund the money. I therefore disallow the contention raised by the counter-petitioner on this point and I allow the petition.”

He does not really discuss the question of res judicata here, or his power for granting a review of his previous order under O. 47, R. 1. He does not even say that he thinks he made a mistake in the law in his previous order. Against this order the present revision petition is filed. With regard to O. 47, R. 1, the leading decision now is the

Privy Council's in *Chhajju Ram v. Neki* (1), where it was held that

"any other sufficient reason must be a reason sufficient on grounds at least analogous to those specified immediately previously. There is no question that a Court has jurisdiction to decide a point of law wrongly as well as rightly and a review cannot be granted merely because the judgment or order proceeds on an incorrect exposition of the law."

Two subsequent decisions have been quoted and I do not want to say much about them here as I shall be considering them in another case. They are *Murari Rao v. Balvant Dikshit* (2), and *Debi Sahat Gulzari Mal v. Basheshar Lal Bansi Dhar* (3). But these two cases are easily distinguishable from the present. In both of them, had the correct view of the law been taken the Court could not have passed the order which it did. That is not the case here. The most that can be said here is that on account of the mistaken view which he took of the law, namely, that he had no jurisdiction, the learned Subordinate Judge did not in passing his order on 6th November 1931 apply his mind to the question whether he would or would not demand security. Even had he taken a correct view of the law one cannot say that his order would not still have been the same. There is therefore no error of law at all in the order which he passed; it is merely that the reason which he gives for passing it is owing to his erroneous interpretation of the law. He might have passed the same order on a correct interpretation.

That being so, it appears to me to be clear that there is no error of law on the face of the order whatsoever. There is no new fact adduced and there is no other fresh reason in the sense laid down in *Chhajju Ram v. Neki* (1). It has been contended that this after all is not really an order in execution and that this Court should not interfere in a matter of this sort unless substantial injustice is done. But I think it is necessary in the interests of litigants that there should be a term put to questioning orders of the Court and improperly getting reviews of orders which are legally correct, otherwise; there can be no finality in such orders. I must there-

fore allow this petition with costs and set aside the order of the lower Court in E. A. No. 865 of 1931 and restore his order in E. A. No. 726 of 1931.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 664

WALSH, J.

(*Pasumarthi*) Subbaraya Sastri—Defendant—Appellant.

v.

Mukkamala Seetha Ramaswami—Plaintiff—Respondent.

Second Appeal No. 1838 of 1931, Decided on 21st March 1933, against decree of Sub-Judge, Bezwada, in A. S. No. 62 of 1930.

(a) Civil P. C. (1908), O. 1, Rr. 3 and 9—Person having right to defend is necessary party—Suit to eject from site and for removal of pial erected thereon—Plea that site belonged to Municipality and permission had been obtained from it for erection of pial—Municipality is necessary party and suit should be dismissed for non-joinder.

If a person has a right to defend, it is the same thing as saying that he is a necessary defendant, for it is not within the discretion of the Court to say whether it will add him or not [P 667 C 1]

Plaintiff brought a suit to eject the defendant from a site and to remove a pial erected by him thereon. The plea of the defendant was that the land belonged to the Municipal Council, that he put up a pial with its permission and that the Municipal Council was a necessary party to the suit. The trial Court held that, as plaintiff claimed the suit property as his, it was unnecessary to implead the Municipality on the contention of the defendant:

Held: that the Municipality was a necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed: *Case law reviewed.*

[P 667 C 2]

(b) Civil P. C. (1908), S. 99—Non-joinder of necessary party in spite of objection taken from start—Suit should be dismissed.

A person who was a necessary party was not impleaded as defendant in spite of such objection being taken at the very start and the suit was decreed:

Held: that the suit should be dismissed: *Case law referred.* [P 667 C 2]

(c) Madras Survey and Boundaries Act (4 of 1897), S. 13—Decisions under Act.

Decisions under the Act if not challenged become res judicata. [P 668 C 1]

G. Lakshmanna and G. Chandrasekara Sastri—for Appellant.

V. Suryanarayana and P. Satyanarayana Rao—for Respondent.

Judgment.—The plaintiff brought the suit to eject the defendant from a site and to remove a pial erected by him thereon. The plea of the defendant was that the land belonged to the Municipal Council, that he put up a pial with its

1. A I R 1922 P C 112 = 49 I A 144 = 3 Lah 127 = 72 I C 566 (PC).

2. A I R 1924 Mad 98 = 46 Mad 955 = 76 I C 342.

3. A I R 1928 Lah 919 = 10 Lah 181 = 112 I C 540.

permission and that the Municipal Council was a necessary party to the suit. This latter point was raised as issue 3 and the objection was repeated in appeal. With regard to issue 3 the trial Court said:

"According to the plaint allegations plaintiff exclusively claimed the suit lane as his property. So it is unnecessary for him to implead third party on the contentions raised by the defendant."

In respect of this its judgment reads throughout as if it were a decision between the plaintiff and the Municipality. The District Munsif says in para. 6:

"I am constrained in this state of evidence as observed (sic) that plaintiff had made out a better title to the suit lane than the Municipality," and later on in the same paragraph:

"As already observed there is some dispute between plaintiff and the Bezwada Municipality about the ownership of this lane. As the available evidence is not before the Court, I am constrained to find in this state of evidence that plaintiff had made out a better title than the Municipality."

In dealing with this issue the lower appellate Court says:

"As for the contention of the defendant that it is part of the Municipal lane, there is no proof of it."

If by proof the learned Subordinate Judge means evidence, he is clearly in error. There is the evidence of the receipts granted to the defendant by the Municipality as well as the direct evidence of D. W. 4, the Municipal Town Surveyor, who swears it is a public lane. An attempt was made in arguing the case before me to state that what the defendant got the license receipts for was not the present pial but some other in a different position. That cannot be maintained, for it is seen from the plaint that the pial in its present position has been there for four years which is within the period covered by the two receipts. Both the Courts decreed the suit in plaintiff's favour and the main contention in this second appeal is that the Municipality was a necessary party. The plaintiff is the owner of house sites A and A-1 and the defendant of house site, B. Plot C is the one in dispute. The written statement has not been printed. If the defendant's written statement as regards the origin of the suit is as extracted in para. 3 of the judgment of the District Munsif, it is very badly expressed. It is there stated as follows:

"The defendant contends that the alleged land C is not the exclusive one of the plaintiff.

The plaintiff and his predecessor-in-title had no interest in that site. The sites A and B originally belonged to one joint family. When they were divided they kept this suit land C as their joint lane. Plaintiff purchased A and A-1 marked land only eight months back, while defendant purchased site marked B twenty years back. The Municipality acquired this suit land long ago."

I think that the defendant clearly means that A, B and C originally belonged to the joint family. If that were not so there was no meaning in saying that when they divided they kept the suit land C as joint lane. However the matter is not of very much importance because the defendant's clear case was that the Municipality acquired the suit land long ago and the question is whether the Municipality is not a necessary party to the suit in the circumstances.

For the appellant is quoted *Umed Mal v. Chand Mal* (1), a Privy Council case. In that case where a mortgagee as purchaser of the mortgaged properties in Court auction in execution of his mortgage decree sued a third party, not being the mortgagor, in ejectment of one of the items alleged to have been included in his mortgage and purchased by him in execution of his mortgage decree without making the mortgagor a party to the suit and the lower Courts decreed the suit, it was held that the lower Courts acted with material irregularity in the exercise of its jurisdiction in deciding the question of title to the mortgaged property in the absence of the mortgagor and that the High Court had jurisdiction to interfere in revision under S. 115. The present case is very much stronger than that because there the mortgagee had actually purchased the mortgagor's property. The next case is *Haran Sheikh v. Ramesh Chandra* (2). In that case where in a suit for declaration of a right of way as a village road and for removal of obstruction thereon, an objection was taken that one of the persons interested in the servient tenement had not been made a party to the suit, which was overruled by the Courts below on the ground that it was taken at a late stage, and the Courts below decreed the suit, it was held that the non-joinder of the person in question as a party to the suit was a fatal defect and on that ground the suit was dismissed;

1. AIR 1926 P C 142=99 I C 749=53 I A 271=54 Cal 333 (P C).

2. AIR 1921 Cal 622=62 I C 425.

and it was also held that notwithstanding the provisions of O. 1, R. 9, Civil P. C., the Court will not entertain a suit in which no effective decree can be made in the absence of an interested party. Here again the present case is much stronger for the objection was taken from the start. The next case is *Mohamad Israel v. J. P. Wise* (3).

There it was held that in a suit for possession of land, where the plaintiff alleged that he is the rightful owner of the lands which have been resumed by the Government, but that the defendant by false allegation of ownership and of possession induced the Revenue authorities to enter into settlement with him, the Government ought to be made a party. Of the five Judges one expressed no opinion on the point. So it was apparently not necessary for the determination of the case. A recent decision of Sundaram Chetty, J., in this Court in *S. A. No. 1502 of 1927* is also quoted. In that case the plaintiffs as reversioners to the estate of one Sattigadu sued for recovery of possession of the plaint properties. The defendant resisted the claim setting up the title of a minor Subbulu as the adopted son of Sattigadu. Sundaram Chetty, J., held that the objection taken by the defendant that the suit was bad for non-joinder of the alleged adopted boy was good, quoting the decisions which I have already quoted. He did not however find it necessary to set aside the decree and remand the suit because in a subsequent suit the matter of the alleged adoption with the boy as a party had been gone into and the adoption found not true. Another case quoted is *Brojanath Bose v. Durga Prasad Singh* (4). In that case a Digwari tenure-holder granted a lease of all the surface and sub-soil rights. Upon a suit by the landlord without making the Government a party, for a declaration that the mineral rights belonged to him as landlord and that the defendant had no right to grant such a lease, it was held that the Government was a necessary party to the suit as the Digwari tenure was held on the condition of the performance of certain police or public services for the due discharge of which

the holder had been responsible to the Government.

For the respondent four cases are quoted. *Mahabir Prasad v. Jamuna Singh* (5) is a decision which is quite irrelevant because it will be found that the person from whom the appellant claimed was made a defendant (defendant 5). Even if he had not been, it is doubtful if the decision would have any relevancy because the appellant is described as his assignee. What is meant by the right *jus tertii* pleaded by a party in connexion with this question whether that third party should be impleaded in the suit is of course a present right and not one which has been extinguished by assignment. The next case is *Kashi v. Sadasiv* (6). This was a peculiar case where both parties claimed under the Government. It was held that the Government was not a necessary party. It was really a case of priority of title. The next case is *Subramanya v. Anantakrishnaswami Naidu* (7). This was merely a matter of landlord suing his tenant under a lease. The tenant was estopped from disputing his landlord's title under S. 116, Evidence Act. The last case quoted is *Poonit Singh v. Kamal Singh*, A. I. R. 1924 Pat 172. This case is exactly on all fours with *Umed Mal v. Chand Mal* (1) as to the inclusion of a mortgagor. It is the decision of a single Judge and must be held wrong in the light of the Privy Council decision. There appears to be either a misquotation or a misunderstanding of some quotation from Bullen and Leake's *Precedents of Pleadings*, 7th Edn., which is quoted as follows:

"Strictly all persons who are actually in physical possession of the property should be made defendants. It is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land."

I have looked up Bullen and Leake's *Precedents of Pleadings*. I have unfortunately not got the 7th Edn., but only the 8th. Bullen and Leake seems to have been remodelled, for the first remark now appears on p. 20. I shall quote the whole passage as it stands there:

"Strictly, all persons who are actually in physical possession of the property should be made defendants. 'In ejectment the tenant in posses-

3. (1874) 21 W. R. 327=13 Bom. L. R. 118.

4. (1907) 31 Cal. 753=5 C. L. J. 582=12 C. W. N. 193.

5. AIR 1925 P. C. 234=921 C. 31 (P. C.).

6. (1897) 21 Bom. 229.

7. AIR 1932 Mad 688=139 I. C. 679.

sion must be sued,' Per Lord Tenterden, C. J., in *Berkeley v. Dimery* (8). But where a larger number of persons are in occupation of the premises who all claim title under the same lessor, the rule is relaxed and the plaintiff is allowed merely to make that lessor defendant: *Minet v. Johnson* (9) and *Green v. Harring* (10)."

It being provided by O. 16, R. 9

"where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

There is no sentence here at all that it is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land. On the other hand the passage quoted above shows that where there are a large number of persons in occupation all claiming title under the same lessor the plaintiff is allowed merely to make that lessor defendant. If therefore there is any such remark in 7th Edn., it cannot refer to the landlord but must refer to some person who is merely in receipt of the rents and profits of the land by some arrangement with the landlord. Dicey on Parties to an Action, R. 113 (p. 495) says:

"The persons who have a right to defend in an action of ejectment are any persons named in the writ and any person who is in possession by himself or his tenant."

The learned author proceeds:

"The object of the plaintiff in ejectment is to obtain, not damages but possession of the land. He brings his action against the persons actually in possession, and if he succeeds, e. g., through their letting judgment go by default, he turns them out and himself obtains possession. This may cause damage to a person, who owns but does not himself actually occupy the land and is therefore not made a party to the action. A for example, brings an action of ejectment against X and Y who are in the occupation of land as tenants of Z from week to week; Z is not made a party to the action, the tenants let judgment go by default and A obtains possession. This is obviously an injury to Z, for he must, in order to regain possession, either enter and then turn A out, or, in his turn, bring an action of ejectment against A. But the injury may extend far beyond this, and Z may be deprived of his property, for A may have no title and therefore Z may be able if sued to resist his claim."

This rule of Dicey is quoted in *A. I. R. 1924 Pat 172* as if it supported the decision there but, with respect, in my opinion it is opposed to it for I take it that if a person has a right to defend, it is the same thing as saying that he is a necessary defendant, for it is not within

the discretion of the Court to say whether it will add him or not.

It is then argued that this Court cannot under S. 99, Civil P. C., interfere with a decree on account of the non-joinder of a party. In this connection *Yakanath Eacha Ranni v. Manakkat Vasunnie Elaya* (11), is quoted to show that for purposes of S. 99 misjoinder includes non-joinder. The remark is obiter and the case on which it relies, *Mahabala Bhatta v. Kunhanna Bhatta* (12), was under the old Code. S. 578 of the old Code corresponding to S. 99 of the present ran as follows:

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court."

The words "mis-joinder of parties or causes of action" were introduced in the Code of 1908; so *Mahabala Bhatta v. Kunhanna Bhatta* (12) is no authority as to the meaning of the section as it now stands. This obiter remark in *Yakanath Eacha Ranni v. Manakkat Vasunnie Elaya* (11) has been noticed in *Mohana Mudaliar v. Annamalai* (13) where Sir Walter Schwabe, C. J., says:

"Under S. 99, Civil P. C., no decree is to be reversed on account of any mis-joinder of parties not affecting the merits of the case or of the jurisdiction of the Court and it has been held, how far correctly I am not prepared at present to say, that "mis-joinder" in that section includes non-joinder."

In *Amichand Nagindas & Co. v. Raoji Bhai Moti Bhai* (14) a Bench of the Court held that S. 99 would not permit the Court interfering in appeal even in a case of mis-joinder if the appeal was that the lower Court acted without jurisdiction.

I must therefore hold that the Municipality was a necessary party to the suit and not having been made one in spite of objection taken from the start, the suit must be dismissed. I cannot help observing however that there are several defects in the lower appellate Court's judgment which would probably have by themselves justified the setting aside of its decree. I have noted above the statement that there is no proof of the contention of the defendant that the

8. 10 B & C 113.

9. (1891) 63 L T 507.

10. (1905) 1 K B 152=74 L J K B 62.

11. (1910) 33 Mad 436=5 I C 774.

12. (1898) 21 Mad 373.

13. AIR 1923 Mad 337=72 I C 63.

14. AIR 1930 Mad 714=130 I C 453.

site is part of the Municipal lane; and that if by this it is meant there is no evidence it is a complete mis-statement of fact. The Municipal authorities refused to produce the survey plan and in connection with this the Subordinate Judge observes :

"Unless the plaintiff or his predecessor has raised a dispute at the time of the Municipal survey and the point had been found against him, the decision of the survey authorities cannot be res judicata against the plaintiff".

That is entirely wrong. The survey was made under the Survey and Boundaries Act. Decisions under that Act if not challenged become res judicata. Finally there is the remark:

"It is alleged for the defendant (appellant) that when opening a gate into C the plaintiff took the Municipality's permission. But this was necessary under the Act even if the site C belonged to plaintiff"

Section 196, District Municipalities Act, only requires permission to the opening of a gate into a public street. Therefore if plaintiff had really taken the Municipality's permission to open a gate into the site C it would have been almost conclusive against his contention that C was his private property. The mistake in law here made by the Subordinate Judge is so grave that it might reasonably be said that it affects his whole decision. I have looked at the actual evidence on the point. Apparently what the plaintiff said was that he applied for permission from the Municipality to open a doorway. It was not elicited exactly where this doorway was. Though one cannot be absolutely certain, it is not easy to see where else it could have been than at the point A (1) opening into the site C. In any case the learned Subordinate Judge clearly took it as meaning that the gate opened into the site C, and if so, the admission was fatal to the plaintiff's case.

The appeal is allowed with costs throughout and the suit will be dismissed.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 668

SUNDARAM CHETTY, J.

Rajagopala Goundar and others — Plaintiffs—Appellants.

v.

Maruthamuthu Asari — Defendant — Respondent.

Second Appeal No. 1949 of 1927, Decided on 16th February 1932.

(a) Limitation Act (1908), Art. 144 — Possession permissive in beginning—Onus that it has become adverse is on person setting up that plea—Land held on service tenure—Its possession does not become adverse when no services are performed.

If in the beginning, possession is only permissive, the burden of proving that at some later time it became adverse to the owner is clearly on the person who sets up a title by such adverse possession. If a land is held as a service tenure to be enjoyed as remuneration for services the fact that no services have been performed for any length of time cannot of itself make the holding adverse. In order to make the possession adverse to the owner, there must be a refusal to perform service or a claim to hold the land free of service : 23 Bom 602 and A I R 1922 Pat 541, *Foll.* [P 669 C 2].

(b) Madras Survey and Boundaries Act (1897), S. 13—Order passed under R. 3 of Board's Standing Order No. 31—S. 13 does not apply — Suit for eviction in such case would be governed by Limitation Act (1908), Art. 120.

Bar under S. 13 can be held to be good, if it is proved that there was an order passed by the survey and settlement officer under S. 11 of that Act and it is shown that the procedure prescribed under that Act was duly observed. If the order should be deemed to have been passed under R. 3 (1) (a) of the Board's Standing Order No. 31, Cl. 7, S. 13 would have no application and the suit for eviction of the defendant would be governed by Art. 120, Lim. Act : A I R 1924 P C 150, *Rel on.* [P 670 C 2 ; P 671 C 2]

C. S. Venkatachariar and D. Ramaswami Ayyangar—for Appellants.

N. S. Ramaswamy Ayyangar—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiffs as trustees of the plaint mentioned temple in the village of South Therku Poyyur for the recovery of possession of a plot of land 71 cents in extent as belonging to the temple and also for the recovery of mesne profits. The plaintiffs' case is that this land is a Blacksmith's service manyam land which originally belonged to the mirasidars of the village and was subsequently gifted by them to the temple. The suit land which is comprised in survey No. 83/2-X according to the old survey is included in the pattah, Ex. A which stood in the name of the temple and other prominent mirasidars of the village. The defendant and his ancestors have no doubt been in possession and enjoyment of this land for a pretty long time. A number of documents have been filed on the plaintiff's side which have been duly considered by the learned District Munsif who came to the conclusion that the temple is the

real owner of the suit land and that the defendant's predecessor must have been let into possession of this land for the performance of the Blacksmith's service, and as such, his possession was permissive at the inception. Though there is no document to evidence the alleged gift in favour of the temple, there is, in my opinion, sufficient documentary evidence to indicate that the temple was dealing with this land as owner, though the enjoyment of it has been with the family of the defendant. The cist receipts, Ex. L series, clearly show that in respect of pattah No 380 (Ex. A) the temple was paying the cist from the year 1899 to 1903.

The plea of the defendant that the temple had nothing to do with the suit land and had no sort of title to it is obviously untenable. The learned District Judge did not give a definite finding as to who is the owner of the suit land, though he made a reference to a number of documents bearing on this question in para. 6 of his judgment. The reasoning of the District Munsif is clear, and should, in my opinion, be accepted in coming to a conclusion on this question.

I therefore hold that the plaintiff temple is the owner of the suit land, which is styled as Blacksmith's manyam land and which must have been granted to a predecessor of the defendant for doing the Blacksmith's service to the temple and to the mirasidars of the village. There is no doubt that the possession of the defendant's ancestor was only permissive in its nature at the beginning. There was thus a relationship of landlord and tenant between the temple and the defendant, the condition for the enjoyment of the land being the rendering of some service to the temple. Both the lower Courts have practically treated the defendant's possession as adverse to the temple by reason of the fact that the enjoyment by defendant had been for over the statutory period without rendering any service. If in the beginning, possession was only permissive the burden of proving that at some later time it became adverse to the owner is clearly on the person who sets up a title by such adverse possession. On this question the principle of law has been laid down in two decisions relied upon by the learned advocate for the appellants,

namely, *Komargowda v. Bhimaji* (1) and *Nandlal Sahu v. Tikait Srinivasa Kukum Sing Deo* (2).

If a land is held as a service tenure to be enjoyed as remuneration for services the fact that no services have been performed for any length of time cannot of itself make the holding adverse. In order to make the possession adverse to the owner, there must be a refusal to perform service or a claim to hold the land free of service. If therefore mere cessation in the performance of service would not change the character of possession into adverse possession, it has to be seen whether there was a demand for the performance of service and a refusal on the part of the defendant. It is alleged in the plaint that the defendant declined to render service to the villagers and the temple for six years before the date of the suit. The evidence on the side of the plaintiffs also tends to show that the defendant was refusing to comply with the demand for performance of service during three or four years before suit. In fact the defendant himself admits in his evidence that before settlement the temple authorities asked him to do some work and he refused to do it. The settlement referred to by him was in 1920 or 1921.

In this view the possession of the defendant could not be deemed to be adverse to the temple before such demand and refusal. The lower Courts are not correct in treating the defendants' possession to be adverse from the mere fact of non-performance of services for more than 12 years before the date of suit. The present suit is not therefore barred under Art. 144, Lim. Act. The Courts below have held that the plaintiffs' suit is barred under S. 13, Survey and Boundaries Act (Act 4) of 1897, because it was brought after the expiry of the period of one year prescribed in that section. This bar can be held to be good, if it is proved that there was an order passed by the Survey and Settlement Officer under S. 11 of that Act and it is shown that the procedure prescribed under that Act was duly observed. In February 1921 the present defendant filed a petition to the Survey Collector referring to the re-survey of the village and also to the fact of the Survey Inspec-

1. (1899) 23 Bom 602=1 Bom L R 61.

2. AIR 1922 Pat 541=69 I C 703=1 Pat 292.

tor having registered the land in question in his name. He further stated that the counter-petitioners were objecting to his enjoyment and causing obstruction to him. He prayed for the decision of the dispute and for an order in his favour: vide Ex. D. Ex. D-1 is a copy of the order passed by the Special Assistant Settlement Officer. The defendant's petition was treated as one for the transfer of registry in his name in respect of S. No. 84/1. It seems some inquiry was made and that officer observed in his order as follows:

"The whole village says that the land belongs to the temple. The Asari certainly occupies the house and has raised the crops surrounding the house. It is admitted that he and his family have lived in the house for 50 years. Revenue registry should follow enjoyment. The temple authorities should evict petitioner by civil suit. Register in the name of the Asari." (Ex. D-1).

In view of Exs. D and D-1 it is contended on behalf of the appellants that the order is not one within the purview of S. 11 of the aforesaid Act, but must be deemed to be one passed under Board's Standing O. 31, Cl. 7. That clause says, that where parties who have no documents of title are shown in a summary inquiry to have been in possession and to have paid the revenue as reputed owners for 12 years or more, transfer of registry must be made after notice, as provided in R. 3 (1) (a). Such an order can be made by a revenue officer as is indicated in the rule itself, because the action contemplated may be taken by the revenue officers either on their own motion or on the application presented by the parties concerned. If this order should be deemed to have been passed under the aforesaid rule, then S. 13, Survey and Boundaries Act, would have no application. It is however argued on the respondent's side that such an order can be passed at the re survey by the Survey and Settlement Officer and would therefore come within the scope of S. 11 of the Act. There is some difficulty in deciding whether this order comes really within the purview of S. 11 or not, in the absence of sufficient materials before the Court. It looks that both the Courts below assumed that the order is one to which the Survey and Boundaries Act applied and therefore this aspect of the question was not fully considered and decided. As the question of limitation turns upon the deter-

mination of this point, it seems to me necessary in the interests of justice, that a revised finding should be submitted after giving an opportunity to both sides to adduce any additional evidence which they choose to offer. The point as to which the revised finding is to be submitted is as follows:

"Whether the order evidenced by Ex. D-1 was one coming within the purview of S. 11, Survey and Boundaries Act (Act 4) of 1897, which would be conclusive against the plaintiffs under S. 13 of the Act, as no suit was brought to have that order set aside within a year from its date."

The case is remanded to the Court of the District Munsif of Negapatam for the submission of the finding within six weeks from this date. Ten days will be allowed for objection. If the plaintiffs' suit should be held to be not barred, then the question of paying compensation to the defendant in respect of the house built by him on the suit site or of allowing him to be in possession thereof, will have to be considered and decided.

Finding.

This Court has been asked by the High Court to submit a finding on the following point:

"Whether the order evidenced by Ex. D-1 was one coming within the purview of S. 11, Survey and Boundaries Act (Act 4) of 1897, which would be conclusive against the plaintiffs under S. 13 of the Act, as no suit was brought to have that order set aside within a year from its date."

For the reason discussed above, my finding is that the order evidenced by Ex. D-1 is one coming within the purview of S. 11, Survey and Boundaries Act (Act 4) of 1897, and that it is conclusive against the plaintiffs under S. 13 of the Act as no suit has been brought to have that order set aside within a year from its date. (After the return of the finding of the Court of first instance, the Court delivered the following)

Judgment.—The question now to be determined is, whether the finding of the learned District Munsif, on the issue framed and sent to him for a finding should be accepted. Defendant who sets up a special bar of limitation to the suit, has to prove satisfactorily, that the order (Ex. D-1) dated 28th February 1921, is really an order passed by the Survey Officer under S. 11, Survey and Boundaries Act of 1897. It is necessary to pay particular attention to the wording of the order itself, for understanding its nature and scope. The order does

not specify under what provisions of law it was passed. The petition of the defendant is treated as an application for the transfer of registry in his name for Survey No. 84/1 in Therukupoyyur village, Nagapatam Taluq. The dispute was as to the ownership of this land. By virtue of the defendant's long enjoyment, the registry was ordered to be made in his name. The reason for this order is stated thus: "Revenue registry should follow enjoyment." It is obvious, that this was not a case of boundary dispute at all. In the petition (Ex. D) on which this order was passed, there is no allegation as to the existence of any dispute as to the boundaries of any land. The preamble of the aforesaid Act, shows that it relates only to Survey of lands and settlement of boundary disputes. S. 11 of the Act, relates to disputes about boundary only. If the boundary between two lands is in dispute and has to be fixed, a proper survey should be made, and the question of possession and enjoyment may have to be determined, for fixing the boundary correctly.

In the present case, such was not the dispute at all. It is also clear, that the authority competent to pass an order under S. 11 is the Survey Officer. There can be no doubt as to this. About the time of this order, Mr. Holdsworth, I. C. S., was Sub-Collector and Special Assistant Settlement Officer (as would appear from the History of Services of Gazetted Officers), and the Notification No. 160, Part I, pp. 1000 of the Fort Saint George Gazette of 1920, shows that he was appointed as Special Assistant Settlement Officer, No. 1 Party, Tanjore. Whereas, the Survey Officer was Mr. R. Dasaratha Raman, as shown by Exs. 4 and 7. From the materials available, it is not possible to hold that Mr. Holdsworth was the Survey Officer, when he passed the order (Ex. D-1) in February 1921. The learned District Munsif does not seem to have paid due attention to the scope of the said Act and the nature of the dispute contemplated in S. 11 of that Act, before inferring that the order Ex. D-1 must be one passed under that section. Mr. Holdsworth has passed that order, as Special Assistant Settlement Officer. In that capacity, he had the power to fix the rates of assessment, and make the classification of the soils, which

would be incorporated in the settlement record. For that purpose, he would have authority to determine the person liable for paying the assessment fixed for a particular land. It is for revenue purposes, he has ordered the transfer of registry to the defendant's name.

Under the Boards Standing Order No. 31, Cl. 7, transfer of registry may be effected by a Revenue Officer. Mr. Holdsworth, was on the date in question a Revenue Officer, as he was a Sub-Collector. But in the order Ex. D-1, he styled himself as Special Assistant Settlement Officer. If it can be said that that order should not be taken to be one passed under S. 11, Survey and Boundaries Act, as he was not the Survey Officer, it can also be urged, that the order should not be deemed to be one passed under Cl. 7 of Board's Standing Order No. 31, as he did not purport to pass that order as a Revenue Officer. At any rate, we can safely hold, that the order in question would not have become conclusive against the plaintiffs after the lapse of a year from its date, under S. 13, Survey and Boundaries Act, because the order is not shown to be one passed under S. 11 of that Act. On a perusal of Exs. 4 and 7, there is no difficulty in stating, that the notice issued to the defendant after the completion of the survey, on 12th February 1922, is one under S. 11, sub-S. 4 of the Act, and not a special communication of an order as per sub-S. 3. Moreover, this notice (Ex. 4) was issued about a year after the date of the order Ex. D-1, and this is an indication that it could not be an order under sub-S. (2). I am therefore unable to accept the finding of the District Munsif. The issue sent down for a finding, must be answered in the negative and against the defendant.

The present suit is, in my opinion, governed by Art. 120, Lim. Act, and is not barred as it has been filed within six years from the date of Ex. D-1: (vide *Ambu Nayar v. Secy. of State* (3) at p. 585 of 47 *Mad*). In case of eviction, the defendant is certainly entitled to adequate compensation for the house built on the suit land. In the result, the decrees of the Courts below are set aside, and a decree is passed in plaintiff's favour for the recovery of possession of

the suit land, with the house thereon, on payment of adequate compensation to the defendant for the house, which will be fixed by the Court of First Instance in execution, after making the requisite inquiry. The payment of compensation so fixed, is a condition precedent for the recovery of the suit land from the defendant. Considering the circumstances of the case, I direct the parties to bear their own costs throughout.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 672

CURGENVEN AND SUNDARAM
CHETTY, JJ.

Kumarappa Chettiar and others—Defendants—Appellants.

v.

Suppan Chettiar—Plaintiff—Respondent.

Appeal No. 124 of 1927, Decided on 7th March 1933, against decree of Dist. Judge, West Tanjore, in O. S. No. 8 of 1926.

Mortgage—Redemption—Suit for redemption by subsequent usufructuary mortgagee against prior usufructuary mortgagee—Latter can claim reasonable interest only if he is entitled to do so under T. P. Act (1882), Ss. 67 and 68.

Where a subsequent usufructuary mortgagee sues for redemption against a prior usufructuary mortgagee, the former can be made liable for reasonable interest also along with principal amount, only if the latter can claim interest in a suit under S. 68 coupled with S. 67.

[P 673 C 2]

*K. S. Sankara Ayyar—*for Appellants.

*B. Sitarama Rao and S. R. Muthuswami Ayyar—*for Respondent.

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff for redemption of the plaint mentioned usufructuary mortgage which is evidenced by Ex. D. The plaintiff sued in his capacity as a later usufructuary mortgagee, defendants 2 to 5 being the mortgagees under Ex. D. One of the contentions raised by the mortgagees by way of attack against the plaintiff's claim is, that the suit is premature. This question depends upon the construction of the terms of the mortgage deed. That deed is dated 8th July 1908 and provides a period of 15 years for the enjoyment of the mortgaged properties by the mortgagees from the date of that document, and further recites that the mortgagor should pay the amount in the beginning of the sixteenth year. If the

terms of the deed are literally understood, we must hold that the amount of the mortgage is payable at the end of the 15 years' term which should be calculated from the date of the mortgage deed. In this view the time for redemption would expire on 8th July 1923, and the present suit is sustainable. It is however contended on behalf of defendants 2 to 5, that the mortgagees should have a period of 15 years for the enjoyment of the mortgaged properties, irrespective of the term "from this year," indicating the commencement of the period.

If the items of consideration set forth in the mortgage deed are taken into account, it is clear that the sums of Rs. 8,500 and Rs. 6,000, were not paid on the date of the mortgage deed, but were undertaken to be paid by the mortgagees in discharge of two prior othies. The only amount that was actually paid on the date of Ex. D was Rs. 1,000. We find that the terms fixed for the redemption of the two prior othies had still to run when Ex. D was executed. Those mortgages were redeemable in April 1911. That being so the mortgagees under Ex. D should be taken to be legitimately entitled to possession of the two villages covered by the previous othies, only from April 1911. They were at liberty to enjoy the third item of the mortgaged properties mentioned in Ex. D even from the date of the deed. Assuming that the period of 15 years' enjoyment with respect to those two villages should be reckoned from the date of the expiry of the term of the previous othies the time for redemption would be ripe by April 1926. Even from this standpoint, the present suit which was filed on 28th July 1926 is certainly not premature. This objection against the maintainability of the suit must therefore be overruled.

The second question for consideration is what is the proper amount payable to defendants 2 to 5 in redemption of the suit mortgage. That the principal amount of Rs. 15,500 is due is admitted on both sides and the only point in dispute is whether the mortgagees would be entitled to any interest by way of compensation for the period subsequent to 2nd April 1911 till the date of their actually taking possession in April 1913. The mortgage deed Ex. D provides for

the enjoyment of the rents and profits in lieu of interest. There is no specific provision for the payment of interest at a certain rate. The question before us is whether the mortgagees are entitled to claim any reasonable rate of interest on their principal amount for the aforesaid period and can claim the payment of the same along with the principal money at the time of the redemption of this mortgage. The case set up by defendants 2 to 5 is, that prior to April 1911 they did make a deposit of the amount of the prior othies in Court and therefore they must be deemed to have been wrongfully kept out of possession of the mortgaged properties on account of the plaintiff's conduct. What we find from the judgment in the previous suit (Ex. 2) is that there was no valid tender of the mortgage money, as the plaintiffs therein (the present defendants 2 to 5) failed to prove that they made an effective deposit into Court in proper time so as to enable the mortgagee to draw the money in accordance with the stipulations contained in the othi deeds.

This is the finding on issue 8. It is contended that that finding would not operate as res judicata in the present suit. Granting that it is so we have to see whether any evidence has been adduced in the present suit on behalf of defendants 2 to 5, in order to show that they made the deposit in proper time in conformity with the stipulations contained in the prior mortgage deeds. Beyond the statement of D. W. 1, that a sum of Rs. 14,500 was deposited in Court which was lying there for two years, there is nothing to show that the deposit was made in proper time in conformity with the terms of the mortgage deed. We are not therefore in a position to say that it was a valid deposit. It is only when defendants 2 to 5 who were entitled to redeem the previous mortgage were kept wrongfully out of possession by the act of the prior mortgagee, that they could ask in the present suit that a reasonable amount should be awarded to them by way of interest, which should be tacked to the principal of the mortgage money payable by the plaintiff for redeeming the mortgage. If in a suit for the recovery of the mortgage money under S. 68, T. P. Act, coupled with S. 67, defendants 2 to 5 can properly claim interest in addition to

the principal amount, then only can the plaintiff in the present suit be made liable for the same in order to redeem the mortgage. We are not satisfied that such a claim for interest has been made out and therefore we hold that the plaintiff was bound only to pay the principal amount of the mortgage money, namely, Rs. 15,500, by way of redeeming the suit mortgage. The decision of the lower Court, so far as these two questions are concerned, is correct. The appeal should therefore be dismissed with costs.

There is a memorandum of objections which the plaintiff-respondent has filed and the question to be considered is whether the plaintiff is entitled to any mesne profits for the period subsequent to the deposit of the principal sum into Court. In this case, it is shown that the amount was deposited by the plaintiff, but as the defendants refused to accept that amount in satisfaction of the mortgage, the Court dismissed the plaintiff's application on 17th July 1926 (vide Ex. K-1). By reason of the findings already given, the deposit of the principal sum alone by the plaintiff must be taken to be a valid deposit. Under S. 76 (1), T. P. Act, the mortgagees would be bound to account for the gross receipts from the mortgaged property from the date when they could take such amount out of Court. This is not a case of a mere deposit of the amount into Court. The additional circumstance disclosed in the evidence is, that subsequent to the refusal by defendants 2 to 5 to accept that amount, the plaintiff withdrew that sum and utilised it for his own purposes. That being so, it is contended on behalf of the appellants, that the mortgagees should be allowed reasonable rate of interest and this should be set off against the mesne profits awardable to the plaintiff. In order to disentitle the mortgagees to interest, the plaintiff should prove that in spite of his having withdrawn the money from the Court and utilised it for his own purposes, he was ever ready and willing to pay the same towards the discharge of the mortgage.

He should satisfy the Court that he had sufficient funds available with him and that he was also ready to pay the same. Such proof is wanting in the present case, and as observed by the

learned District Judge, even when a challenge was made in Court, the plaintiff did not choose to accept the challenge and deposit the money into Court in order to testify his ability to pay as also his readiness and willingness to do so. We therefore find that the plaintiff has not shown circumstances which would induce us to disallow interest to the mortgagees. In the circumstances of this case, we think fit to allow 9 per cent interest on the principal amount. In ascertaining mesne profits for the period between 17th July and 8th April 1927, the date of the order of the High Court on the petition for stay of further proceedings (vide C. M. Ps. 1339 and 1518 of 1927), interest on the principal amount at 9 per cent will have to be set off in favour of defendants 2 to 5. The amount of the profits subsequent to 8th April 1927 will have to be determined in accordance with the order on the aforesaid petitions. This enquiry will be made by the lower Court and the result of that enquiry will be incorporated in the final decree to be passed. There will be no order as to costs in the memorandum of objections. Three months' time is fixed for the payment of the entire mortgage money after the ascertainment of the same by the lower Court.

P.R.S./K.S.

*Order accordingly.***A. I. R. 1933 Madras 674**

MADHAVAN NAIR, J.

E. Chathukutty—Appellant.

v.

E. Raman and others—Respondents.

Civil Misc. Second Appeal No. 225 of 1927, Decided on 8th September 1932, against order of Dist. Judge, South Malabar, in A. S. No. 368 of 1926.

Limitation Act (1908), Art. 182 (5) — Payment by one defendant for himself and not certified — Limitation is not extended against others either under Art. 182 (5) or Limitation Act (1908), S. 20.

An execution application was made beyond three years from the last application in 1922. One of defendants had made certain payment which was not certified towards costs within three years from the execution last filed. The payment was not made on behalf of the other defendants:

Held: that the application was barred against the other defendants as mere payment is not a step-in-aid of execution and it is only the petition put in to certify such payment that can constitute a step-in-aid of execution such as will give a fresh starting point of limitation under S. 182 (5) and the payment by one of the

defendants being only for himself could not extend limitation under S. 20 also: *A I R 1925 Mad 131, Foll*; *A I R 1918 Mad 620 and 31 I C 318, Dist.* [P 674 C 2]

K. Kuttikrishna Menon — for Appellant.

K. P. Ramakrishna Ayyar — for Respondents.

Judgment.—The question in this case is whether the payment made by defendant 27 would save the decree from becoming barred by limitation against the other defendants.

The previous application for execution was made on 22nd August 1922. The present application was made on 3rd September 1925. Obviously the application is barred by limitation. But reliance is placed on the payment of Rs. 50 made by defendant 27 towards costs in October 1922. The question is whether this payment would operate to save the application from becoming barred by limitation. At the outset I may mention that there was no application filed to certify this payment of Rs. 50 by the decree-holder. There is a decision of this Court which is on all fours with the present case: see *Narayana Nair v. Kunhi Raman Nair* (1). There it was held that mere payment is not a step-in-aid of execution and it is only the petition put in to certify such payment that can constitute a step-in-aid of execution such as will give a fresh starting point of limitation under Art. 182 (5), Lim. Act. This reported case is precisely similar to the present case. I do not see any reason why I should not follow it. As pointed out in that decision there are two ways in which a decree-holder may get his application saved from the bar of limitation; he may prove a payment under S. 20, Lim. Act or he may show that a step-in-aid of execution before the expiry of three years from the prior application has been taken by him. In the present case obviously S. 20, Lim. Act, cannot help the decree holder, because the payment made by defendant 27 was not a payment on behalf of the others also. The payment was a payment for himself. Then he can rely only on Art. 182 (5). As I have pointed out no application has been filed to certify the payment. In fact there is no application before the Court in connection with this payment of Rs. 50.

Mr. Ramakrishna Aiyar relies on *Masilamani Mudaliar v. Sethuswami Ayyar* (2) and *Rajam Ayyar v. Anantharatnam Aiyar* (3) to show that mere mention of the payment of Rs. 50 in the execution petition under consideration is enough without any request for certification of the payment to save the application from the bar of limitation. I have carefully read the two decisions. They are decisions not under Art. 182 (5), but under S. 20, Lim. Act. They simply state that for the purpose of S. 20 mention of the past payment of the money in the execution petition, if the payment is proved, would amount to a certificate of payment even though the payment has not been actually certified. Those decisions therefore do not help the decree-holder in this case. For the above reasons I think that the lower Court's decision is wrong; it is set aside and that of the Subordinate Judge is restored with costs here and in the Court below.

P.R.S./M.N.

Appeal allowed.

2. A I R 1918 Mad 620 = 41 I C 701=41 Mad 251.
3. (1915) 31 I C 318.

A. I. R. 1933 Madras 675

WALSH, J.

S. V. R. Rm. Ramaswami Chetty—Appellant.

v.

S. P. S. S. Palaniappa Chetty and others—Respondents.

Appeal No. 34 of 1928, Decided on 10th January 1933, from order of Dist. Judge, Ramnad, D/- 22nd August 1927.

(a) Limitation Act (1908), Art. 182—Step in aid of execution—Conditions necessary so far as Madras is concerned are (1) step must be one which Court has to take; (2) Court must be asked to take it — Application for time to apply for substituted service is not step-in-aid.

So far as Madras is concerned a step in aid of execution for the purposes of Act. 182, Lim. Act must fulfil two conditions: (1) the step must be one which the Court has to take and; (2) the Court must be asked to take it.

The decree-holder filed an execution petition on 14th October 1920. Notice was ordered returnable on 15th November 1920. Service not having been effected, fresh notice was ordered for 16th December 1920. The notice was taken out for the same address, to which the first notice had been taken out and was returned with the intimation that the judgment-debtor had gone to Rangoon. Then the decree-holder's pleader applied for time to put in an application for substituted service, but the Court ordered fresh notice for 17th January 1921.

Batta was ordered to be paid, but the same not having been paid the petition was dismissed, statedly on this ground, on 23rd December 1920.

Held: that the application for time to put in an application for substituted service was not step in aid of execution: *Case law reviewed.*

[P 677 C 1]

(b) Civil P. C. (1908), O. 7, R. 6 — Exemption from limitation.

Grounds for exemption from limitation should be expressly pleaded under O. 7, R. 6: 31 Cal 195, Ref.

[P 677 C 1]

(c) Practice—Party should not be allowed to raise new case in appeal founded on facts which opposite party had no opportunity to meet in appeal.

It is not open to a party to raise in the appellate Court a case founded on totally different and contradictory facts which the opposite party had no chance of meeting. [P 677 C 2, P 678 C 1]

S. R. Muthuswami Ayyar — for Appellant.

A. Nagaswami Ayyar — for Respondents.

Judgment.—This appeal concerns the question as to whether an execution petition filed on 15th December 1923 is time-barred or not. The facts are fully stated in the order of the lower appellate Court and the question of limitation turns on two points: (1) was the application of the decree-holder's pleader on 16th December 1920 for time to put in an application for substituted service a step in aid of the E. P. then pending E. P. No. 1006 of 1920; (2) had that petition been improperly dismissed on 23rd December 1920 and was it therefore to be regarded as still pending when the present E. P. was put in on 15th December 1923?

The learned District Judge with some hesitation finds the first point in the decree-holder's favour, but thinks that the second which he finds in the affirmative is a stronger ground. Against his finding that the execution petition is not time-barred this appeal is filed. The decree was a mortgage one for sale. The decree-holder filed an execution petition, E. P. No. 1006 of 1920, on 14th October 1920. Notice was ordered returnable on 15th November 1920. Service not having been effected, fresh notice was ordered for 16th December 1920. The notice was taken out for the same address, Buduvayal, to which the first notice had been taken out and was returned with the intimation that the judgment-debtor had gone to Rangoon. From the deposition of the pleader who appeared for the decree-holder, which has been accepted by the lower appel-

late Court as correct, what happened on that date was this that the pleader asked for time to apply for substituted service but the Court ordered fresh notice for 17th January 1921. Batta was ordered to be paid and not having been paid the petition was dismissed, statedly on this ground, on 23rd December 1920.

The entry in the printed papers that this dismissal was on 17th January 1921 is an error and the order of the lower appellate Court has proceeded on the correct fact that it was dismissed on 23rd December 1920. It seems to be well settled now, so far as Madras is concerned, that a step in aid of execution for the purposes of Art. 182, Lim. Act, must fulfil two conditions: (1) the step is one which the Court has to take; and (2) the Court must be asked to take it: *Rangachariar v. Subramai Chetty* (1). This was approved of in *Krishna Pattar v. Seetharama Pattar* (2) and was followed in *Ramaswami v. Veerama* (3), and the same principles were followed in *Raghava Aiyangar v. Natesa Chettyar* (4). The same view was taken in *Parthasarathy Chetty v. Abdul Rahman* (5). In *Devasikamani Annamalai Desikar v. Raju Pillai* (6) it was held that where the decree-holder asks for time to do something which he himself has to do this cannot be a step in aid: see also *Umed Ali v. Abdul Karim* (7).

The respondent relies on *Abdul Kader Rowther v. Krishnan Malaval* (8) which was followed in *Munuswami Naidu v. Muthiah Naidu* (9), but this was expressly dissented from in *Masilamani Mudaliar v. Sethuswami Aiyar* (10) by Ayling, J. It is argued before me that it was not necessary for the purpose of the latter case for him to dissent from *Abdul Kader Rowther v. Krishnan Malaval* (8), but whether that is so or not the two principles laid down above and accepted would render the decision in *Abdul Kader Rowther v. Krishnan Malaval* (8) incorrect and it is clear that *Abdul*

Kader Rowther v. Krishnan Malaval (8) has not been followed in the later decisions of this Court. *Narsingh Dyal Singh v. Kalicharan* (11) is no doubt an authority in respondent's favour but in the light of the rulings of this High Court I am not prepared to follow it. *Sheoshankar Lal v. Radha Shyam* (12) is not quite parallel and in any case is opposed to the principle laid down in *Devasikamani Annamalai Desikar v. Raju Pillai* (6). It was argued for the respondent that the decree-holder could not apply for substituted service until he knew the result of the return, but there is nothing to show that he could not have put in such an application on the day of the return, 16th December 1920, when he came to know of it. I do not agree with the view of the learned District Judge that a failure to make an application for substituted service at once might have entailed the dismissal of the petition for want of diligence as regards the correct address of the judgment-debtor. There had been no order that correct address was to be furnished as that given was wrong. The Court could not under these circumstances have dismissed the petition merely because the judgment-debtor was absent from home on the second occasion when notice was taken to him. But assuming that the Court might have dismissed it it has not been shown why the decree-holder could not have put in his petition for substituted service on the 16th itself when he learned that the notice had not been served.

One case, *Sankara Nainar v. Thangamma* (13), has been quoted for the respondent, where an application by a decree-holder in a redemption suit to extend the time for payment of the mortgage decree was held to be a step in aid. It is a very nice point whether such an application is one in aid of execution, but it is certainly arguable that it is so, because the redemption decree-holder improves his position under the decree by getting further time to redeem. This case has been referred to in *Devasikamani Annamalai Desikar v. Raju Pillai* (6) and some doubt cast on it. It is however clearly no authority for holding that an application to grant time to put in a petition

1. A I R 1920 Mad 86=58 I C 536.

2. A I R 1926 Mad 1178 = 50 Mad 49 = 98 I C 156.

3. A I R 1928 Mad 143=106 I C 648.

4. (1930-31) M W N 418.

5. A I R 1923 Mad 686=75 I C 489.

6. A I R 1930 Mad 995=128 I C 713.

7. (1908) 35 Cal 1060=8 C L J 193.

8. A I R 1914 Mad 384 = 38 Mad 695 = 23 I C 533.

9. (1916) 33 I C 79.

10. A I R 1918 Mad 620=41 Mad 251=41 I C 41.

11. (1910) 5 I C 147.

12. A I R 1919 All 447=50 I C 278.

13. A I R 1922 Mad 247=45 Mad 202=70 IC 33.

for substituted service in a case like the present is anything which advances execution or is a step in aid. I must hold on the recent authorities of this Court that the application for time to put in a petition for substituted service was not a step in aid so as to save limitation.

The second ground on which the present execution petition has been found to be in time is one which was not taken at all in the petition—certainly not in its present form—and has really been made up for the decree-holder in the lower appellate Court on facts which are directly contrary to those which the decree-holder himself stated in his E. P. Taking first the broad argument that the E. P. was wrongly dismissed, the grounds for exemption from limitation should have been expressly pleaded under O. 7, R. 6, Civil P. C., in the petition: vide *Jogeshwar Roy v. Rajnarain Mitter* (14). It is doubtful whether such a ground was pleaded at all in the petition. The decree-holder said in his E. P.

"Fresh notice was ordered on 16th December 1920 and it was posted to 17th January 1921 when the notices were returned stating that the defendant went away to Kaulalampur and thus the application came to an end."

There is a further allusion to the point in the prayer at the end. As there was some dispute as to whether the printed translation of this part was correct, I had a fresh translation made. The relevant part runs:

"Although more than three years have passed since the date of filing of the previous petition, inasmuch as it was pending disposal, the notice returnable date being up to 16th December 1920, inasmuch as fresh notice was ordered on the said date and inasmuch as the defendant was living for about two or three years at Kaulalampur in the Malay States (outside British India), this petition is not barred under law and the Limitation Act."

Assuming that these two statements amount to an assertion that the petition was wrongly dismissed and was therefore to be regarded as still pending we have to see what was the wrongful dismissal put forward by the decree-holder. His statement that the notice ordered on 16th December 1920 was returned unserved on 17th January 1921, on which date the petition was dismissed owing to the want of service, clearly implies that batta was paid by the decree-holder, else the notice would

never have been sent at all. The wrongful dismissal, if any, therefore pleaded was that the Court had no right to dismiss the petition on 17th January 1921, for the mere reason that the decree-holder was found absent from the address given. There was according to this pleading no default whatsoever on the part of the decree-holder in paying batta or taking any other necessary action. That was the case, if any, which the judgment-debtor had to meet when he asserted the obvious bar of limitation. Now it is admitted that these facts are entirely incorrect and that the petition was in fact dismissed on 23rd December 1920 for want of payment of batta which had not been paid.

The decree-holder's case of wrongful dismissal having been proved to be totally false, the lower appellate Court has either set for him, or allowed to be set up, a case which he did not plead, and which is entirely at variance with the case which he did plead. The learned District Judge holds that the dismissal of the E. P. on 23rd December 1920 was illegal because no notice was given to the decree-holder that it would be dismissed on that day and no time had been fixed within which batta had to be paid. In *Venkatappa v. Nanjappa* (15) it was held that dismissal for default of payment of batta is a correct dismissal and *Chalwadi Kotiah v. Ahimchamma* (16) was there distinguished. It is true that in that case a date had been fixed for the payment. I do not think it is necessary to discuss the question whether, if the decree-holder had pleaded that he had failed to pay the batta in time because he was not given a date, and that therefore the dismissal of 23rd December 1920 was improper, such an argument would have been good to save limitation. But the fact is that, if he be taken to have pleaded a wrongful dismissal of a petition at all, it was not only not on these grounds but on grounds totally contradictory of any such case. He stated inferentially that he had paid batta and that the wrongful dismissal was on 17th January 1921, for no other reason than that the judgment-debtor was not found at his address. It was not open to raise for him in argument in the lower appellate Court a case

14. (1904) 31 Cal 195=8 C W N 168.

15. (1916) 35 I C 594.

16. (1908) 31 Mad 71=18 M L J 46.

founded on totally different and contradictory facts which the judgment-debtor had no chance of meeting.

As a matter of fact, on the decree-holder's version as given in his E. P. there is no explanation for his not turning up on 17th January 1921, which he does not appear to have done and for not taking some further steps then. His learned advocate before me suggested that on account of the dismissal of the petition on 23rd December 1920 the decree-holder had got tired of it and took no further interest in it; but on his clients showing he knew nothing at all, even when he put in the present petition, of the dismissal on 23rd December 1920 and was under the impression that the petition had been dismissed on 17th January 1921. The cases where petitions are dismissed for statistical purposes have no application here. The dismissal in this case was for non-payment of batta. The second ground therefore on which the appellate Court mainly relied in holding that the petition was not barred by limitation was, in my opinion, not open to the decree-holder to take, as it was a new case which contradicted on facts the case he had already set up. In the result I must hold that the petition was barred by limitation. The appeal is allowed with costs throughout and the present E. P. must be dismissed with costs.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 678

Full Bench

RAMESAM, ANANTHAKRISHNA AYYAR
AND CORNISH, JJ.

(*Kalagerla*) Sankara Mahadeva Setty
—Appellant.

v.

(*Kalagerla*) Sanyasayya—Respondent.

Misc. Appeal No. 296 of 1929, Decided on 5th January 1933, from order of Dist. Judge, Vizagapatam, D/- 8th December 1928.

(a) Civil P. C. (1908), O. 32, R. 6—No order granting leave to next friend to receive property—R. 6 does not apply.

Where there is no order by the Court, granting leave to the next friend to receive any property on behalf of a minor, but merely to draw money deposited in Court and to purchase Government pro-note, O. 32, R. 6, does not apply: *A I R 1918 Mad 661, Dist.* [P 678 C 2]

(b) Civil P. C. (1908), S. 145—Money paid by judgment-debtor into Court—Application before disbursement of money to convert into

Government pro-notes is "proceeding consequent" on suit within S. 145.

No doubt when the judgment-debtor has paid the money due from him under the decree into Court there is no further dispute between the two parties to the suit; but until the money deposited by the judgment-debtor is finally disbursed, an application to convert the money into Government pro-notes would be "a proceeding consequent" on the suit within S. 145: *A I R 1928 Rang 249, Dist.* [P 678 C 2]

B. Satyanarayana—for Appellant.

Y. Suryanarayana and Kasturi Seshagiri Rao—for Respondent.

Facts.—A Court merely ordered that the next friend of a minor decree-holder should be allowed to draw out the money paid into Court by the judgment-debtor in satisfaction of the decree in suit, and after deducting expenses of the suit should purchase Government promissory notes for the balance and deposit the same into Court. Another person executed a surety bond binding himself responsible for the said amount till the next friend deposited in Court the Government promissory notes. The next friend died without ever depositing any Government promissory notes and when the minor, on attaining majority, filed an application under S. 145, Civil P. C., for execution against the surety, the lower Court dismissed it relying on *Kurugodappa v. Soogamma* (1).

Judgment.—In this case there is no order by the Court granting leave to the next friend to receive any property on behalf of a minor. O. 32, R. 6 does not therefore apply. In this respect the case differs from the decision in *Kurugodappa v. Soogamma* (1).

The question still arises whether S. 145 does not apply to the case. Cls. (a) and (b) do not apply. But we think Cl. (c) applies. It is true that the judgment-debtor has paid the money due from him under the decree into Court and there is no further dispute between the two parties to the suit. But until the money deposited by the judgment-debtor was finally disbursed there can be "a proceeding consequent" on the suit. The application by the next friend in which the order of the Court for converting the money into Government promissory notes was made is such a proceeding. We think that the conclusion of the learned Judges in *Kurugodappa v. Soogamma* (1) depended on the fact that that was a proceeding un-

1. *A I R 1918 Mad 661=39 I C 928=41 Mad 40.*

der O. 32, Cls. 6, and the observations must be confined to the actual facts of the case. We are of opinion that S. 145 applies and an order for execution against the surety may be made. In *Ko Maung Gyi v. Daw Tok* (2) there was no suit or proceeding consequent on the suit.

We reverse the order of the Court below and remand the matter for fresh disposal according to law. The appellant will have costs of this appeal. Costs in the Court below will abide the result.

P.R.S./R.K.

Case remanded.

2. A I R 1928 Rang 249=112 I C 427=6 Rang 474.

* A. I. R. 1933 Madras 679

CORNISH, J.

Manicka Chetty—Petitioner.

v.

Narayanswami Naidu and others—
Opposite Parties.

Civil Revn. Petn. No. 291 of 1930, Decided on 24th March 1933, from order of Sub-Judge, Cuddalore, D/- 8th August 1929.

* Civil P. C. (1908), O. 33, R. 1—Suit for redemption—Equity of redemption is "subject-matter of suit" within R. 1—It should be excluded in determining whether plaintiff is pauper.

In a suit for redemption the equity of redemption is equally "the subject-matter in dispute" within the Court-fees Act as "the subject-matter of the suit" under O. 33, R. 1. The value of the equity of redemption to which the petitioner under O. 33, R. 1 is entitled, must therefore be excluded in determining whether he is a "pauper" as defined in the latter part of the explanation. The Court has therefore to inquire whether the petitioner is entitled to any other property worth Rs. 100: 3 I C 459; 3 Mad 249 and 33 All 237, Ref. [P 679 C 2]

J. R. Gundappa Rao—for Petitioner.

A. Srirangachari—for Opp. Parties.

Order.—The petitioner who applied for leave to sue as a pauper has brought a suit to redeem a mortgage for Rs. 6,000. The mortgage is stated to be a mortgage by conditional sale, and the petitioner is not in possession. In his plaint he alleges that the mortgaged property is worth at least Rs. 12,000. The Subordinate Judge has dismissed the application in the following words:

"The petitioner cannot redeem except on payment of Rs. 6,000 according to him. If he can find that amount after the decree is passed he can find it now and file the suit after paying court-fee."

The petitioner in order to bring himself within the explanation of "pauper"

in O. 33, R. 1, Civil P. C., must show that he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit. He has at least the equity of redemption which he admits to be worth considerably more than Rs. 100. In *Kapil Deo Singh v. Ram Rikha Singh* (1), it was held that a plaintiff suing for redemption of a mortgage could not be allowed to sue as a pauper when he could raise money on his equity of redemption. The ground of that decision was that such a course did not amount to a mortgaging of the plaintiff's claim within the mischief aimed at in *Vedanta Dasikacharyulu v. Perindevaramma* (2). The report does not state what was the character of the mortgage or whether the mortgagor was in possession. But the ruling does not cover the question to be considered in the present case. I think there can be no doubt that the subject-matter of a mortgagor's suit for redemption is his right to redeem or his equity of redemption.

I cannot conceive what else could be the subject-matter of the suit. Reference has been made to *Sekaran v. Eatcharan* (3). There it was held that the equity of redemption was "the subject-matter in dispute" for the purpose of the Court-fees Act. It was suggested in the argument that the decision should be limited to the construction of the particular words in that Act. It seems to me that there is no real distinction, and that in a suit for redemption the equity of redemption is equally "the subject-matter in dispute" within the Court-fees Act and "the subject-matter of the suit" under O. 33, R. 1. The value of the equity of redemption to which the petitioner is entitled must therefore be excluded in determining whether he is a "pauper" as defined in the latter part of the explanation. The Subordinate Judge will have to inquire whether the petitioner is entitled to any other property worth Rs. 100. The case is remitted to him for this purpose and for disposal in the light of the above observations. The costs of this revision petition will abide the result of his finding.

P.R.S./R.K.

Case remanded.

1. (1910) 33 All 237=8 I C 484.

2. (1881) 3 Mad 249.

3. (1910) 3 I C 459.

A. I. R. 1933 Madras 680

VENKATASUBBA RAO, J.

National Indian Life Insurance Co. Ltd., Calcutta—Defendant—Appellant.

v.

Mahadevan and others—Plaintiffs—Respondents.

Second Appeal No. 199 of 1929, Decided on 17th January 1933, from decree of Sub-Judge, Trichinopoly.

Insurance—Policy should be construed by collecting meaning of parties from language employed—Courts will lean against forfeiture of policy.

A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed. The Court will, far from favouring a forfeiture, lean against it. The material portion of the clause in a policy ran as follows:

"A policy which has acquired a surrender value sufficient to pay at least one year's premium is not forfeited immediately by non-payment of the premium within the days of grace; such surrender value being automatically applied in payment of instalments of premium and interest thereon to keep the policy in force for so long a term as such surrender value will cover."

Annual premium of Rs. 150-12-0 was payable in quarterly instalments. Default in payment of premium for a year occurred in respect of last instalment of Rs. 37-11-0. The surrender value on date of default was Rs. 86-3-0.

Held: that in considering whether the surrender value was sufficient to pay the year's premium or not, portion of the year's premium already paid should not be overlooked and that the policy was not forfeited: *Haughton v. Empire Marine Insurance Co.* (1866) 1 Ex. 206, Ref. [P 680 C 2]

Rajamanickam—for Appellant.

K. V. Krishnaswami Iyer—for Respondents.

Judgment.—A question of some interest has been raised in this appeal. The lower Courts have held that no forfeiture was incurred and in my opinion rightly. It is unnecessary to quote the relevant clauses of the policy, which have been set forth in the careful and well considered judgment of the learned District Munsif. The short point in the case is, what is the true construction of the words "sufficient to pay at least one year's premium"? Before attempting to construe these words, I shall briefly state the facts. The year with which we are concerned, is 2nd April 1920 to 1st April 1921. The annual premium was Rs. 150-12-0, payable in four quarterly instalments. Three instalments amounting to Rupees

113-1-0 were duly paid, and the fourth instalment, which amounts to Rupees 37-11-0, became payable on 2nd January 1921. The default that occurred, was in respect of that instalment. The point to decide is, whether that default led to a forfeiture of the policy. The material portion of the clause runs as follows:

"A policy which has acquired a surrender value sufficient to pay at least one year's premium is not forfeited immediately by non-payment of the premium within the days of grace; such surrender value being automatically applied in payment of instalments of premium and interest thereon to keep the policy in force for so long a term as such surrender value will cover."

What is the intention to be gathered from this clause? The surrender value is treated as the money belonging to the assured, and so long as the company has in its hands a sum sufficient to pay at least a year's premium, the parties stipulate that the policy shall not lapse. This is a provision distinctly intended for the benefit of the assured and bearing that in mind, can the construction suggested for the insurance company be accepted? As I have said, the balance due against the annual premium was only Rs. 37-11-0, but the surrender value of the policy on the date of default was admittedly Rs. 86-3-0. Was that amount sufficient or not to pay the year's premium? What then was the year's premium payable for the year in question? Rs. 113-1-0 had already been paid; thus a balance of Rs. 37-11-0 only was left. In considering whether the surrender value was sufficient to pay the year's premium or not, we cannot overlook that a portion of the year's premium had already been paid. To ignore this circumstance would be not only unreasonable but be opposed to the clear intention of the parties. This is the view taken by the lower Courts, and in my opinion it is both reasonable and sound. Mr. Rajamanickam, the learned counsel for the Company, has referred me to *Haughton v. Empire Marine Insurance Co.* (1) where Channel, B. observes:

"A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense and not to speculate on

1. (1866) 1 Ex. 206=4 M H & C 41=35 L J Ex. 117=14 W R 645=15 L T 80=12 Jur NS 376.

some supposed meaning which they have not expressed."

Surely, I am not departing from this well known rule of construction, but what is more to the point is, that it is equally well settled that the Courts will, far from favouring a forfeiture, lean against it: See Porter's Law of Insurance, Edn. VII, pp. 79 and 80 and Woodfall on Landlord and Tenant, 22nd Edn., p. 397. What the Company suggests is that a year's premium means a calendar year's premium; in other words a full year's premium in the abstract, without reference to the amount actually due for any particular year. This could not have been the intention of the parties. The words

"such surrender value being *automatically* applied in payment of *instalments* of premium . . . for so long a term as such surrender value will cover"

clearly negative the contention put forward for the insurance company. I underline the two words in that clause, namely "automatically" and "instalments." In the result, the second appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 681

CORNISH, J.

A. Swaminatha Ayyar — Plaintiff—Petitioner.

v.

Taluk Board, Nannilam—Defendant—Opposite Party.

Civil Revn. Petns. Nos. 22 and 23 of 1930, Decided on 10th March 1933, from decrees of Sub.Judge, Tiruvarur, D/- 30th April 1929.

(a) Madras Local Boards Act (14 of 1920), S. 228—President is not bound to accept income-tax assessment as the only basis for assessment of professional tax.

Income-tax assessment is one of the matters which the President may take into consideration but he is not bound to accept it as the only basis of assessment for professional tax. He is entitled to take into consideration a variety of matters as a guide to an assessee's professional income, including the reputed value of his business.

[P 682 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 228—President is not privileged from divulging grounds on which he makes assessment.

The President is not privileged from divulging the grounds on which he makes the assessment. If the defence of S. 228 is relied upon, it must appear from evidence that the assessment has been made upon grounds which the President is entitled to take into consideration in making the assessment.

[P 682 C 2]

T. M. Krisnaswami Ayyar and *S. Tyagaraja Ayyar*—for Petitioner.

N. S. Srinivasa Ayyar—for Opposite Party.

Judgment.—These petitions arise out of two suits by the plaintiff-petitioner to recover from the defendant, the Taluk Board of Nannilam represented by its President, two sums which he alleges are the amount of profession tax illegally levied on him for the years 1923-24 and 1925-26, and which he has been compelled to pay by legal process. His grievance is that he has been assessed for the first of those years on a Class 1 income and for the second year on a Class 2 income, whereas he claims that the correct basis of assessment was his income-tax returns for those years which would have brought him within a lower class of income and made him liable to a lower rate of profession tax. The substantial defence raised to the petitioner's claim is S. 228, Madras Local Boards Act. This provides, sub-S. (1):

"No assessment or demand made, and no charge imposed under the authority of this Act, shall be impeached or affected by reason of any clerical error or by reason of any mistake: (a) in respect of the name, residence, place of business or occupation of any person; or (b) in the description of any property or thing; or (c) in respect of the amount assessed, demanded or charged; provided that the provisions of this Act have been, in substance and effect, complied with."

And sub-S. (2):

"No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment or collection of money under the said authority; provided that the provisions of this Act have been in substance and effect complied with."

The question to be determined is therefore has the assessment for profession tax been made upon the petitioner in substantial compliance with the provisions of the Act. By R. 9, Sch. 4 of the Act the President of a Local Board is entrusted with the duty of classifying persons assessable to profession tax according to the amount of their income. The rule fixes classes according to the scales of income and the maximum rate of tax leviable in respect of each class. Thus, at the top of the list stands Class 1 which includes incomes not less than Rs. 2,000 per mensem subject to a maximum half yearly tax of Rs. 110, and at the bottom is Class 10 comprising incomes between Rs. 50 and Rs. 25 per mensem subject to

a maximum half yearly tax of eight annas. R. 11 indicates the methods of making the classification. It says :

"The President may classify all persons liable under R. 9 on general considerations with reference to the nature and reputed value of their business, the size and rental of residential and business premises, the quantity of articles dealt with, the number of persons employed and the income-tax paid to Government."

It further provides :

"The President shall not call for the accounts of any assessee, but any person may produce his accounts to show that the income derived by him from the exercise of his profession falls below the lowest income entered at the head of the class in which the President has placed him and the President shall revise the assessment if satisfied that the person should be placed in a different class."

If the President is not satisfied that a revision should be made the assessee is given by R. 27 the right to appeal to the Local Board. The petitioner's case, as appears from para. 6 of his plaint, is that the proper basis of assessment for profession tax is the amount in respect of which he has been assessed for income-tax. It is alleged in the plaint that

"it is distinctly provided in the Local Boards Act that the basis for assessment of profession tax must be the income-tax amount to be paid by the assessee,"

and it is further alleged that the assessment having been made

"without any regard to the said basis is contrary to the provisions of the Madras Local Boards Act, and also contrary to the admissions distinctly made by the defendant in many proceedings."

Apparently it is the fact that for the intervening year 1924-25, the petitioner was assessed for profession tax upon the income-tax basis. Income-tax assessment is one of the matters which the President may take into consideration, but he is not bound by the Act to accept it as the only basis of assessment for profession tax. The learned advocate for the petitioner has however contended that there was no other basis on which his client could have been assessed. I think there is evidence that this is not the case. The President is entitled by R. 11 to take into consideration a variety of matters as a guide to an assessee's professional income, including the reputed value of his business. The petitioner was carrying on the business of a money lender. For the year 1923-24 the President received Ex. 1, a report by the village officer stating that the petitioner's income from the business was Rs. 1,500 per mensem. The President

was entitled to take that report into consideration and to act upon it if he thought proper.

It is true that the village officer's report recommended that petitioner should be assessed on the income-tax basis. But the President was free to ignore the recommendation if he considered that the reputed value of his money lending business was the proper basis of assessment. For the year 1925-26 the President received a report from the village officer stating that the petitioner's income from his business was Rs. 150 per mensem. The President suspected the truthfulness of this report and referred the matter to the village panchayat. The panchayatdars reported that the village officer's report was untrustworthy and unanimously adopted a report made by the panchayat President upon the professional income of the petitioner. The resolution, Ex. 5 (a), of the panchayat has been exhibited, but not the report. But it may, I think, be reasonably inferred that the President of the Local Board was guided by this report of the panchayat in making of the assessment. I do not agree with the view of the Subordinate Judge that the President is privileged from divulging the grounds on which he made the assessment. If the defence of S. 228 is relied upon, it must appear from evidence that the assessment has been made upon grounds which the President is entitled to take into consideration in making the assessment. In my judgment it has been sufficiently shown that the assessments were made in substantial compliance with the provisions of the Act, and that the petitioner's suit was rightly dismissed. The revision petitions must accordingly be dismissed with costs, one set.

P.R.S./K.S. *Petition dismissed.*

A. I. R. 1933 Madras 682

BEASLEY, C. J. AND BARDSWELL, J.

Manjeri S. Krishna Ayyar—Appellant.

v.

Secy., Urban Bank, Ltd., Calicut, and another—Respondents.

Letters Patent Appeal No. 71 of 1932, Decided on 26th January 1933, from order of Burn, J., D/- 18th October 1932.

(a) Co-operative Societies Act (1912), S. 2 (d) and Madras Co-operative Societies

Act (6 of 1932), S. 2 (e) — Legal adviser of society is "officer" of society.

The legal adviser of a Co-operative Society is an officer of the society within the meaning of the Co-operative Societies Act of 1912 and of the Madras Act of 1932. (P 684 C 1]

(b) Co-operative Societies Act (1912), S. 43 and Madras Co-operative Societies Act (6 of 1932), S. 51 (1) (b), (c) — Member of the Bar who is also member of Co-operative Society, instructed by the society to engage in legal proceedings on behalf of society — His position is only that of vakil and not that of officer, or servant of society.

The position of a member of the Bar who is a member of a Co-operative Society and who is instructed by the society of which he is a member to engage in legal proceedings on their behalf is that of a vakil to such Society. He cannot be considered to be an officer, agent or servant of the society. Hence acts of misconduct done by him while acting as vakil cannot be made the subject of reference either under S. 51 of the Madras Act of 1932 or S. 43 of the Act of 1912. [P 685 C 2 ; P 686 C 1]

T. R. Venkatarama Sastriar and *P. S. Narayanaswami Ayyar*—for Appellant.

Government Pleader and *P. Govinda Menon*—for Respondent.

Beasley, C. J. — This is a Letters Patent Appeal from an order of Burn, J., dismissing the appellant's petition for the issue by the High Court of a writ of prohibition prohibiting the respondents from proceeding with the trial of Suit No. 179 of 1932-33 on the file of the Deputy Registrar of Co-operative Societies, Calicut. The appellant who is a legal practitioner was and is a member of the Calicut Co-operative Bank, Ltd. He was a Director of the bank from November 1919 to December 1929, and then again from October 1930 to January 1932. He was also the legal adviser of the bank from September 1922 to December 1929 and he was also the vakil of the bank from July 1922 to March 1932. The Secretary of the Calicut Urban Bank Ltd., filed a suit under S. 51, Madras Co-operative Societies Act (6 of 1932), against the appellant claiming a sum of Rs. 6,017-7-1. That amount is made up as follows :

	Rs.	a.	p.
(a) Out of pocket expenses charged by the appellant...	1,007	1	0
(b) Extra fees charged by him for which there is no sanction of the Directors ...	892	12	0
(c) Aggregate of amounts paid in by him to the Bank out of collections from the Bank's borrowers which are not found entered in the cash book of the bank and for which the appellant holds no valid receipts...	4,117	10	1

The accounts of the appellant with the bank as its vakil were the subject of an investigation by a special sub-committee of the Committee of depositors appointed on 11th April 1932. As a result of this investigation, the Directors of the bank requested the Deputy Registrar of Co-operative Societies, Calicut, to cause the accounts to be audited and accordingly the Acting Senior Inspector of Co-operative Societies conducted an audit and in his report he observed inter alia that items (a) and (b) were exorbitant and inadmissible. The appellant was accordingly called upon to pay the sum of Rs. 6,017-7-1 to the bank in default of which it was stated that a suit would be filed against him. He declined to pay and accordingly a reference was made under S. 51, Madras Co-operative Societies Act (6 of 1932), and a decree against him was asked for. The appellant raised the point that the Registrar had no jurisdiction to entertain this reference on the grounds that the matters complained of related to the conduct of the appellant in his capacity of vakil conducting litigation on behalf of the bank and that the dispute did not touch the business of the society.

He accordingly moved for the issue of a writ of prohibition. Burn, J., dismissed that petition holding that under both the Co-operative Societies Act (Act 2 of 1912) and the Act of 1932 there was a dispute between the petitioner and the society which fell to be decided by the Registrar on the ground that the appellant was a member, the legal adviser and a member of the Board of Directors of the Society and was an "officer" of the Society, that the business concerning which the present dispute has arisen was business which came to him as legal adviser and that it was his position as legal adviser that made him a member of the Board of Directors. It is, in my opinion, not correct to say that the business of the society with which the present dispute is concerned came to the appellant as its legal adviser because it is the appellant's case—and this is conceded also by the bank—that the dispute arises out of matters relating to the appellant's acts as the bank's vakil ; and it is important to keep in mind the distinction between the two capacities of bank's legal adviser and the bank's vakil. In my opinion, Burn, J., was

right in holding that in the capacity of legal adviser to the bank the appellant was an "officer" of the Society as defined by S. 2 of the Act which by Cl. (d) includes :

"a Chairman, Secretary, Treasurer, Member of Committee, or other person empowered under the rules of the bye-laws to give directions in regard to the business of Society."

There is no committee in this society but there is a Board of Directors in whom the management of the affairs of the society is vested by by-law No. 41 of the By-laws of the Society and, this Board of Directors forms the Committee as defined in S. 2 (b) of the Act of 1912. The same definition of officer appears in the Act of 1932 in S. 2 (e) except that two or three other persons are included. By-law 41 (a) of the Society says that :

"the affairs of the Society shall be managed by a Board of Directors consisting of a President, a Vice-President, a Secretary, an Assistant Secretary, a Legal Adviser, a Treasurer, and not more than six other members. The members of the Board of Directors shall be elected once in two years by general assembly from among the members holding not less than five shares each. The Directors shall elect from among themselves the President, Vice-President, Secretary and Assistant Secretary, Treasurer and Legal Adviser."

In my opinion therefore the legal adviser of the bank is an "officer" of the bank. I must now consider the rules under both Acts. Under the Act of 1912 by S. 43 (1) the Local Government is empowered to make rules to carry out the purpose of the Act and by (2) such rules may (1) provide that any dispute touching the business of the society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision, etc. By-law 68 of the Society is as follows :

"If any dispute arises touching the business of the Society between members or past members of the Society, or persons claiming through a member or past member or between a member or a past member or persons so claiming and the Board of Directors the party or parties concerned may refer the matter in writing to the Registrar. Similarly in the case of a dispute relating to a debt due to the society, by a member or past member or persons claiming through a member or past member, a reference in writing may be made by either party to the Registrar."

The decision of the Registrar or the arbitrator appointed by him is to be final. The Act of 1932 provides by S. 51 (1) that

"if any dispute touching the business of a registered society (other than a dispute regarding

disciplinary action taken by the society or its committee against a paid servant of the society) arises (a) among members, past members and persons claiming through members, past members and deceased members or (b) between a member, past member or persons claiming through a member, past member or deceased member and the society, its committee or any officer, agent or servant of the society or (c) between the society or its committee and any officer, agent or servant of the society or (d) between the society and any other registered society, such dispute shall be referred to the Registrar for decision."

There is an explanation which reads as follows:

"A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, is a dispute touching the business of the society within the meaning of this sub-section."

It will be seen that S. 51 (1) of the Act of 1932 is wider in its terms than the earlier Act. The Bank claims to make a reference to the Registrar under the later Act contending that this question comes within either sub-Cl. (b) or (c) to sub-S. (1), S. 51 or both. It is further contended that, if it should be held that the Act of 1932 does not apply to the case but that the procedure laid down by the Act of 1912 is to be followed, the rules made under S. 43 of that Act apply equally to this case.

It is contended on behalf of the appellant that the Act of 1932 is of no retrospective effect and that, as the matters complained of were matters which occurred before the passing of the new Act, the dispute with regard to them was not one which under the rules made under that Act could be referred to the Registrar for decision. It is argued: (1) that the appellant was not engaged in the business of the Society; (2) that it is not a dispute between a member of the society and the committee or any officer and the society; (3) that the acts complained of were not done by the appellant in his capacity as member of the society but as its *vakil*, and (4) that even if the Act of 1932 is of application, the appellant as the society's *vakil* was not an officer, agent or servant of the society. As before stated, no question arises here with regard to any acts of the appellant in his capacity of legal adviser but only as the Bank's *vakil*. It is quite true that he is a member of the society, that he was a director of the society and that he was the legal advi-

ser of the society. But does that in any way affect his position as vakil? It seems to me that this matter has got to be considered from the standpoint only of a vakil engaged in the society's legal business.

The fact that he may at the same time occupy the other positions already specified in the society, however irregular his conduct may be in occupying them, cannot in the least degree affect this question. As regards the appellant's first contention, namely, that the appellant was not engaged in the business of the society, in my view, the appellant was. In the course of the society's business members of the society incur debts and it is the business of the society to recover from its members the sums of money owed by them to the society and if necessary to take legal proceedings for their recovery. The appellant as the vakil engaged by the society to do so was clearly engaged in the business of the society.

The next two contentions, namely, that this is not a dispute between a member of the society and the committee or any officer and the society and that the acts complained of were not done by the appellant in his capacity as a member of the society but as its vakil, may be considered together. This is a dispute between the society's vakil and the society and the acts complained of were done by the appellant in his capacity of the society's vakil. Had this been a dispute between the society and the appellant as its legal adviser, then under the Act of 1932 it might be a dispute between the society and one of its officers, namely, its legal adviser. But even assuming that this case is governed by the Act of 1932, in my view the appellant was not an officer, agent or servant of the society and what he did was not done in his capacity as a member of the society at all. I think it is clear that both under the Building Societies Act and the Friendly Societies Act in England which contain somewhat similar provisions as regards the settlement of disputes within the society by the Registrar, that in order that such a dispute can be dealt with by the Registrar, it must be a dispute between the society and a member in his capacity as member: see Halsbury's Laws of England, 2nd Edn., Vol. 3, p. 436, para. 829

which deals with Building Societies and Halsbury's Laws of England (1st Edn.) Vol. 15, p. 177, para. 370, which deals with Friendly Societies where it is stated that disputes between a society and a member not in his capacity as member, e. g., a claim by a society against one of its officers for misappropriation of funds, are not disputes to which the Act applies and consequently they are determinable by ordinary legal methods. Viewed in this light, this dispute is not a dispute within the provisions of the Act of 1912 and unless the appellant when acting as society's vakil was doing so as an officer, agent or servant of the society, the Act of 1932 is also not of application.

It is however contended that the appellant was the agent of the society as its vakil within the provisions of S. 51 of the Act of 1932. With this contention I am unable to agree. In acting in litigation as the society's vakil he was not the agent of the society but he occupied merely the position of a vakil to his client. Different considerations altogether may arise where the vakil is a whole-time vakil of a society or a company and receives as his remuneration a fixed salary. It may be stated here that the Registrar of Co-operative Societies is not anxious to clutch at a jurisdiction which he does not possess. The position he takes up here is that he desires only to know whether in such cases as this he does possess jurisdiction. In my view he does not. Here the position is that of vakil and client, the vakil appearing in each case for a fee. Mr. T. R. Venkatarama Sastri stated that the question before us is one of considerable importance to members of the Bar and put to us the question

"What is the position of a member of the Bar who is a member of a Co-operative Society and who is instructed by the society of which he is a member to engage in legal proceedings on their behalf?"

It seems to me that the answer to this question must be that, merely because a legal practitioner is a member of a society, he is not prevented by any rule of professional etiquette from accepting instructions from the society of which he is a member. There can, in my view, be no impropriety in his doing so provided that his engagement is not directly due to his being a member. The Madras Bar Council have recently ruled

that it is improper for a member of the Bar who is a Director of a company or a society to appear for remuneration for that company or society in its legal business. This rule follows that of the English Bar that the appellant's conduct in legally advising the society and appearing as its vakil in both capacities for remuneration whilst being a director was without question most improper, but so far as the case before us is concerned, we have only to consider him in his capacity of vakil to the society. That being so this dispute is not a dispute to which either the Act of 1912 or the Act of 1932 applies; and it is therefore unnecessary to consider the further question raised as to which Act this dispute falls to be decided under.

The result is that this Letters Patent appeal is allowed and an order is made directing the issue of the writ of prohibition sought for by the appellant. With regard to costs in my view the proper order will be to direct the appellant and the respondents to bear their own costs. It is improbable that the Registrar of Co-operative Societies would have thought that he had jurisdiction to deal with the matter if the appellant had not been also a director, the paid legal adviser of the society, and at the same time its vakil.

Bardswell, J.—I agree.

P.R.S./K.S. *Appeal allowed.*

A. I. R. 1933 Madras 686

BEASLEY, C. J. AND BARDSWELL, J.

Gomathi Ammal — Defendant — Petitioner.

v.

Avu Ammal—Opposite Party.

Civil Revn. Petn. No. 1055 of 1928, Decided on 21st February 1933, from decree of Dist. Munsif, Ambasamudram.

Limitation Act (1908), Ss. 19 and 20—Admission by wife of lunatic of debt in her petition for appointment of guardian—Wife dying before appointment—Admission is not valid acknowledgment.

The wife of an insane husband was managing his properties, and she filed a petition under the Lunacy Act to get herself appointed as his guardian wherein she mentioned the assets and liabilities of her husband. Subsequently before appointment as guardian she died:

Held: that an admission made by her in the petition, as to a debt due by her husband, was not a valid acknowledgment within the meaning of Ss. 19 and 20 as she was not an agent duly authorised in that behalf and that her admission did not save limitation: *Case law referred.*

[P 687 C 2, P 688 C 1]

G. Ramakrishna Ayyar — for Petitioner.

S. Rama Swami Ayyar — for Opposite Party.

Beasley, C. J.—The suit out of which this civil revision petition arises was upon a promissory note executed by the defendant's deceased husband and dated 17th August 1923. The suit was filed in 1928. On 16th August 1924 the defendant's husband made a payment of Rs. 5 in respect of the promissory note. This had the effect of extending the period of limitation to 16th August 1927. The suit having been filed in 1928, the plaintiff's claim would be barred by limitation, but it was claimed that the debt had been kept alive by an acknowledgment of it made by the defendant. This acknowledgment is, it is alleged on behalf of the plaintiff, to be found in an admission made by her in a petition which she put in to get herself appointed guardian of her husband who had then become insane. The petition is O. P. No. 38 of 1926. The petition was made under the Indian Lunacy Act to have her husband declared to be insane and for the appointment of herself as guardian of his person and manager of his property. It is conceded that the defendant's husband must have been found to be insane as a result of an inquiry under the Act because an order was made on the defendant's petition appointing her guardian and manager on furnishing security. She failed however to furnish the security ordered and in the meantime her husband died and she was in fact never appointed his guardian and the manager of his property. For the purpose of her petition, she had to set out her husband's assets and liabilities and she included in the latter the suit promissory note debt. It was contended in the lower Court that this was an acknowledgment by the defendant within S. 19 (1), Lim. Act, and that the defendant was her husband's "agent duly authorised in this behalf." This contention the learned District Munsif upheld in the following words:

"The defendant's husband being insane and he being divided from his brothers, the natural and de facto guardian was his wife who was major even then, and she also put in the original petition. P. W. 1 further states that it was she who was managing her husband's property. Thus she, as the actual manager of the estate and the de facto and the legal guardian under Hindu law, has acknowledged the suit debt in the said

original petition. Wife's acknowledgment where she is accustomed to conduct her husband's business is sufficient, she being regarded as a duly authorized agent: *Rustomji on Limitation*, Edn. 4, p. 244. Thus the defendant's acknowledgment in the said original petition is sufficient to give a fresh starting point of limitation for the suit promissory note."

For the petitioner it is argued that she was not the lawful guardian of her insane husband and that therefore she was not her husband's "agent duly authorised in this behalf" in S. 19 as defined in S. 21 (1), Lim. Act, which reads as follows :

"The expression 'agent duly authorized in this behalf' in Ss. 19 and 20, shall in the case of a person under disability include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager, to sign the acknowledgment or make the payment."

That section therefore deals with persons who are under disability such as the defendant's husband here. If at the time when the acknowledgment was made the defendant had been appointed the committee or manager of her insane husband's property, then she clearly would have come within the provisions S. 21 (1), Lim. Act, as S. 75, Lunacy Act, permits every manager of the estate of a lunatic appointed under the Act to pay all just claims, debts and liabilities due to or by the estate of the lunatic, but she never was so appointed. It is argued that she was not his lawful guardian either and that the section as regards guardianship can have no application to majors and that, even as regards minors, a de facto guardian has no power to acknowledge a debt so as to bind a minor, and *Ramaswami Pillai v. Kasinatha Iyer* (1) is relied upon. In that case at p. 536 (of 108 I C) Kumaraswami Sastri, J., says :

"Section 21, Lim. Act, says the expression 'agent duly authorized' referred to in Ss. 19 and 20 shall, in the case of a person under a disability, include his lawful guardian, committee or manager to sign the acknowledgment or to make the payment. It can hardly be said that a person who takes upon himself the management of property without being the legal guardian under Hindu law or a guardian duly appointed by authority can be said to be a lawful guardian under S. 21."

It is very difficult to see how any question of guardianship arises at all in the case of a major person. If that person comes under disability by reason of insanity, then, in my opinion, anybody, even if it is his wife, who does any acts

on his behalf without being clothed with authority conferred by the Indian Lunacy Act does not do such acts as the lawful guardian of the person under disability and is almost in the position of an intermeddler. Upon the question as to whether the de facto guardian of a minor can acknowledge debts so as to bind the minor, there is a considerable conflict of opinion. That a de facto guardian can alienate family property so as to bind the minor there is clear authority for if such alienation is for necessity or for the benefit of the minor. But it is difficult to see how the acknowledgment of a debt can be of benefit to a minor and in this case we are not dealing with a minor at all but with an insane person. There is a decision of Bakewell, J., *Tirapayya v. Ramaswami* (2), in which it was held by him that the natural mother of a minor, when acting for the benefit of the minor was a lawful guardian within the meaning of S. 21, Lim. Act. This case however is not in agreement with *Ramaswami Pillai v. Kasinatha Ayyar* (1). An executor appointed under the will of a deceased person can, by the inclusion of a debt due by the deceased in the form of valuation filed with the petition for the grant of letters of administration, make an acknowledgment of that debt within the provisions of the Limitation Act because he is the man to acknowledge liability in his capacity of legal representative of the deceased. This arises from his position of executor who derives his title from the will and immediately upon the testator's death his property vests in the executor for the law knows no interval between the testator's death and the vesting of the property.

In *Raja Rama v. Fakruddin Saheb* (3) it was held that the position of an administrator is very different and that he derives his title wholly from the Court and has no title until letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. In my view the defendant had no authority to acknowledge the suit debt on her husband's behalf. She certainly had no direct authority and I cannot see that she had any implied authority to do so.

2. (1913) 19 I C 362.

3. A I R 1930 Mad 218=122 I C 504=53 Mad 480.

1. A I R 1928 Mad 226=108 I C 529.

It is true that a wife has an implied authority to pledge the credit of her husband for necessaries and that this implied authority is not taken away or diminished by reason of her husband's insanity. But it is a limited authority and limited only to necessaries. But it is contended on behalf of the respondent that as it was necessary for the defendant to put in a petition to get herself appointed guardian and manager under the Indian Lunacy Act, and as it was necessary for that purpose to set out the assets and liabilities of her insane husband, the admission she is alleged to have made was a necessary one and that she was in fact an agent of necessity. But I do not think that she was an agent of necessity or that it follows that she had any implied authority to acknowledge the debt on behalf of her insane husband. It is further contended on behalf of the respondent that the lower Court has found that the respondent was managing her husband's business and that as manager of his business she had authority to pledge his credit and acknowledge his debts. I take the finding to be that the defendant was only managing her husband's business after he became insane and not before. But she certainly could derive no authority from her husband to manage his business as he was insane. In my opinion the District Munsif was wrong in holding that the suit debt had been acknowledged. The civil revision petition must therefore be allowed with costs, the lower Court's decree set aside and the plaintiff's suit dismissed with costs.

Bardswell, J.—I agree.

P.R.S./K.S. *Petition allowed.*

A. I. R. 1933 Madras 688 (1)

BURN, J.

Arunachala Asari—Petitioner.

v.

Anandayammal—Opposite Party.

Criminal Revn. Petn. No. 24 of 1933, Decided on 27th April 1933, from order of Sub-Divisional First Class Magistrate, Salem, D/- 31st October 1932.

Criminal P. C. (1898), S. 488—Wife can only claim maintenance under S. 488 but cannot claim to be treated as wife the food, clothing and lodging.

A wife cannot claim under S. 488 to be treated as a wife; she can only claim to be maintained on the scale appropriate to her station in life.

Maintenance does not include anything more than appropriate food, clothing and lodging.

[P 688 C 2]

K. S. Jayarama Ayyar and *R. Sundaralingam*—for Petitioner.

T. Krishnaswami Aiyangar—for Opposite Party.

Public Prosecutor—for the Crown.

Order.—I cannot see that S. 488, Criminal P. C., has anything to do with ordinary conjugal rights; it deals with "maintenance" only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging.

On the facts of this case it is clear that the husband has offered to give his wife maintenance in his house but he wants her to live in a separate room and not to associate with the other members of his family. She has refused this offer and in my opinion she has no sufficient grounds for refusing. She cannot claim under S. 488, Criminal P. C., to be treated "as a wife;" she can only claim to be maintained on the scale appropriate to her station in life. The order for payment of separate maintenance is therefore unsupportable and I set it aside.

P.R.S./K.S.

Order set aside.

A. I. R. 1933 Madras 688 (2)

BURN, J.

Hari Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision Case No. 848 and Criminal Revn. Petn. No. 747 of 1932, Decided on 31st March 1933, from order of Sess. Judge, Coimbatore, D/- 4th July 1932.

Criminal P. C. (1898), Ss. 110 and 162—Inquiry under Chap. 8 is not inquiry into offence, and statement given to police cannot be shut out by use of S. 162.

An inquiry before a Magistrate under Chap. 8, Criminal P. C., is not an inquiry into an "offence;" and therefore S. 162, cannot be used to shut out statements given to the police by persons who are afterwards called as witnesses. Further the police, when investigating in a case under the preventive sections of Criminal P. C., are not acting under S. 162. [P 689 C 1]

N. S. Mani—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The sole ground on which this petition was admitted was that statements recorded by the police under S. 162, Criminal P. C., had been used by the lower Courts as substantive evidence. But the police when investigating a case under the preventive sections of the

Criminal Procedure Code, are not acting under S. 162, Criminal P. C. Moreover the inquiry before the learned joint Magistrate under Chap. 8, Criminal P. C., was not an inquiry into an "offence" and therefore S. 162, Criminal P. C., cannot be used to shut out statements given to the police by persons who are afterwards called as witness. This point therefore fails. On the merits I will only say that the evidence, in so far as it has been accepted by the learned joint Magistrate and the learned Sessions Judge, was quite sufficient to support the finding that the petitioner was a person to whom S. 110 (f), Criminal P. C., was properly applicable. I decline to interfere in revision.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 689

BEASLEY, C. J. AND BARDSWELL, J.

S. Narayana Iyengar—Petitioner.

v.

K. V. Desika Chariar—Opp. Party.

Civil Revn. Petn. No. 721 of 1929, Decided on 28th February 1933, against order of Dist. Judge, Tinnevely, D/- 20th November 1928.

Madras Hindu Religious Endowments Act (1 of 1925), S. 78—Court making order under S. 78 has jurisdiction to do all acts necessary for execution of such order—Interpretation of Statutes.

The legislature which gives the Court jurisdiction under S. 78 to make orders for the delivery of possession has impliedly granted the power of doing all acts necessary to the execution of its order. Hence where the obstructor disobeys the order under S. 78, the Court has power to enforce it under the provisions of Civil P. C.: *National Telephone Co. Ltd. v. Postmaster-General*, (1913) A. C. 546, Appl.

[P 689 C 2; P 690 C 1]

K. V. Sesha Ayyangar—for Petitioner.

R. Krishnaswami — for Opposite Party.

Beasley, C. J.—This petition at the instance of Pandalai, J., has been referred to a Bench although our learned brother himself felt very little doubt that the order in this case was wrong.

The facts of the case are that under S. 78, Madras Religious Endowments Act, the petitioner, being a trustee of a temple appointed under the Act, obtained an order from the District Court against an obstructor directing him to deliver up the temple and its properties to the petitioner. The obstructor disobeyed that order. The petitioner then applied to the Dis-

trict Court to cause delivery of possession to be given to him by an officer of the Court. The learned District Judge was of the opinion that he had no jurisdiction to pass such an order because the provisions of the Civil Procedure Code, have not been made applicable to the Religious Endowments Act, which in his opinion is a self-contained Code and the order contemplated under S. 78 of the Act, is not a decree which can be enforced under the provisions of the Civil Procedure Code. S. 78 of the Act enables the Court on application by a person appointed a trustee by the Committee or the Board in accordance with the provisions of the Act and on production of the order of appointment to order the delivery to such person of possession of the mutt, etc., where such person is resisted in or prevented from obtaining such possession. If the view of the learned District Judge is correct, it means that, although the Court may make an order for delivery of possession, it cannot enforce its order. That it seems to me is a position that can hardly have been intended by the legislature which must, in giving the Court jurisdiction under S. 78 to make orders for the delivery of possession, have impliedly granted the power of doing all acts necessary to the execution of its order (*Maxwell on Interpretation of Statutes*, 5th Edn. 575). It is obvious that the power to make orders would be useless if these could not be enforced. In *National Telephone Co., Ltd. v. Postmaster-General* (1), Viscount Haldane, L. C., at p. 552 stated :

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

At p. 545, Lord Atkinson stated :

"It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law."

And at p. 557, Lord Shaw stated :

"In the general case, when a Court of Record (which the Railway and Canal Commission is by the Act of 1888, S. 2), becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a Court ensue."

1. (1913) A C 546=82 L J K B 1197=109 L T 562=57 S J 661=29 T L R 637.

This case shows that, when once a Court is given a jurisdiction, the necessary consequences flow from its exercise of such jurisdiction without any express words. In my opinion, the learned District Judge came to a wrong conclusion in this case and the Court's order can be enforced in the usual way in which orders for the delivery of possession are enforced. This Civil Revision Petition must therefore be allowed with costs both here and in the Court below, the order of the lower Court set aside and the case remanded to the District Court for disposal according to law.

Bardswell, J.—I agree.

P.R.S./K.S.

Petition allowed.

*** A. I. R. 1933 Madras 690**

CURGENVEN AND SUNDARAM
CHETTY, JJ.

(*Mutyalu*) *Virayya*—Plaintiff—Appellant.

v.

(*Mahabub Sur Fraja Ventu Rajah*)
Parthasarathi Appa Rao and others—
Defendants—Respondents.

Appeal No. 185 of 1926, Decided on 18th April 1933, against decree of Sub-Judge, Kistna, in O. S. No. 84 of 1924.

*** Hindu Law—Debt—Pious obligation—**
Sons are liable for father's debt which is neither illegal nor immoral irrespective of fact whether father is manager of joint family or whether joint family is composed of persons other than father and sons.

Every Hindu son is under a religious obligation to discharge his father's debts, unless they are illegal or immoral, irrespective of the fact, whether the father is or is not the manager of the joint family, or whether the joint family is or is not composed of persons other than the father and sons : *A I R 1933 All 235, Rel on.* ; *A I R 1931 All 512 (F B)* and *A I R 1924 P C 50, Ref.*
[P 690 C 2 ; P 691 C 1]

V. Govindarajachari—for Appellant.

Advocate-General—for Respondents.

Curgenven, J.—The plaintiff, who appeals, sued upon a promissory note executed by one Narayya Appa Rao. Narayya Appa Rao died and the suit was brought against his father, defendant 1, and his sons, defendants 2 and 3, these three defendants forming a Hindu co-parcenary. The question arose whether each and every one of these defendants could be made liable in respect of their shares of the family property. The learned Subordinate Judge tried the question whether the debt was borrowed by Narayya Appa Rao in his capacity as family manager and for family necessity,

and answered it in the negative. He further came to the conclusion that the debt was not contracted for any illegal or immoral purpose, and the findings upon these issues have not been controverted before us. Notwithstanding the finding upon the latter issue, the learned Subordinate Judge has come to the conclusion that the shares of defendants 2 and 3, i. e., the sons of the executant of the note, are not liable for the debt, and that is the question arising in this appeal. His view is that the pious obligation of a son to discharge his father's debt does not extend to a case where the family consists not merely of father and sons, but of collaterals as well, though in the present instance defendant 1 can hardly be described as a collateral but as an ascendant.

The principle contended for before us, which is virtually the same as that adopted by the Subordinate Judge, is that only where the father happens to be the family manager, will the son's share in the family property be liable for the debt. The leading case dealing with the question of pious obligation is *Brij Narain v. Mangal Prasad* (1). At the close of the judgment, the Privy Council have summarised their conclusions upon that and cognate points in five paragraphs. This case has been made the subject of comment by Srinivasa Ayyangar, J., in *Subramania Iyer v. Sabapathy Iyer* (2). That was the Full Bench case which decided that the pre-partition debts of the father are binding upon the son's shares after a bona fide partition. In delivering one of the minority judgments the learned Judge took occasion to discuss the meaning of the Privy Council's pronouncement in the case just cited and came to the conclusion that it was to be read as meaning that only when the father is the managing co-parcener can the creditor proceed against the son's share. The same view was at one time held by two learned Judges of the Allahabad High Court in *Ajodhia Prasad v. Data Ram*, *A. I. R. 1931 All. 131*, that also being a case where the grandfather was still alive when the question of the liability of the sons for the personal debt of the father arose. This case however was

1. *A I R 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).*

2. *A I R 1928 Mad 657=110 I C 141=51 Mad 361 (F B).*

subsequently considered by a Full Bench decision reported in *Bankey Lal v. Durga Prasad*, A. I. R. 1931 All. 512 (F. B.) of which the two learned Judges Sulaiman, Ag. C. J., and Young, J., who had decided the previous case, were members and occasion was taken to reconsider the former decision, and the Bench concluded that it had not been correctly decided.

It is certainly difficult to understand upon what logical basis the principle of a son's pious obligation should be identified with the liability of a co-parcener of a joint undivided estate for a family debt contracted by the manager. Whatever connexion may be discovered between the first two paragraphs of the Privy Council summary of their principles, we think that a perusal of the text of the judgment will make it amply clear that the two doctrines with which they are dealing and which they described as "seemingly conflicting principles" are regarded as quite distinct and as based upon two entirely different foundations. A still more recent case of the Allahabad High Court, *Lalta Prasad v. Gajadhar*, A. I. R. 1933 All. 235, is a direct authority for the view that even where the family consists of other members than the father and the sons the pious obligation still arises. Iqbal Ahmad, J., remarks :

"I can discover no justification for holding that the sons of a father, who is not the manager of the joint family, are under no such religious obligation or that, if the joint family consists of members over and above the father and the son, there is no such obligation on the sons. To put it in another way, every Hindu son is under a religious obligation to discharge his father's debts of the class mentioned above, irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons."

It seems to us that this is the only reasonable principle to adopt upon this point and we agree with the view so expressed. In the present case if the father had been alive there could be no doubt, we think, that his own and his son's shares would have been liable for the debt, whatever other members of the family might have consisted of and it seems indisputable that the same liability must exist after the father's death, as the sons are in enjoyment of the whole of the property which they formerly shared with their father. That being so, we think that the lower Court

was wrong in refusing to give the plaintiff a decree against the half share of defendants 2 and 3 in the family property; and allowing the appeal we amend the decree in the sense indicated, by declaring that defendants 2 and 3's half share is liable for the suit debt. As the appellant has not succeeded on the issue regarding family necessity, he will get the full court-fee and half of the printing charges and vakil's fee from the respondents, who will bear their own costs. The costs decreed here and those decreed in the lower Court will be recoverable from the same share in the family property, as well as from any private property of Narayya Appa Rao in their hands.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 691

BEASLEY, C. J. AND BARDSWELL, J.
(*Eramullan*) *Kunhi Moidin and another*—Appellants.

v.
Kunhi Koman Nair and another—Respondents.

Appeal No 34 of 1926 and Civil Revn. Petn. No. 264 of 1926, Decided on 8th February 1933, against order of Dist. Judge, South Kanara, D/- 7th September 1925.

Civil P. C. (1908), Ss. 47, 145 and 151—Suit for declaration and permanent injunction — Temporary injunction granted on plaintiff's executing security bond to Court, undertaking to make good loss occasioned by grant of temporary injunction—Suit dismissed — Bond can be enforced only under S. 151.

In a suit for a declaration and permanent injunction, plaintiff applied for temporary injunction pending decision of the suit; and he executed a security bond to the extent of Rs. 15,000 undertaking to the Court to make good the loss that may be caused to the defendant. The suit was dismissed, and in execution proceedings the defendant tried to enforce the security bond :

Held: that the power of a Court to order security in such cases could not be limited by S. 95.

Held further: that S. 145 did not apply as both were parties to the suit, that remedy by suit was not open to him as the bond was executed to the Court and that as he had no other remedy to enforce the bond he could do so under S. 151: A I R 1919 P C 55 and 22 Bom 42, Ref.

[P 693 C 1, 2]

D. A. Krishna Variar—for Appellant.
B. Sitarama Rao—for Respondents.

Beasley, C. J.—The suit out of which this matter arises, namely O. S. No. 32 of 1920 in the Court of the Subordinate Judge of South Kanara, was a suit insti-

tuted by the karnavan of a tavazhi seeking a declaration that the suit scheduled properties were the joint family properties of the tavazhi and not the private properties of defendant 2. There was also a claim for a permanent injunction restraining defendants 1, 2, 30 and 31 or their men from cutting or removing trees on the plaint properties or from interfering in any way with the plaintiff's management of them. Defendant 1 in the suit had leased the properties to defendant 2 who sub-leased them to defendants 30 and 31, the appellants here, who were thus in possession of the properties cutting and removing the trees on them. Pending the disposal of the suit, the plaintiff applied for a temporary injunction against defendants 1 and 2 and the appellants. The plaintiff, in view of the fact that damages were likely to be suffered by the appellants if the temporary injunction were granted and the suit should not succeed, offered to give security to the extent of Rs. 15,000 as a condition for the granting of the temporary injunction; and a registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also made himself personally liable.

The security bond having been executed and put into Court, the temporary injunction was granted. As against some of the defendants who were members of the tavazhi, the suit was compromised. As against the appellants, the suit was dismissed with costs. Then the appellants in execution proceedings (O. P. No. 5 of 1922) claimed an assessment of the damages suffered by them by reason of the temporary injunction and a payment to them by the plaintiff of the sum so assessed or so much of it as was covered by the security bond and in default a sale of the properties given as security in the security bond. The Subordinate Judge was of the opinion that the ap-

pellants were entitled to put in their claim under S. 145, Civil P. C. Respondent 1 appealed to the District Judge who held that the appellants here were not entitled in execution proceedings to enforce the security bond on the ground that there had been no decree for the payment of the damages, nor any executable order with regard to them. He held that S. 145, Civil P. C., only applied to execution against persons who had become liable as sureties and who are not parties to the suit. He held further that S. 47 was not applicable because there had been no decree or executable order and the matter did not relate to the execution, discharge or satisfaction of the decree. He further held that S. 151, Civil P. C., was of no help to the appellants. It was contended on behalf of the respondents that the appellants' only remedy was by way of suit.

The question before us is whether the appellants are entitled to enforce the security bond in execution either under Ss. 145 or 47, Civil P. C., or failing a remedy if those sections are not applicable then under S. 151, Civil P. C. For the respondents it is contended that the appellants' remedy is by way of a suit or that an application should have been made under S. 95, Civil P. C., to the Court to award compensation to the appellants, and in support of the latter contention *Varajlal Mulchand v. Kastur Dharamchand* (1) was referred to. In that case the respondent had obtained a decree against one Vannalai and attached a house in execution. The appellant intervened and applied that the house, if sold, should be sold subject to a mortgage which he held upon the house. His application was dismissed and he thereupon brought a suit for a declaration that the house was not liable to be attached in execution of the respondent's decree. The suit was dismissed by the lower Court and the appellant appealed. Pending the hearing of the appeal, he applied for and obtained under S. 492, Civil P. C., an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent on Rupees 2,000, the acknowledged value of the house. The appeal was heard in due course and was dismissed with

1. (1898) 22 Bom 42.

costs and thereupon the respondent applied to recover the interest for which security was ordered to be given by the District Court. It was held that he was not entitled to recover it as a Court of execution cannot award interest when the decree is silent and that his remedy was under S. 497, Civil P.C., the equivalent of S. 95 of the present Code, and that that remedy was obtainable on application not to the Court of execution but to the Court which issued the injunction. The short answer, it seems to me, to this contention is that S. 95, Civil P. C., only deals with cases of compensation not exceeding Rupees 1,000 and cannot be applied to cases where a security bond for a larger amount than Rs. 1,000 has been given. It was faintly argued nevertheless by Mr. Sitarama Rao that the section is applicable because it shows that the Court had no power to make any order as a condition for the granting of a temporary injunction for the giving of security to a greater extent than Rs. 1,000. In my view, such a contention as that cannot be sustained as the power of a Court to order security in such cases obviously cannot be limited by S. 95, Civil P. C. As regards the other contention that the appellants' remedy is by suit, there is one obvious difficulty and it is that the security bond was given to the Court. The appellants therefore were unable to sue upon the bond unless it had been assigned to them. By whom was the security bond to be assigned? If the bond had been executed in favour of the Amin or some officer of the Court, then that person could either have sued upon it or, under orders of the Court, assigned it to the appellants to sue upon. But that is not the case here as the security bond does not purport to bind the plaintiff to any individual officer or person but merely binds the plaintiff to the Court and as was pointed out in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (2), at p. 167 (of 42 All.), the Court is not a judicial person and cannot be sued and it cannot take property and, as it cannot take property, it cannot assign it. The security bond in question here is as follows:

"I am the plaintiff in the above suit. As per order on R. I. A. 241 of 1920, besides issuing an

injunction restraining defendants 1, 2, 30 and 31 from entering on the suit properties and from felling the trees standing thereon and from removing therefrom the trees already felled, the Court has ordered me to furnish security for Rs. 15,000. I offer as security my arwar right in the properties mentioned in the schedule annexed hereto and give the following undertaking to the Court. If the suit goes against me, I shall be bound to pay defendants 1, 2, 30 and 31 the amount of damages which may be assessed by the Court resulting on account of the order on R. I. A. 241 of 1920. In case of my default to pay the amount of damages as stated above, I bind myself and my heirs and representatives to pay the same on my personal liability as well as on the responsibility of my properties mentioned below when ordered by the Court."

It is quite clear that the undertaking was given to the Court and I am unable to agree that the appellants could have sued upon the security bond. It remains to be seen what was the appellants' remedy. The procedure provided by Ss. 145 and 47, Civil P. C., was resorted to. It is, I think, clear that S. 145, Civil P. C., does not apply to such a case as this as the appellants and the respondents were parties to the suit, and *Raja Bahadur Singh v. Indra Bahadur Singh* (2), is authority for the proposition that although the case does not come within the terms of S. 145, Civil P. C., the Court has inherent power to enforce its bond without recourse to a suit. Therefore even assuming that the respondent's contention is correct that S. 47, Civil P. C., does not provide for such a case as this, the appellants having no remedy under either of those sections and no remedy by suit, it is a case which brings into play S. 151, Civil P. C., and, in my view this is a claim which can properly be dealt with under that section. That being so, the judgment of the lower appellate Court was erroneous upon this point and its decree must be set aside and that of the Subordinate Judge restored with costs here and in the lower appellate Court. The petition is restored to the file of the first Court for further inquiry.

Bardswell, J.—I agree.

P.R.S./K.S.

Order accordingly.

2. A I R 1919 P C 55=55 I C 550=46 I A 228=42 All 158=22 O C 212 (P C).

* A. I. R. 1933 Madras 694

SUNDARAM CHETTY, J.

A. Swaminatha Odayar—Petitioner.

v.

Kalyanarama Ayyangar and another—
Opposite Parties.Civil Revn. Petn. No. 1359 of 1932,
Decided on 31st March 1933, from order
of Dist. Judge, West Tanjore, D/- 9th
September 1932.* Civil P. C. (1908), O. 21, R. 90—The
expression "person whose interests are
affected by sale" is not restricted only to
persons having interest in praesenti—Adjudi-
cated insolvent is such person.The expression "whose interests are affected
by the sale" in O. 21, R. 90 is a wide and com-
prehensive one. It is not restricted to persons
having an interest in praesenti. It is wide enough
to include a judgment-debtor who has been ad-
judged insolvent and whose property has vested
in the Official Receiver, especially when the
Official Receiver has not been made actually a
party to the execution proceedings: *Case law*
referred. [P 694 C 2; P 695 C 1]*R. Rajagopala Ayyangar*—for Peti-
tioner.*K. S. Rajagopala Ayyangar, R. V.*
Raghavathachariar and R. Srinivasan
—for Opposite Parties.*Judgment.*—In this case, the only
question for determination is whether
the petitioner had locus standi to put in
an application under O. 21, R. 90, Civil
P. C., for setting aside a sale in execu-
tion of a decree against him. Both the
Courts below have held that the peti-
tioner could not maintain this applica-
tion, because he was adjudged an insol-
vent and his estate must be deemed to
have vested in the Official Receiver. If
before the auction sale in question, the
petitioner was adjudged an insolvent,
I fail to understand why the decree-
holder did not bring in the Official
Receiver as a party to the execution
proceedings. It is obvious that any sale
held in execution of that decree subse-
quent to the adjudication of the judg-
ment-debtor would not bind the Official
Receiver, unless he was impleaded in
the execution proceedings prior to the
auction sale. On this simple ground, it
would be open to the Official Receiver
to have this auction sale set aside. But
that is not the question with which we
are concerned in this revision petition.According to O. 21, R. 90, Civil P. C.,
any person whose interests are affected
by the sale may apply to the Court to
set aside the sale on the ground of
material irregularity or fraud in publish-ing or conducting it. The point for con-
sideration is, whether a judgment-debtor
who is adjudged an insolvent and whose
property is vested in the Official Receiver
can be deemed to be a person whose
interests are affected by the sale, within
the meaning of the aforesaid rule. Under
R. 72, O. 21, Civil P. C., the judgment-
debtor or any other person whose inte-
rests are affected by the sale may apply
to have the sale set aside.In construing this expression, the
learned Judges in the case reported in
K. Tati Reddi v. Ramachandra Rao (1),
have held that the insolvency of a
judgment-debtor does not render it
incompetent for him to continue the
proceedings connected with an applica-
tion under that rule by way of appeal.
Having regard to the similarity of the
wording employed in Rr. 72 and 90,
I should think that the same view must
be applied to the present case also. It
may be that by reason of the adjudica-
tion the insolvent would not be entitled
to any present interest in the estate,
which of course vests in the Official
Receiver. That does not mean that by
the sale of his property in Court auction
his interests could in no way be affected
within the meaning of R. 90. Suppose
a composition scheme is put in and ap-
proved by the Court and the result
is the annulment of the adjudication,
the properties would at once go back
to the insolvent and if the Court auction
sale should be left unchallenged by any-
body there is every likelihood of the
interests of the insolvent being affected.
In the Full Bench case reported in *Hari*
Rao v. Official Assignee, Madras (2), the
main question for consideration was
whether an insolvent would be a person
"aggrieved" for the purpose of preferring
an appeal against an order in insolvency.
Their Lordships had not to consider the
language of O. 21, R. 90, in that case.
On the other hand, there is a decision of
Ramesam, J., in *Adanamoli Chetti v.*
Chinnaswami, A. I. R. 1926 Mad. 959,
in which the learned Judge distinctly
held that even a presumptive rever-
sioner entitled to the property after the
death of a Hindu female can maintain
an application under O. 21, R. 90, Civil
P. C., for setting aside the sale, though

1. AIR 1921 Mad 402=62 I C 854.

2. AIR 1926 Mad 556=49 Mad 461=94 I C 642
(F B).

it may be said that the interest of such a person is only contingent and not vested.

The decision in *Brij Kishore Lal v. Pratap Narain* (3), has been followed. The expression used in R. 90, namely, "whose interests are affected by the sale" is certainly a wide and comprehensive one. It is not restricted to persons having an interest in praesenti, and if a presumptive reversioner who has only the chance of succeeding to the estate in the event of his surviving the widow can have locus standi under this rule to put in an application, I fail to see why the judgment-debtor in the present case in spite of his having been adjudicated an insolvent, cannot apply under the aforesaid rule. The interest of a presumptive reversioner is as much contingent as that of the insolvent if not more. I may also observe that in the present case when the Official Receiver has not been made actually a party to the execution proceedings, there is all the more reasons for the judgment-debtor himself to apply under this rule. I hold that the petitioner has locus standi to maintain this application. In setting aside the orders of the Courts below, the application is remanded to the Court of first instance for disposal on the merits. The petitioner's costs in this petition should be paid by the respondents. The other costs will abide the final result of the petition.

P.R.S./K.S. *Application remanded.*

3. AIR 1919 Pat 127=4 Pat L J 360=51
I C 359.

A. I. R. 1933 Madras 695

WALSH, J.

Dibba Balesu—Appellant.

v.

Lagudu Chinna Sanyasayya and another—Respondents.

Appeal No. 132 of 1929, Decided on 27th January 1933, against appellate order of Court of the Agent to the Governor, Vizagapatam, D/- 24th September 1927.

Madras Agency Tracts Interest and Land Transfer Act (1 of 1917), S. 4 (2) — Application under S. 4 (2) is not suit and order refusing it is not decree—Civil P. C. (1908), Ss. 2 and 100.

An application under S. 4 (2), Act 1 of 1917, for ejectment of transferee is not a suit, and the order refusing it is not a decree within the meaning of S. 2, Civil P. C. Hence no second appeal lies from such an order.

[P 696 C 1]

B. Jagannadha Dass—for Appellant.
V. Govindarajachari — for Respondents.

Judgment.—Under S. 4 (1), Agency Tracts Interest and Land Transfer Act (1 of 1917), any transfer of immovable property situated within the agency tracts by a member of a hill tribe shall be absolutely null and void unless made in favour of another member of a hill tribe, or with the previous consent in writing of the agent or any other prescribed officer. Where a transfer of property is made in contravention of sub-S. (1), the agent or any other prescribed officer may, on application by anyone interested, decree ejectment against any person in possession of the property claiming under the transfer and may restore it to the transferor or his heirs: S. 4 (2). An application under S. 4 (2) for such ejectment was made before the Special Assistant Agent, Narasapatam, by the appellant. The assistant agent found that he was not a person interested and dismissed the application. He put in an appeal to the agent, and the order was confirmed. This second appeal has been filed to the High Court. A preliminary objection was taken by the office as to the maintainability of the appeal, and it was ultimately admitted subject to the matter being left open to discussion when the appeal came on for hearing. This preliminary objection, that no second appeal to the High Court lies, is based on the fact that S. 4 (3) states

"subject to such conditions as may be prescribed, an appeal against a decree or order under sub-S. (2), if made by the agent, shall lie to the Governor in Council, and if made by any other officers, shall lie to the Assistant Agent or to the Agent as may be prescribed."

Rule 4, framed under the Act, which deals with appeals from ejectment orders, expressly says that no second appeal lies. For the appellant it is argued that the prohibition contained in R. 4 applies only to orders of ejectment passed under S. 4 (2) of the Act, but not to orders refusing ejectment, that an order refusing the application is a decree and therefore a second appeal to the High Court under R. 48, Agency Rules, lies. The interpretation clause in the rule says that "decree" shall include orders passed under Rr. 39 (1) and 43 (3) but not orders under Rr. 33 and 35. Rr. 39 (1) and 43 (3) are not in question in the

present case. Turning to the definition of "decree" in S. 2, Civil P. C., it is stated to be

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

Therefore to be a decree within this definition, the determination must be made by a Court, must conclusively determine the rights of the parties with regard to all or any of the matters in controversy and must be in a suit. There is, in my opinion, nothing to show that an application under S. 4, Act 1 of 1917, is a suit. Under the Code of Civil Procedure decrees are appealable: first appeals lie under S. 96 and second appeals under S. 100. Certain orders are also made appealable by S. 104 (1) and by S. 47 orders in execution between the parties are to be deemed decrees for purposes of appeal. Thus it will be seen that unless there is a decree, there is no second appeal under the Code of Civil Procedure. No doubt S. 4 (2), Act 1 of 1917, talks about the Court "decreeing ejectment against any person" and S. 4 (3), of an appeal, "against a decree or order under sub-S. (2)" but if we adopt the appellants' reasoning that there is a difference in procedure, namely, that, if the order is one dismissing the application for ejectment, a second appeal lies to the High Court, but does not lie from an order granting the application, then we might equally introduce the same distinction into the words and say that it is only an ejectment order which is a decree and hence the words "decreeing" and "decree" will not avail to bring an order refusing the application under the definition of a "decree." It would certainly be anomalous that there should be a second appeal to the High Court by the unsuccessful applicant but that no second appeal lies to the High Court by the person who is ejected from the property. In my opinion the application is not a suit and the order refusing it is not a decree. Therefore I must dismiss the appeal as I hold it does not lie. The respondents will have their costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 696

PANDALAI, J.

Viriyala Jaganatha Rao—Appellant.

v.

Viriyala Narayanamurthy — Respondent.

Second Appeal No. 149 of 1930, Decided on 25th April 1933, against order of Sub-Judge, Cocanda, D/- 21st January 1930.

Limitation Act (1908), Art. 182 (5)—Application for execution against minor judgment-debtor inpleading guardian with bona fide belief that he was living—Application gives fresh starting point of limitation though guardian is found to be dead before application—Decree—Execution.

An application for execution against a minor judgment-debtor mentioning therein as his guardian, the person who had been appointed and was acting as guardian but who happened to have died before the date of the application in bona fide belief that he was living, is sufficient to furnish a fresh starting point for limitation, for a further application: *A I R 1931 Lah 636* and *A I R 1924 Pat 333, Rel on; 17 Mad 76, Ref.*

[P 696 C 2]

Kasturi Seshagiri Rao — for Appellant.

V. Govindarajachari and K. V. Srinivasachari—for Respondent.

Judgment.—The sole point in this appeal is one on which it appears there is no direct decision of this Court, and it is, whether an application for execution against a minor judgment-debtor mentioning therein as his guardian the person who had been appointed and was acting as guardian but who happened to have died before the date of the application, is or is not sufficient to furnish a fresh starting point for limitation for a further application. The question has been directly decided in the Lahore and Patna High Courts, by *Ghulam Hussain v. Narain Singh*, *A. I. R. 1931 Lah. 636*, and *Puran Mull v. Dulva* (1) respectively, in the affirmative. I am content to say that I agree with the view of those High Courts and adopt it. There is also a decision of our Court in *Samia Pillai v. Chockalinga Chettiar* (2), which shows that this view is right. In that case it was held that an application for execution against a judgment-debtor who happened to have died before the date of the application bona fide made in the belief that he was still alive, was a step in aid of execution; in other words, will furnish a starting point for limitation for a fur-

1. *A I R 1924 Pat 333=72 I C 1003.*

2. (1894) 17 Mad 76=4 M L J 8.

ther application. If that is the case in respect of the judgment-debtor himself, much more so is it in a case where it is not the judgment-debtor that is dead but his guardian in respect of whom there is no such procedure known to law as adding a legal representative. What is required to be done is, when the applicant comes to know of it, that he should take steps to furnish the minor judgment-debtor with a fresh guardian. But the appellant's learned advocate relied upon O. 32, R. 5 (2), Civil P. C., and urged that a petition against a minor without a proper guardian, which means a living guardian, is not one made in accordance with law. He is here confusing two matters. It is the case that an order passed against a minor without a guardian properly appointed can be discharged under that rule, but the point here is whether the petition is sufficient for the purpose of limitation to afford a fresh starting point, and on that point O. 32, R. 5 is of no assistance whatever.

The learned advocate raised another point, that it had not been established that the petitioner acted bona fide in filing the particular petition in this case, namely the fourth execution petition, mentioning a dead man as the guardian. On that point it is perfectly clear that the petitioner decree-holder was perfectly bona fide as it is impossible to assume that anyone would be so foolish as to file a petition against a minor knowing that the guardian on the record was dead but still adding his name as such. The appeal fails and is dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

A. I. R. 1933 Madras 697

[CURGENVEN, J.]

V. E. A. Annamalai Chettiar and another—Defendants—Petitioners.

v.

V. E. A. Rm. Annamalai Chettiar and others—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 1256 of 1930, Decided on 12th April 1933, against decree of Sub-Judge, Devakottai, D/- 31st January 1930.

Civil P. C. (1908), S. 115 and Sch. 2, Para. 14—In the absence of objection by party, Court is not bound suo motu to remit award under para. 14—High Court will not interfere in revision with decree passed on award as made.

In the absence of any objection to an award

by the party, the Court is not bound to scrutinize the terms of the award, and satisfy itself, before passing its decree, that it disposes of all the matters referred to arbitration; and if the award does not so dispose of them, the Court is not bound suo motu to remit the award under para. 14. The Court has jurisdiction to pass a decree in terms of the award as made by the arbitrator, and the High Court cannot interfere in revision with such decree as no question of jurisdiction is involved: *Case law referred.*

[P 698 C 2; P 699 C 1]

M. Patanjali Sastriar — for Petitioners.

T. M. Krishnaswami Ayyar and T. D. Srinivasachariar—for Respondents.

Judgment.—The parties are Nattukottai Chetties and originally formed a joint Hindu family. The plaintiffs sued for partition and division of the assets shown in Schs. A to D of the plaint. Issues were framed and a reference was then made to a single arbitrator, who was entrusted with the duty of dividing the property. The arbitrator submitted his award on 3rd January 1930. On the 7th the Court allowed until the 17th for objections and then further until the 24th. On that date it was stated that the plaintiffs did not wish to file any objections while further time until the 31st was allowed to defendant 2. On the 31st further time was applied for on his behalf, but the Court passed a decree in terms of the award. The petitioners before me are defendant 2 and his son, defendant 3. They object that the award failed to dispose of certain matters referred to the arbitrator. Sch. A relates to sites and buildings and these it is said had been left undivided. Item 1, Sch. B comprises certain lands, and the arbitrator did not himself divide these but nominated two persons whom he instructed to divide these lands into two portions and send the lists to the Court, which was to assign one share to the plaintiffs and one to the defendants. In point of fact this was not carried out. Item 2 of Sch. B consisted of a building which was to be divided into two halves, eastern and western, and assigned by lot, the recipient of the eastern half to pay Rs. 250 to the recipient of the western half. In these respects the partition was left incomplete. Nevertheless a decree was passed in terms of the award. I am asked to hold that the learned Subordinate Judge was wrong in passing a decree, having regard to the condition in which the arbitrator left the matter, and that it was incumbent upon him to

remit the award to the arbitrator as containing certain matters left undetermined.

The question arises in what circumstances, if any, can this Court interfere in revision with a decree based upon an award. No authority is really needed for the view that the decree of the Court must disclose some such excess or defect of jurisdiction, or irregularity in the exercise of its jurisdiction, as will satisfy the terms of S. 115, Civil P. C. It is only necessary to have recourse to case-law in so far as it applies this section to the special case of decrees passed upon awards. In *Ghulam Khan v. Muhammad Hassan* (1), the primary question which arose was whether an appeal lay from the decree recording an award and it was answered by the Judicial Committee in the negative. The High Court, in coming to the same conclusion, had allowed an application for revision, but their Lordships were inclined to agree with the view of Clark, J., in *Jhanghi Ram v. Pudho Bai* (2) "that in the case of an award revision would be more objectionable than an appeal," because if an application in revision were admissible the finality of any award would be open to question. They point out that the award had been made and, whatever its correctness, having been duly made and not having been corrected or modified, and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in accordance with it.

"The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the Code."

This Court was guided by the principles thus laid down in *Batcha Sahib v. Abdul Gunny* (3), remarking:

"If it were quite clear that the learned Judge has exercised discretion wrongly in this case, we might be prepared to take the strong step of interfering in revision, but the general policy of the legislature is clear that in these matters the judgment in accordance with an award should be final."

I have not been shown any case in which interference took place where the objection regarding jurisdiction was not

clearly established. *Raja Har Narain Singh v. Bhagwant Kuar* (4) was a case under the old Code and the Judicial Committee held that the award, having been delivered four days out of time, was invalid and therefore without jurisdiction. It may be observed that S. 521 of the old Code of 1882, which contained the words "and no award shall be valid unless made within the period allowed by the Court," has not been reproduced verbatim in para. 15, Sch. 2 of the present Code, with the result that this decision of the Privy Council is probably no longer good law: see *Shib Kristo Daw & Co. v. Satish Chandra Dutt* (5). However that may be, the Privy Council case clearly proceeded upon the footing of jurisdiction. The same may be said of *M. Appayya v. Y. Venkataswami* (6), where Spencer, J., held that an award signed by two out of three arbitrators was invalid. In *Ramaswami Chettiar v. Venkatarama Ayyar* (7), Wallace and Madhavan Nair, JJ., before interfering with the decree embodying an award, very carefully considered the question of jurisdiction, arguing that if the arbitrators' award was beyond their jurisdiction then obviously the decree which embodied it also was without jurisdiction. I think too that the learned Judges who decided *Sukhamal Bansidhar v. Bubulal Kedia & Co.* (8), held this matter in view although the circumstances were peculiar and neither party seems to have been interested to object to the revision of the decree. Now in the present case I am unable to see that any question of jurisdiction is involved. It cannot be said that the arbitrator exceeded his powers, except perhaps in so far as his award delegated to others the ascertainment and division of the lands comprising item 1, Sch. B; and since this was not carried out there was in fact no exercise of powers by persons not authorized by the reference to arbitration. What happened was that the arbitrator left undone certain work which he should have completed. If the petitioners desired to take exception to the award on the score of its completeness, they had an opportunity to do so before the decree was passed. There is not

1. (1902) 29 Cal 167=29 I A 51=S Sar 154 (P C).

2. (1901) 84 P R 1901.

3. AIR 1914 Mad 675=21 I C 308=38 Mad 256.

4. (1891) 18 All 300=18 I A 55=6 Sar 14 (P C).

5. (1912) 39 Cal 822=18 I C 69.

6. AIR 1919 Mad 877=47 I C 597.

7. AIR 1926 Mad 201=91 I C 745.

8. AIR 1920 All 258=59 I C 75=42 All 525.

even a suggestion made here that they were prevented by any sufficient cause from so doing. In a similar case *Ram Bhajan Pandey v. Udit Pandey* (9) it was held to be the duty of an objector to get the award remitted under para. 14, Sch. 2. I do not accept the position that in the absence of any objection the Court was bound to scrutinize the terms of the award and satisfy itself, before passing its decree, that it disposed of all the matters referred to arbitration; and if it did not so dispose of them, was bound suo motu to remit the award under para. 14. This is what the petitioners ask me to hold, and, further, that the Court had no jurisdiction to pass the decree in terms of the award because it turns out that the award did not completely divide the property. They must take the award with all its defects now that the opportunity afforded to them of objecting to it has gone by. Their learned advocate complains of the difficulties created by the decree in its present form, and it may well be that it does create difficulties. But the mere circumstance that the petitioners may have put themselves into an awkward situation will not give this Court jurisdiction and power to extricate them which it does not otherwise possess. What they are virtually asking for is a further opportunity to object to the award after letting slip the opportunity provided for them in the trial Court. The civil revision petition is dismissed with costs.

P.R.S./K.S.

Petition dismissed.

9. (1913) 19 I C 405.

* A. I. R. 1933 Madras 699

PANDALAI, J.

Rangappaya Aithala and others — Plaintiffs—Appellants.▼.
Shiva Aithala and others—Defendants—Respondents.

Second Appeal No. 837 of 1931, Decided on 7th April 1933, against decree of Sub-Judge, South Kanara, in A. S. No. 106 of 1930.

* (a) **Hindu Law—Maintenance—Widow**—Widow's right is one which accrues from day to day during her life-time—Specific family property charged with maintenance payable to widow for previous year on certain date—On death of widow before such date, her heirs are entitled to recover pro-

portionate amount due to her after last payment till date of death.

In its origin, the right of a widow for maintenance is one which accrues from day to day during the life-time of the wife or widow who is entitled to be paid her necessary expenses as and when they arise. Hence the heirs of a Hindu widow, in whose favour the head of the husband's family has executed an agreement charging specific family property to pay her maintenance at a certain rate on a particular date in each year for the previous year, can, if she dies on an intermediate date, recover the proportionate amount due after the last payment till the date of her death. [P 699 C 2; 5P 700 C 2]

(b) **Transfer of Property Act (1882), S. 36**—Provision in S. 36 is applicable only as between transferor and transferee of benefit of payment and not between principal persons.

The provision contained in S. 36 is applicable only as between transferor and transferee of the benefit of the payment, and not as between the person liable for and the person entitled to the payment. [P 700 C 2]

(c) **Hindu Law—Maintenance—Law to be applied is rule of Hindu law and in its absence rule of justice, equity and good conscience.**

Primarily, the law to be applied to a case of maintenance under Hindu law is not the English Common law, but the Hindu law; and if there is no specific rule in that law on the question, the rule of justice, equity and good conscience should be applied. [P 700 C 2]

(d) **Hindu Law—Maintenance—Widow—Obligation to maintain widow is dependent on taking property of her husband whether by inheritance or survivorship.**

The obligation to maintain a widow is dependent on taking the property of her deceased husband by inheritance or survivorship and the widow of a co-parcener whose share is taken on his death by the other branches is entitled to be maintained by them after his death, and this right is enforceable against the whole family and not only against the branch which took by survivorship his undivided share: 35 *Mad* 147, *Ref.* [P 700 C 2]

K. Y. Adiga—for Appellants.

B. Sitaram Rao—for Respondents.

Judgment.—The question in the case is whether the heirs of a Hindu widow in whose favour the head of her husband's family has executed an agreement charging specific family property to pay her maintenance at a certain rate on a particular date in each year for the previous year, can, if she dies on an intermediate date, recover the proportionate amount due after the last payment till the date of her death.

The facts are not in dispute. The plaintiffs and defendants 2 and 3 represent one brother and defendant 1 another brother, and the father-in-law of Mahalakshmi Hengsa was the third (eldest) brother in a joint Hindu family. On 2nd June 1879 after the death of Maha-

lakshmi's husband and father-in-law, the father of plaintiffs as the elder surviving brother and head of the family executed in her favour a registered agreement, Ex. B, charging some of the family properties agreeing to pay her for each year from 1st Chaitrai Sudha (about 25th March) of 1870 maintenance at Rs. 68 and 21 muras of rice per year, the payments to begin on 1st Chaitrai Sudha (about 25th March) 1871 and on default of punctual payment to pay interest at 12 per cent on the money and customary interest in kind on the rice. In 1875 the plaintiff's and defendant 1's branches partitioned the family property including the properties charged for Mahalakshmi's maintenance and the deed stipulated that defendant 1's branch would pay their half share of the maintenance to the plaintiff's father who was to pay the whole maintenance over to Mahalakshmi. Mahalakshmi died on 2nd March 1917, the due date as per the agreement for payment of that year's maintenance being 23rd March 1917. Her heirs on her death were the plaintiffs and the father of defendants 2 and 3 who are nearer by one degree to her husband than defendant 1. The suit was brought by plaintiffs as her heirs for recovery for themselves and defendants 2 and 3 from the properties charged in the possession of defendant 1 one-half of the proportionate amount of maintenance due for the year ending 23rd March 1917, less the 21 days before Mahalakshmi's death. The lower Courts have held that the whole year's maintenance fell due after Mahalakshmi's death, that the claim is not apportionable from day to day and that the plaintiffs have no cause of action. The suit was accordingly dismissed. Hence this appeal by the plaintiffs.

No Indian authority applicable either way has been referred to in the judgment of the Courts below or in the arguments before me. Apparently the lower Courts rely, as the respondents' learned advocate wants me to rely, on the old Common law doctrine that except in the case of interest on money lent an entire contract is not apportionable either as to time or partial performance. (Story on Equity, Ss. 470 to 475, 3rd English Edition.) In England this doctrine was all but entirely abolished by the Apportionment Act of 1870, Vic. 33 and 34

Ch. 35, (Chitty's Statutes, Edn. 6, Vol. 1 p. 393). In India the statutory provision contained in S. 36, T. P. Act, is applicable only as between transferor and transferee of the benefit of the payment and not as between the person liable for and the person entitled to the payment. S. 340 (2), Succession Act, applies to wills only. There is no statutory provision in India applicable to the case and the question is whether the old Common law rule is to be applied to maintenance due under the Hindu law and even if generally not to be so applied whether, there being an express contract Ex. B making the maintenance payable on a certain date in the year, the rule should be applied to this case.

My first observation is that primarily the law to be applied to the case is not the English Common law, but the Hindu law and if there is no specific rule in that law on the question the rule of justice, equity and good conscience: S. 16, Civil Courts Act, 1873. According to Hindu law, the obligation to maintain widows is dependent on taking the property of the deceased by inheritance or survivorship: Mayne, S. 451, citing the Smriti Chandrika, xi-1, S. 34. Mahalakshmi being the widow of a coparcener whose share was taken on his death, by the other branches was entitled to be maintained by them after his death and this right was enforceable as indeed Ex. B recognizes against the whole family and not only against the branch which took by survivorship his undivided share: *T. Subbarayulu Chetty v. Kamalavalli Thayaramma* (1). The right is traceable to the property out of which in her husband's life-time she would be maintained and on which her maintenance was and remained a charge. In its origin therefore the right is one which accrues from day to day during the life-time of the wife or widow who is entitled to be paid her necessary expenses as and when they arise. It is not one depending on any contract for whose performance a due date is previously agreed on. That being so, it is clear to me that if there were no such express contract as is found in Ex. B, fixing a particular date for the payment of each year's maintenance, the respondents' contention that Mahalakshmi could not demand maintenance for the incom-

plete period of 11 odd months during which she lived after receiving the last payment would be unfounded.

This being the nature of the right, I think, the fixing of a date for the annual payment had not and was not intended to have the effect of altering the nature of the right by cutting it down to an annual payment for every completed year of existence. The date was fixed for convenience both for those who paid and for the widow who was to receive.

I therefore think that the view of the lower Courts was erroneous and that the appellants as heirs of Mahalakshmi are entitled to the arrears till her death and interest thereon as per Ex. B till date of plaint and interest at 6 per cent from date of plaint. The decree of the lower Courts is set aside. Though it was agreed by the parties that second class Gazette rates should be adopted for valuing the rice the District Munsif has not recorded a finding what that rate is. It is therefore impossible now to pass a decree. The case will be sent back to the District Munsif with the direction to pass a decree for sale in accordance with the above. The appellant will have his costs in this Court and in the lower appellate Court. The District Munsif will provide for the costs hitherto incurred and hereafter to be incurred in his Court in the revised decree.

P.R.S./K.S. *Order accordingly.*

* A. I. R. 1933 Madras 701

Special Bench

BEASLEY, C. J., CORNISH AND
BARDSWELL, JJ.

A. C. T. Nachiappa Chettiar—Petitioner—Assessee.

v.

Commissioner of Income-tax, Madras—Opposite Party.

O. P. No. 145 of 1932, Decided on 4th January 1933.

* Income-tax Act (1922), S. 60—Government of India Notification of Finance Department (Central Revenues) No. 21, dated 12th October 1929—Government of India can under S. 60 deal with income-tax and super-tax—But notification No. 21 dated 12th October 1929 deals only with income-tax.

Under S. 60 the Government of India can by notification, deal with income-tax and super-tax; but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India Notification No. 21, dated 12th October 1929, ex-

empts assessee only from income-tax. It does not extend to super-tax. [P 702 C 1; P 703 C 1]

R. Kesava Ayyangar—for Assessee.

M. Patanjali Sastri—for Commissioner of Income-tax.

Beasley, C. J.—The petitioner is the Manager of a Hindu undivided family carrying on banking business at Alagapuri in the Ramnad District and at Minhla and Sitkwin in Burma. Up to December 1928 he had been a partner with P. L. S. M. Muthukaruppan Chettiar, Karaikudi, in a firm known as "C. T. A. M. Minhla" and in another firm known as "C. T. A. S. M. Sitkwin," but in December 1928 these two partnerships were dissolved and the petitioner and his former partner started independent concerns of their own in both those places. A question arose as to whether the partners were successors in respect of these concerns to the businesses formerly carried on at those places by the before mentioned partnerships. After an appeal, the Commissioner of Income-tax, Burma, held that no succession had taken place. In the meantime the Income-tax Officer, Karaikudi, had made an additional assessment on the petitioner under S. 34 including in his assessment his share of the profits of the firms on the footing that a succession had taken place and he levied both income-tax and super-tax. On appeal to the Assistant Commissioner, in view of the decision of the Commissioner of Income-tax, Burma, the petitioner's assessment to income-tax was cancelled, but his assessment to super-tax was upheld. On an application under S. 33 to the Commissioner of Income-tax, Madras, for cancellation of the assessment to super-tax the Commissioner of Income-tax declined to cancel the assessment. The petitioner's claim that the assessment to super-tax must be cancelled is based upon Government of India Notification, Finance Department (Central Revenues) No. 21, dated 12th October 1929, which it is contended exempts the assessee not only from liability to pay income-tax in respect of the profits and gains, the subject of this reference, but also to super-tax thereon. The question for our consideration is:

"Whether upon the facts of this case the assessee is liable to be assessed to super-tax upon the income exempted by Government of India Notification, Finance Department (Central Revenues) No. 21, dated 12th October 1929."

The Government of India Notification referred to reads as follows :

"In exercise of the powers conferred by S. 60, Indian Income-tax Act, 1922 (11 of 1922) the Governor-General in Council is pleased to direct that no income-tax shall be payable by an assessee in respect of such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to his share in the firm at the time of such discontinuance if tax has at any time been charged on such business, profession or vocation under the Indian Income-tax Act 1918 (7 of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub-S. (1), S. 25, Income-tax Act 1922 (11 of 1922): Provided that such part of the profits or gains shall be included in computing the total income of the assessee."

It is contended on behalf of the assessee that the words "income-tax" in the notification comprise income-tax and super-tax, that S. 60 refers to "income-tax" and that even if the Government of India intended to apply the notification only to income-tax to the exclusion of super-tax it would be ultra vires because S. 58, Indian Income-tax Act, which excepts certain sections of the Act from application to the charge, assessment, collection and recovery of super-tax, does not except S. 60. It is further contended that throughout the Act the words "income-tax" mean both income-tax and super-tax. With regard to the contentions that by reason of S. 58 of the Act the Government of India in issuing a notification under S. 60 have no power to exclude super-tax, in my opinion, there is no real substance in that contention. It is quite true that under S. 60 the Government of India can, by notification, deal with income-tax and super-tax, but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. What has to be considered here is what really was intended by the notification. Taking the words "income-tax" by themselves without any consideration of the reasons which make such a notification necessary, I agree with the assessee's contention that ordinarily the words "income-tax" should be taken to include super-tax as well. But Mr. Patanjali Sastri on behalf of the Income-tax Commissioner argues that under the Indian Income-tax Act of 1918 the basis of assessment was the income of the year of assessment and that since of course it could not be really

known until the end of the year what that income was, a provisional assessment was made and adjustment was made later when the actual income was known and then a final assessment was made.

In 1922 the basis was altered and assessment made on the income of the previous year, but by S. 68 of the Act which is now no longer in operation the old basis of assessment was kept alive for one year. This resulted in a double assessment. When the adjustment system was abandoned on the passing of the Act of 1922, it was agreed that one final adjustment should be made in the year 1922-23; and both a final assessment or adjustment under the old system (retained, as before mentioned, for one year under S. 68) and an assessment under the new system was made on the income of the year 1921-22. This resulted in the assessments which had been a year behind (so far as final assessments were concerned) being brought up abreast of the income again. Since that is the position, it is clear that provision had to be made as regards the assessment of business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act of 1918 and which were or might be discontinued. These are provided for in S. 25 (3). Super-tax has always been in a different position because ever since it was imposed in 1917-18, it has always been assessed on the previous year's income and so was always a year behind-hand and not abreast of income. The effect therefore of S. 25 (3) is that in the case of income-tax the business, profession or vocation which is discontinued has been assessed for the number of years of its existence. If it has been in existence for 10 years, it has been assessed in respect of the income of those 10 years. But with regard to super-tax, as it has always been a year behind-hand, it has only been assessed on nine years' income. Hence it is that a distinction is drawn by the income-tax authorities between the two taxes and the argument addressed to us that the notification does not cover both. What then is the necessity for the notification? S. 25 (3) leaves in an unsatisfactory position an assessee who is a member of an undivided Hindu family in respect of the profits and gains which he receives

as such member of any firm which have been assessed to income-tax as are proportionate to his share in the firm. It is pointed out that, notwithstanding S. 25 (3), S. 14 (2) (b) might still render such profits and gains liable to income-tax since S. 14 (2) (b) deals with the profits and gains of a firm which have been assessed to income-tax and, since it might have been contended by the income-tax authorities that as the firm is free from assessment by reason of S. 25 (3) and the assessee will on that account not be able to bring himself within the provisions of S. 14 (2) (b), the notification was made necessary in order to protect such an assessee.

This explanation, in my opinion, is the correct one, and it is clear that it is intended by the notification to put the assessee in the same position as regards exemption as that occupied by the assessee in S. 25 (3); and in my view neither an assessee in S. 25 (3) nor the assessee here is entitled to claim that the notification extends to super-tax as well as income-tax. I am further confirmed in this opinion by the proviso to the notification which reads as follows:

"Provided that such part of the profits or gains shall be included in composing the total of income of the assessee."

It is conceded here by the assessee that the profits and gains are included for the purpose of arriving at the appropriate rate of income-tax. I cannot see why the proviso is limited merely to that purpose. I think it follows that it is also for the purpose of ascertaining whether the income is sufficient to make it chargeable to super-tax. I would therefore for the reasons I have given, answer the question referred to us in the affirmative. The assessee must pay Rs. 250 costs of the Commissioner of Income tax.

Cornish, J.—I agree.

Bardswell, J.—I agree.

P.R.S./K.S.

Question answered.

* A. I. R. 1933 Madras 703

WALSH, J.

T. L. Swaminatha Ayyar—Appellant.

v.

Official Receiver of South Malabar—Respondent.

Appeals Nos. 94 and 95 of 1929, Decided on 8th March 1933, against appellate order of Dist. Judge, South Malabar, D/- 11th October 1928.

* Provincial Insolvency Act (1920), Ss. 51 and 52 — S. 52 is inapplicable where property has been brought to sale—But creditor who brings property to sale is entitled to first charge for costs under S. 51 as "benefit" under S. 51 means net realization after paying costs.

Section 52, which deals entirely with property which has not been brought to sale, is inapplicable to a case where the property has been brought to sale. Hence a creditor who has brought the property to sale is not entitled to a first charge for the costs incurred for bringing the debts of insolvent to sale under S. 52; but he can do so under S. 51, as "benefit" under S. 51 means net realization in execution after paying costs: *Case law referred.* [P 704 C 1, 2]

T. M. Krishna Swami Ayyar and *C. V. Mahadeva Ayyar*—for Appellants.

T. S. Anantaraman—for Respondent.

Judgment.—These appeals raise a matter of some difficulty. One Swaminatha got a decree against one Gopalakrishna and in execution attached on 12th March 1926 some debts due to the debtor. An insolvency petition was filed against Gopalakrishna in April 1926 and the Official Receiver was appointed interim Receiver. He petitioned the executing Court to have the execution of Swaminatha's decree stopped and have the attached properties delivered to him. Ultimately the debts attached were sold on 25th June 1926 by the Court in execution of Swaminatha's decree. In August 1926 Swaminatha applied to the Court for payment to him of the sale proceeds. The Subordinate Judge dismissed the petition as there were insolvency petitions pending against Gopalakrishna, the judgment-debtor. Gopalakrishna was adjudged insolvent in August 1927. Both Swaminatha and the Official Receiver then applied for payment of the sale proceeds. The Subordinate Judge ordered the payment of the whole amount to the Official Receiver. In appeal it was held that Swaminatha was not entitled to the sale proceeds, nor was he entitled to a first charge with regard to the costs incurred by him in bringing the property to sale. In second appeal it is not contended that he is entitled to the sale proceeds; but it is contended that he is entitled to a first charge for the costs incurred by him in bringing the debts to sale. The learned District Judge held that S. 52 applied only to the property of a debtor attached in execution but which has not been sold, and that as this was the only section under which the appellant could recover

the charges for bringing the property to sale he could not be allowed those charges. He admits that it is illogical that while a creditor who has taken out execution but has not brought the property to sale is entitled to a charge for the costs of his suit and of the execution, a creditor who has taken out execution and has brought the property to sale should not be entitled to anything. He says:

"But the wording of S. 52 is too clear to allow of an interpretation which would remove this illogicality."

With regard to the case which he quotes, *Lyon Lord & Co. v. Virbhandas Rattanchand* (1) decided by the Assistant Judicial Commissioner of Sind, that would not be an authority in this Court, and as a matter of fact the view taken in that case that S. 52 applies only to movable property has been dissented from in *Haran Chandra Chakravarthi v. Joy Chand* (2) and *Sivaswami Odayar v. Subramania Iyer* (3). This however does not really touch one of the main points in question, viz., whether S. 52 applies to property which has already been sold. It may be observed that the application to the Sub-Court by the Official Receiver was made before the sale but was refused on the strength of the rulings in *Lyon Lord & Co. v. Virbhandas*, A. I. R. 1924 Sind 69, *Ralla Ram v. Ram Labhaya*, A. I. R. 1925 Lah 158 and *Ramchandra Aiyar v. Sankara Ayyar* (4). But in the case *Sivaswami Odayar v. Subramania Iyer* (3) quoted above, the opposite view was held that S. 52 would apply to an interim receiver. This is the latest authority, but it cannot be said perhaps that the point is decidedly settled. Anyhow I do not see any escape from the conclusion that S. 52, which deals entirely with property which has not been brought to sale, is inapplicable to a case where the property has been brought to sale. But it is contended that S. 51 will cover the case. S. 51 says:

"Where execution of a decree has issued against the property of a debtor no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

1. A I R 1924 Sind 69=76 I C 380.

2. A I R 1929 Cal 524 = 123 I C 737 = 57 Cal 122.

3. A I R 1932 Mad 95 = 136 I C 339 = 55 Mad 316.

4. A I R 1926 Mad 357=93 I C 271.

It is argued for the appellant that the word "benefit" here means net realizations after meeting the charges. This argument was put in another form before the learned District Judge, namely that if S. 52 is excluded, there is no other section under which the Court has power to direct the proceeds belonging to the debtor to be delivered to the receiver. With regard to this the learned Judge held that the effect of the provisions of the Act in general, and of S. 51 in particular, was to vest such money in the Official Receiver on behalf of the general body of creditors. I agree that S. 51 does vest the property which has been sold under such circumstances in the Official Receiver, but it appears to me a reasonable interpretation of the word "benefit" to hold that it is the net realization in execution after paying the costs. If that is so the balance will not belong to the Official Receiver and, in the absence of any clear provision to the contrary, it would be justifiable to award it to the decree-holder who has incurred the expenses of bringing the property to sale. If S. 51 can be read so as to do justice to the parties I think it is preferable to read it in such a manner, seeing that S. 52 does not apply, rather than to put a construction upon it which is obviously unjust.

I would therefore hold that under S. 51 the appellant is entitled to a charge on the property sold for the expenses incurred by him in bringing it to sale. The appeal is therefore allowed with costs throughout (one set) out of the estate. Appellant will recover costs of the suit and of execution.

P.R.S/K.S.

Appeal allowed.

A. I. R. 1933 Madras 704

WALSH, J.

(*Manathanath Kolongara Veetil Adambat*) *Gopalan Nair*—Defendant—Appellant.

v.

Dist. Board of Malabar—Plaintiff—Respondent.

Second Appeal No. 13 of 1929, Decided on 24th March 1933, against decree of Sub-Judge, Calicut, D/- 11th July 1928.

(a) Limitation—Toll contractor committing default—District Board exercising option of re-sale—Sale postponed for want of bidders without consent of contractor—Subsequent re-sale and suit for loss incurred—Limitation runs from first date of re-sale and not

date of actual sale—Contract Act (1872), Ss. 39, 63 and 107.

The defendant was a toll-gate contractor under the plaintiff District Board. He committed default in payment and the Board exercised its option of resale. As there were no bidders, the sale was postponed to some other date without the consent of defendant. The resale was held on the subsequent date and the Board sued for the loss occasioned by such resale:

Held: that the Board had treated the contract as broken by ordering the resale, that S. 63 or S. 107, Contract Act, had no application to the case, but that S. 39 applied, and that limitation ran from the date of resale and not from the date of the actual resale: *Case law reviewed.*

[P 706 C 1, 2; P 703 C 1]

(b) Interest—Interest cannot be granted on equitable principles in absence of contract—Defendant toll contractor stipulating to pay 12 per cent on arrears of kist, plaintiff having right to resale—Right of resale of toll exercised by plaintiff and suit for loss occasioned by such resale—Interest cannot be allowed.

In the absence of a contract interest cannot be granted on equitable principles. [P 703 C 1]

There was a stipulation in a toll contract executed by the defendant to pay 12 per cent on the arrears of kist. Owing to default of defendant plaintiff resold the toll and sued for the loss occasioned thereby with interest:

Held: that plaintiff had the option either of bringing a suit for arrears of kist with interest at 12 per cent, or of reselling the toll and making the defendant liable for the loss, if any, resulting from the resale; and as the suit was brought for damages on the resale, interest could not be awarded. [P 708 C 1]

B. Sitarama Rao—for Appellant.

K. K. Pocker and P. Govinda Menon—for Respondent.

Judgment.—The defendant in this appeal is a toll-gate contractor. He had rented a toll at Tamarasseri for 1921-22 for a sum of Rs. 7,500. The contract was to run from 1st April 1921 to 31st March 1922. He defaulted in October 1921, owing to the Moplah rebellion. In all he paid for the contract amount Rs. 3,300. The District Board of Malabar (plaintiff) granted a remission of Rs. 2,000. The Board exercised its option of resale which was held on 26th October 1921, but at which there were no bidders. A second sale was held on 10th December 1921. The resale resulted in a loss of Rs. 2,795. Deducting the Rs. 2,000 remitted the Board sued for the balance of Rs. 795 with interest at "the stipulated rate of 12 per cent."

Various contentions were raised of which the only two which arise in second appeal are the questions of limitation and the matter of interest. As regards limitation the trial Court found that the suit

which was brought on 12th November 1924 was time-barred and dismissed it. On appeal the lower appellate Court held that the suit was in time and gave a decree to the District Board. Against this decree the defendant has filed this appeal. The question of limitation arises in this way. Under para. 6 of the conditions of lease,

"if a kist be not paid on or before the date fixed in the patta it will be regarded as an arrear after that date, and interest at 12 per cent per annum will be charged on it for the actual number of days of default; and the toll will be liable to be resold or conducted under amani subject to the conditions mentioned in para. 3."

Para. 3 says that the farm will be resold at the purchaser's risk or conducted under amani. It says:

"In either case the deposit shall be forfeited and the purchaser will have no claim to any excess that may be realized by the second sale and will be held responsible for any deficit that may result by such resale."

Para. 7 runs

"If a re-sale is ordered, the President may, at his discretion, conduct the toll under amani or permit the original purchaser to conduct it during the period between the order for the resale of the farm and the confirmation of the resale."

It may be noted that para. 3 does not create a liability for deficit if the toll is conducted under amani during the period of amani. The suit was brought more than three years after the first attempted sale on 10th December 1921, but within three years after the actual sale on 26th December 1921, and the question is, which is the correct date from which to reckon limitation?

It is quite clear from paras. 6 and 7 that once resale is ordered, the lessee loses any further benefit of the contract except in so far as the President may permit him to continue conducting the collection of the toll. Therefore the order for resale is a clear indication that the promisee had put an end to the contract owing to the default of the promisor. The learned District Munsif has held, and I think rightly, that it is not open to the promisee to use his discretion in putting off the date of the re-sale and thereby depriving the defendant of the plea of limitation, although in this particular case the adjournment of the sale was probably made in the interests of defendant 1. It is argued for the appellant that such a re-sale was merely for ascertainment of damages and will not affect the starting point of limitation. 19 Halsbury, p. 42, S. 64 says,

"In the action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of action brought. In such an action it is not necessary to prove actual damage, and special damage is merely alleged as a measure of the damage to be recovered. The time is not extended by the fact that the breach had not been discovered, or that damage has not resulted until after the expiration of six years."

It has to be noted that this suit is one for damages. In *Batley v. Faulkner* (1) where certain wheat delivered was useless and consequently the profit which might have arisen from the land on which it was sown was lost it was held that the cause of action arose at the delivery of the wheat, Abbot, C. J., observed:

"The plaintiff in this case might, as soon as he knew of the defective quality of the wheat, or at any time within the six years, have sued out a writ, and have thus obtained an efficient remedy against the defendant; it is by his own negligence that he is deprived of his remedy, and he has no right to complain."

He says also:

"It would be extremely dangerous to require in every particular case, the precise period of time when the damage first came to the knowledge of the plaintiff, and in many instances it would deprive the party of the benefit which the legislature intended to confer upon him."

The learned Subordinate Judge has held that S. 107, Contract Act, which has been wrongly printed in the judgment as Art. 107, Lim. Act, applies to a case like the present and that the District Board had a reasonable time within which to hold the resale. But in *Jamal v. Moolla Dawood Sons & Co.* (2) it was laid down that S. 107 only applies to specific cases where a seller has a lien on goods or has stopped them in transitu. Their Lordships say: "This section follows upon sections dealing with those subject-matters." I am quite clear that S. 39, Contract Act, applies to the present case. It runs:

"When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

As pointed out above, the notice of resale put an end to the contract because thereafter the promisor could not conduct the toll or could only conduct it

under the permission of the President of the District Board. Therefore there is no extension of the time for performance granted by the promisee in this case once the re-sale had been ordered. S. 63 does not therefore apply. In this connexion may be quoted *Muthayya Maniagan v. Lakku Reddiar* (3), where it was held that S. 63, Contract Act, does not entitle a promisee for his own purposes and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract; nor does S. 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. Ayling, J., says:

"S. 63 deals only with concessions on the part of the promisee advantageous to the promisor and cannot be invoked to support an extension of time by the promisee for his own benefit," and says

"that S. 55 read with S. 2 (1) means nothing more than this: on the promisor's failure to perform within the contract time, the promisor loses the power to enforce the contract, that is, to claim any advantage due to himself thereunder. The promisee has the option of enforcing it or not as it may suit him, and if he elects to enforce the contract, he can, under S. 73, obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew, when they made the contract, to be likely to result, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach."

No doubt, in the present case the delay in re-sale was advantageous to the defendant as there were no bidders at the first sale and so the sale was adjourned; but that will not, I think, alter the principle (where the promisor has not consented to the course). To hold otherwise would lead to very great difficulties, even though the promisee may sincerely believe that he is doing his best for the promisor. In the natural course of events, the longer the resale is deferred, the less would it fetch as the period for collecting the toll becomes shorter; so that, even if the promisee thought that a better price would be realised by adjourning a sale on account of low bidding, it would be manifestly unjust to allow him to substitute his own forecast, which might after all prove to be wrong, for the consent of the promisor to such a course; in any event, the course adopted has in the present case, seriously prejudiced the promisor subsequently in the matter of

1. (1820) 160 E R 668=3 B & Ald 288.

2. AIR 1915 P C 48=31 I C 949=43 I A 6=43 Cal 493 (P C).

3. AIR 1914 Mad 573=14 I C 255=37 Mad 412.

limitation if the view of limitation taken by the lower appellate Court is correct. It has been asked on behalf of the respondent, what would happen supposing the contract had been one for five years and the default had occurred after two or three months, and after the notice of re-sale owing to no bidders appearing the lease could not, in fact, be resold for a period of more than three years? The case is a highly hypothetical one because, as observed above, the longer the sale is deferred the less ordinarily will it fetch, and if no purchaser be found for three years, it is very unlikely that any purchaser will be forthcoming at the end of that time; but in any case, the promisor cannot be deprived of the advantage which he derives from limitation, and the promisee can always enforce the other branch of the contract by suing for the contract money itself.

The learned advocate for the respondent attempted to get out of the difficulty by arguing that as regards re-sale the contract is one of indemnity by the promisee, that as such the cause of action only came into existence when there was the actual sale and that therefore limitation starts from that date. In this connexion he quotes *Seetana v. Narayanamurthy* (4). That was an obvious case of indemnity where a member of a joint Hindu family undertook to bear all the debts alleged to have been incurred by him for family purposes and the other defendants were to have nothing to do with them. Obviously, the cause of action there only arose when those, who had been indemnified, suffered damage by being called upon to pay the debts. S. 124, Contract Act, is the section which deals with an indemnity contract. Without damage there is no cause of action under that section. It is clear however that the District Board suffered damage as soon as the defendant defaulted in payment. Another case quoted for the respondent is *Kedar Nath v. Har Govind* (5). There, a person was entrusted with a certain sum of money with instructions to pay it to another person to whom the person who entrusted the money was liable. He failed to pay the money, in consequence of which the person who

entrusted the money had to pay a large sum of money for interest to his creditor. It was held that under Art. 83, Lim. Act, a suit to enforce the indemnity or for damages resulting from the delay, if filed within three years from the date of the actual injury, is within time. That suit was for damages for breach of the contract and not for compensation by reason of the avoidance of the contract. Certain remarks of Ashworth, J., are quoted which are as follows:

"It has been suggested that, if this view is correct, the promisee has no remedy until years after the breach. It may be remarked however that in such a case as this, though he could not sue for specific performance, he could have treated the agreement as void under S. 55, Contract Act, and sued for restoration of the Rs. 5,000."

These remarks are obiter. In *Gopala Ayyar v. Ramaswamy Sastrigal* (6), it was held that in such a case if the plaintiff waited till the expiry of a reasonable time, the defendant's breach of contract would give him a cause of action, whether the plaintiff himself paid the debts or not, and the question as to what is a reasonable time is a question of fact. I do not consider that *Seetanna v. Narayanamurthy* (4), or *Kedar Nath v. Har Govind* (5), is of any assistance to the respondents. Another case quoted for the respondent is *Mancherji Bommanji v. Nusserwanji Mancherji* (7). That case also is different from the present one, because in that case the money remained with the defendant's firm destined for the purchase of ornaments and the intention was that the money should not be paid until the plaintiffs required it for the purpose for which it was destined and demanded and it was held that the contract was not broken until the plaintiffs demanded the money.

It is argued for the respondent that *Jamal v. Moolla Dawood Sons & Co.* (2) has no application to the present case as in that case there was only one contract, while there are two here, that *Muthayya Maniagan v. Lekku Reddiar* (3) did not deal with the starting point for limitation and with the measure of damages and was also a case of a single contract. I think that S. 107 will not apply to a case of this sort and that S. 63 will not enable a promisee to avoid

6. (1912) 10 I C 320.

7. (1896) 20 Bom 8.

8. A I R 1930 Mad 727 = 53 Mad 549 = 127 I C 630.

4. A I R 1920 Mad 615 = 57 I C 982.

5. A I R 1926 All 605 = 95 I C 913.

limitation by postponing the date of re-sale after he has chosen to treat the contract as broken by ordering a re-sale. I would therefore hold that the suit is barred by limitation.

I may also give my opinion with regard to the question of interest. Here the legal principles contended for by the learned advocate for the appellant are not seriously challenged, namely, that in the absence of a contract interest cannot be granted on equitable principles, and there must be a sum certain, which cannot be in the present case as it depends upon an uncertain future event: vide *Nanchappa Koundan v. Vattasari Ittichathara Mannadiar* (8). The Interest Act admittedly does not apply: vide *Maine & New Brunswick Electrical Power Co. v. Hart* (9), which is the authority followed in *Nanchappa Koundan v. Vattasari Ittichathara Mannadiar* (8); vide also *Ramalinga Mudaliar v. Muthuswami Iyer* (10). But it is argued for the appellant that the deficit in re-sale which represents damages ascertained by the Board includes interest. In regard to this, it is only necessary to read the abstract of the plaint as set out in both the judgments to see that this interest was not treated as part of the deficit in re-sale. The loss by the re-sale is said to be Rs. 795 and it was on this sum that interest at the stipulated rate which is said to be 12 per cent was asked for. The clause of the agreement which awarded 12 per cent interest is para. 6. That contemplated what was due on the arrears of kist. The plaintiff had the option either of bringing a suit for arrears of kist with interest at 12 per cent or of re-selling the toll and making the defendant liable for the loss, if any, resulting from the re-sale. I am of opinion therefore that when the suit is brought for damages on the re-sale, interest cannot be awarded. In the result the appeal is allowed and the suit dismissed with costs here and in the lower appellate Court.

P.R.S./K.S.

Appeal allowed.

9. (1929) A C 631 = 98 L J P C 146 = 141 L T 370.

10. A I R 1927 Mad 99 = 50 Mad 94 = 99 I C 960 (F B).

* * A. I. R. 1933 Madras 708

BEASLEY, C. J. AND BARDSWELL, J.

Munusami Goundan—Plaintiff—Petitioner.

v.

Kutti Moopan and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 1031 of 1928, Decided on 10th February 1933, against decree of Dist. Munsif, Vellore, D/- 9th December 1927.

**** Hindu Law—Debts — Promissory note executed by father while joint with sons—Endorsements by father after partition saving limitation—Sons are liable for the debt.**

Where a promissory note is executed by the father, while he is joint with his sons, the fact that an endorsement saving limitation is made by the father in such note after a partition between him and his sons, does not take away the liability of the sons for such debt: A I R 1919 Mad 1175, *Expl*; A I R 1928 Mad 657 (FB), *Rel on*. [P 709 C 2]

Kasturi Seshagiri Rao and V. Kachapeswara Ayyar—for Petitioner.

A. Viswanatha Ayyar and A. Ramaswami Ayyar—for Opposite Parties.

Beasley, C. J.—The suit out of which this petition arises was for Rs. 200 balance of principal and interest under a promissory note dated 27th May 1918, executed by defendant 1, the father of defendants 2 to 4 in the suit. There are three endorsements on the promissory note dated 21st May 1921, 1st July 1922 and 5th December 1924, made by defendant 1. These endorsements are relied upon by the plaintiff as saving the suit from the bar of limitation. Defendant 1 did not defend the suit and defendants 2 and 4 raised the plea that the family had become divided twenty years ago. If they had succeeded in showing that division twenty years ago, clearly no question would have arisen as regards their liability because the promissory note would have been executed by defendant 1 after that division. The learned District Munsif has found that at any rate by 1922 the defendants had become divided, and although he does not find the exact date of the division, it must be taken that in his view the family became divided after the execution of the promissory note.

The learned District Munsif found that defendants 2 to 4 were not liable because, although the debt had been incurred before the partition, the promissory note in respect of that debt was acknowledged after partition, and in

support of that view he referred to *P. Venkanna v. Sreenivasa Diskshatalu* (1), where it was held that a Hindu son is not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. Following this decision he held that defendant 1 would have no authority to make any payment or endorse such payment on the promissory note on behalf of his sons. I do not think that *P. Venkanna v. Sreenivasa Diskshatalu* (1) is any authority upon the latter point. In that case a promissory note had been executed by the father of the other defendants before partition, and as before stated, after partition, the father executed the suit promissory note in renewal of the prior promissory note. Wallace, C. J., on p. 142 (of 41 *Mad.*) states that the father had no authority from the sons to renew the note after partition. Kumaraswami Sastri, J., the other member of the Bench at p. 143, states :

"In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must, in my opinion, be treated as a new obligation incurred after partition."

In the Full Bench case of *Subramania Ayyar v. Sabapathy Ayyar* (2), which held (Coutts-Trotter, C. J., and Srinivasa Ayyangar, J., dissenting) that a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition between the father and the sons. Anantakrishna Ayyar, J., after a careful review of the authorities touching this question at p. 410, states the trend of judicial decisions has been to the effect, amongst others, that if the cause of action for the suit be not the original debt incurred before the partition but a promissory note executed by the father alone after partition though in renewal of a promissory note executed by him before partition, the sons are not liable to any extent if the suit be based on the renewed promissory note only. That opinion is in con-

formity with the observations of Wallace, C. J., and Kumaraswami Sastri, J., in *P. Venkanna v. Sreenivasa Diskshatalu* (1). Neither *P. Venkanna v. Sreenivasa Diskshatalu* (1) nor *Subramania Ayyar v. Sabapathy Ayyar* (2) is any authority for the view that sons are not liable for a debt on a promissory note executed by the father before partition and after partition kept alive by endorsement of part payment of the debt made by the father having the effect of course of keeping the debt alive.

In *Subramania Ayyar v. Sabapathy Ayyar* (2) it is quite clear that Anantakrishna Ayyar, J., was referring to a suit not on the original debt but a suit based on a renewed promissory note and in *P. Venkanna v. Sreenivasa Diskshatalu* (1) also that was the position. The two positions, in my opinion, are quite distinct. If as *Subramania Ayyar v. Sabapathy Ayyar* (2) decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable. But in the case of a renewed promissory note the suit is not upon the original debt at all but upon the renewed promissory note and I can see nothing which can take away from a father his authority from his sons to make a payment during the period of limitation in respect of a debt incurred by him. It is another matter altogether to wipe out the original debt and substitute therefor another debt. Therefore, upon this point, in my opinion, the learned District Munsif was wrong, but it is only fair to say that when he gave judgment he had not before him the judgment in *Subramania Ayyar v. Sabapathy Ayyar* (2) which was delivered in the same month and which of course not being then reported was not referred to in the arguments of counsel. For these reasons, in my opinion, this petition must be allowed with costs.

Bardswell, J.—I agree.

P.R.S./K.S.

Petition allowed.

1. A I R 1919 Mad 1175 = 41 Mad 136 = 43 I C 225.

2. A I R 1928 Mad 657 = 51 Mad 361 = 110 I C 141 (FB).

A. I. R. 1933 Madras 710 (1)

VENKATASUBBA RAO, J.

Susai Lazar Villavaraya—Plaintiff—Appellant.

v.

M. Ramaswami Naidu and others—Defendants—Respondents.

Second Appeal No. 355 of 1929, Decided on 20th April 1933, against decree of Sub-Judge, Tuticorin, in A. S. No. 269 of 1927.

(a) Transfer of Property Act (1882), S. 6 (e)—Word “mere” implies bare right to sue—Transfer of property with right to past profits—Claim to profits on ground of such transfer is valid.

The word “mere” in S. 6 (e) is not without significance, and implies that the transferee has acquired no interest other than a bare right to sue. Where a property is transferred with rights to past profits, claim to profits on ground of such transfer is valid and can be enforced.

[P 710 C 1]

(b) Cosharer—Right to profits against cosharer in possession is not right to mesne profits and can be transferred.

The right to the profits against a cosharer in possession, is not in law a right to mesne profits, but is a right to obtain and call for an account, and such a right can be transferred: *A I R 1922 Mad 150*; *18 I C 138* and *A I R 1931 P C 9, Ref.*

[P 710 C 2]

A. Swaminatha Iyer—for Appellant.*S. Murugesu Mudaliar*—for Respondents.

Judgment.—Some of the co-owners transferred their rights in certain properties in favour of the plaintiff. They also purported to transfer their right to the past profits. Defendant 1 resists the claim to the profits on the ground that under S. 6 (e), T. P. Act, a mere right to sue cannot be transferred. In the first place, was what was transferred a mere right to sue? The word “mere” in the section is not without significance and in my opinion implies that the transferee has acquired no interest other than a bare right to sue. But in this case not only was the right to the profits assigned, but the property itself was transferred. Secondly, defendant 1’s contention is that the transfer was of mesne profits and is therefore invalid. It is unnecessary to inquire whether mesne profits can be assigned or not. The expression “mesne profits” connotes that the defendant is in wrongful possession: vide S. 2 (12) Civil P. C., but it is well settled that the receipt of profits by a cosharer is not wrongful; see *Yeru-*

kola v. Yerukola (1). The right to the profits against a cosharer in possession, is not in law a right to mesne profits, but is a right to obtain and call for an account, and such a right, it has been repeatedly held, can be transferred: see *Ramiah v. Rukmani Ammal* (2) and *Annamalai Chettiar v. Muthukaruppan Chettiar* (3). In this view the assignment in favour of the plaintiff does not contravene any principle of law and must be recognized. In the result the second appeal is allowed with costs here and in the Court below and the judgment of the trial Court is restored.

P.R.S./K.S.

Appeal allowed.

1. *A I R 1922 Mad 150=71 I C 177=45 Mad 648 (FB).*
2. (1913) *18 I C 138.*
3. *A I R 1931 P C 9=130 I C 609=58 I A 1=8 Rang 645 (PC).*

A. I. R. 1933 Madras 710 (2)

REILLY AND CORNISH, JJ.

Swaminatha Odayar—Defendant—Appellant.

v.

K. S. Natesa Iyer—Plaintiff—Respondent.

Appeal No. 245 of 1926, Decided on 2nd December 1932, against decree of Sub-Judge, Tanjore, in O. S. No. 41 of 1925.

(a) Hindu Law—Guardianship—Natural father is not natural guardian of his son given in adoption.

The natural father is not the natural guardian of his son after he has been given in adoption. He can only be a de facto guardian or guardian ad litem.

[P 712 C 1]

(b) Guardian and Ward—Guardian cannot impose unconditional personal liability on minor by executing promissory note in name of minor—Promissory note—Minor.

No guardian can, by executing a promissory note in the name of a minor, impose an unconditional personal liability on the minor. Hence the promisee can get no relief by suing the minor on such promissory note alone: *A I R 1919 Mad 641 (FB)* and *A I R 1931 Mad 140, Dist; A I R 1932 Mad 696 Ref.*

[P 712 C 2, P 713 C 1]

A. V. Viswanatha Sastri and R. Gopalaswami—for Appellant.*S. Panchapagesa Sastriar*—for Respondent.

Reilly, J.—This suit, as I understand it, is a suit on a promissory note and upon nothing else. The cause of action in the plaint is stated to be the promissory note, Ex. B. The fact that earlier in the plaint some of the previous history is recited does not affect, so far as I can see, the basis of the suit as

brought by the plaintiff. The opening words of the learned Subordinate Judge's judgment make it quite clear that he understood this to be a suit upon the promissory note; and that is shown also by the form of the only issue in the suit:

"Is the plaint promissory note true, supported by consideration and binding on defendants 2 to 8?"

Exhibit B is a promissory note payable to order, dated 27th November 1923, and executed by defendant 1 for himself and as guardian of defendant 2 in renewal of a previous note, Ex. A, dated 13th November 1921, by the same parties. In Ex. A it is stated that the purpose for which the debt is incurred is "family and litigation expenses." The learned Subordinate Judge has made a decree against defendant 1 for the whole amount, Rs. 17,000 odd, and against defendant 2's property for Rs. 2,455 only. Defendant 2, who is still a minor, appeals against the decree, so far as it is against him. Defendant 2 is the natural son of defendant 1, but was adopted by defendant 1's deceased paternal uncle. It appears that they belonged to a very wealthy family in the Tanjore District, their property being worth altogether many lakhs, we are told. In respect of that family property a partition suit was instituted by one of the members of the family in 1919 after disputes about the property had been the subject of proceedings in Criminal Courts. That partition suit was eventually tried by the Subordinate Judge of Kumbakonam as O. S. No. 22 of 1924. In this suit the learned Subordinate Judge has made defendant 2 liable for Rs. 2,455 because he finds that amount shown in Ex. E, a costs list in O. S. No. 22 of 1924, as the expenses incurred by defendant 1 and his sons and defendant 2 and defendant 1's brother in that suit. On that basis the learned Subordinate Judge has come to the conclusion that it is shown that litigation expenses had to be incurred on behalf of defendant 2 and to that extent, but no further, the promissory note can be held binding on defendant 2's property.

Apart from the fact that, as Mr. Gopalaswami Iyengar for defendant 2 represents, the costs list, Ex. E, relates not only to defendant 2, but to other parties in the partition suit, and there-

fore it does not show that the whole of the Rs. 2,455 had to be incurred as expenses in that suit for defendant 2, I think there are two sufficient reasons why this appeal must be allowed. The first appears to me to be really a superfluous reason; and I mention it only because it has been the subject of considerable argument before us. As Mr. Gopalaswami Iyengar has urged, there is no real evidence establishing any necessity for borrowing money from the plaintiff for defendant 2. The plaintiff does not rely upon any supposed inquiries made by him to justify his claim; but he sets out to prove necessity. Now defendant 2 admittedly had a share, and a very valuable share, in the large family property I have mentioned. But in the partition suit a question was raised whether he had been adopted by his great-uncle. If he had been adopted, as was established in the suit and not disputed in appeal, then he was entitled to either a fourth or a fifth share in the whole family property; if he had not been adopted, he was still entitled to a very valuable share as the son of defendant 1. His interests had to be guarded in that suit; but there is nothing to show that it was necessary to borrow money in order to guard his interests. It appears that defendant 1 had been in possession of the very valuable family estates for at least two years before the partition suit was instituted; and, when once that suit was instituted, a Receiver was appointed, who held possession of the whole family property during the long history of the suit.

There is nothing whatever to show that defendant 2's interest in the family property, whatever it was, whether as the adopted son of his great-uncle or as the son of his father, was not quite enough to meet any expenses necessary on his account in the partition suit. And, after that suit had been instituted, there is evidence to show that the parties to the suit drew large amounts from the Receiver for their respective purposes. There is nothing whatever to show that any expenditure required to guard defendant 2's interests in that suit could not have been met by money obtained from the Receiver, if an application had been made to the Court for that purpose. For the plaintiff it is urged defendant 1 must have had accounts for

the period when he was managing the family property, and those accounts are not produced. But quite apart from any accounts there is no reason whatever to doubt that plenty of money was available to guard the interests of defendant 2 before the partition suit was instituted, and any money necessary for his purposes in that suit would no doubt have been readily granted by the Court, if an application that the receiver should advance money for the purpose had been made. It is clear I think that the allegation that there was necessity to incur any such debt as this on the date of Ex. A for any legitimate purpose of defendant 2 has not been made out.

Secondly and fundamentally it appears to me clear that the plaintiff cannot have any remedy on this promissory note against defendant 2. I may remark that defendant 1 was not the legal or legally appointed guardian of defendant 2. Defendant 2 had been adopted by his great-uncle. Both his great-uncle and his great-uncle's wife had died ; but that would not make his natural father, defendant 1, again his legal guardian. Under the Hindu law the natural guardians of a minor are only his parents, and defendant 1 was legally no longer defendant 2's father after defendant 2's adoption. Defendant 1 was no more than what is often called a de facto guardian, that is a person who arrogates to himself the charge of a minor's person or property.

In the partition suit it appears he was on record as defendant 2's guardian ad litem; but that would give him no additional right to incur debts on defendant 2's behalf. And, apart from defendant 1's actual position in relation to defendant 2 as de facto guardian or as guardian ad litem, how can any guardian impose a liability upon a minor by executing a promissory note on his behalf? If a promissory note is to effect anything, it must create an unconditional personal liability. How can any guardian impose an unconditional personal liability upon a minor? An agent can impose such a liability upon his principal, if his act is in effect the act of his principal, but a guardian is not the agent of his ward however his guardianship arises. Mr. Panchapagesa Sastri has referred us to *Ramajoggayya v. Jagan-*

nadhan (1) and *Zamindar of Polavaram v. Maharaja of Pittapuram* (2), as authorities showing that a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the minor's property; but those cases were not concerned with promissory notes.

It is true that the principle of those cases has been applied in *Meenakshisundaram Chetty v. Ranga Iyengar* (3), to a promissory note executed by the legal guardian of a minor in the name of the minor. But with very great respect I may point out that the learned Judges dealt with the case on the principles applicable to a debt incurred on behalf of a minor for necessary purposes without considering the special features of a promissory note. An essential feature of a promissory note is that the promise to pay is unconditional. And a negotiable instrument is intended to be one which can pass from hand to hand, bearing its meaning on its face, as itself the basis and evidence of a money claim. Any qualification of the promise in a promissory note, such as that it is only to be enforced against a minor if necessity binding on the minor can be shown, is wholly foreign to the idea of a negotiable instrument. So far as I can see, no guardian can by executing a promissory note in the name of a minor impose an unconditional personal liability on the minor.

It is unnecessary now to consider whether it might be possible for a legal or legally appointed guardian of a minor regarded as a separate entity to impose a personal liability on himself in that capacity by executing a promissory note in that capacity with the result that in that capacity he could be made to pay what was due on the note from his ward's estate. That question does not arise in this case. Nor is it necessary for us to consider whether, if better evidence had been produced by the plaintiff, he might have been able in an appropriate suit to enforce liability against defendant 2's property for the debt out of which this promissory note originally arose. This is not such a suit. In my opinion the

1. AIR 1919 Mad 641=42 Mad 185=49 I C 872 (F B).

2. AIR 1931 Mad 140=54 Mad 163=135 I C 17.

3. AIR 1932 Mad 696=139 I C 383.

plaintiff can get no relief against defendant 2 in this suit upon the promissory note, Ex. B, and therefore this appeal should be allowed with costs in both Courts and the plaintiff's memorandum of objections should be dismissed with costs.

Cornish, J.—I agree. Plaintiff has chosen to sue upon the promissory note and not upon the consideration; and the only liability under the note is the personal liability of defendant 1. If the suit had been on the consideration the case might have been different. It might then have been contended that if it was shown that the money was borrowed for purposes which under the Hindu law rank as a necessity binding on a minor, the plaintiff would be entitled to be subrogated to defendant 1's rights against defendant 2. No necessity has been shown for defendant 1's borrowing the money from the plaintiff on behalf of defendant 2. Assuming that defendant 1 as guardian ad litem wanted money for maintaining defendant 2's claim in the suit, the proper person for him to apply to was the receiver in the suit. The estate was a rich one; and if money was required the receiver could have furnished it to him on the directions of the Court. The plaintiff was not ignorant of this. He says in his evidence that a receiver had been appointed in the partition suit, and that he was in possession of the property.

P.R.S./K.S.

Appeal allowed.

* A. I. R. 1933 Madras 713

RAMESAM AND CORNISH, JJ.

(*Cheedella*) *Rosayya* and another — Plaintiffs—Appellants.

v.

Kommi Pitchayya and another—Defendants—Respondents.

Appeal No. 326 of 1927, Decided on 9th March 1933, against decree of Sub-Judge, Nellore, D/- 27th September 1926.

* Limitation Act (1908), S. 19—Admission of execution of document for amount already due and of its contents before registrar is acknowledgment of liability under document.

When a document is presented for registration, the executants not only admit the fact of its execution but admit the contents of the document, namely, their liability on it. And if the document is executed for amount already due by the executant, an acknowledgment of liability under the document is necessarily implied: *Case law referred.*

[P 715 C 1]

K. Kuppu Swami—for Appellants.

M. Patanjali Sastri—for Respondents.

Ramesam, J.—This appeal arises out of a suit on two mortgage bonds dated 21st May 1909 for Rs. 2,500 and Rupees 1,500 respectively. The mortgage bonds were executed by one Subba Naidu, the father of defendants 1 and 2, for himself and as guardian of defendants 7 and 8, by the present defendant 3 for himself and as guardian of defendant 4 and by defendants 5 and 6. The documents were presented for registration on 9th September 1909 and all the executants admitted execution before the Sub-Registrar. On 18th July 1915 a payment was made and the payment was signed by Subba Naidu and defendant 3, but not by defendant 6. On 7th July 1921 there was again a payment and endorsements were made and they were signed by all the parties. One of the issues raised before the Subordinate Judge was whether the documents were not barred by limitation as against the defendants who were not parties to the endorsements of 1915. He held that the endorsements of 1915 would be inoperative against those who were not parties to it, but as to defendants 5 and 7 he relied upon another acknowledgment (Ex. E) and held that so far as they are concerned, the suit was not barred. As to defendants 6 and 8 he held that the suit was barred. Against the other defendants he gave a decree. The plaintiffs have preferred this appeal. In the plaint the age of defendant 8 is given as 23 on the date of plaint (March 1925) and so in 1915 defendant 8 must have been aged 13. In the written statement of defendants 5 to 8 there is no denial about the age of defendant 8 as given in the plaint. But it was pleaded that at the time of the endorsements in 1915, defendants 7 and 8 were minors. This no doubt indirectly involves a denial of the correctness of the age as given in the plaint but the written statement does not proceed to state what the correct age of defendant 8 is. On this pleading we cannot accept an implied denial in the written statement as an adequate pleading. We must therefore take it that the age of defendant 8 as given in the plaint is correct, and if so, Subba Naidu, who was the guardian at the time of the execution of the document, properly

acted as guardian in acknowledging also in 1915. He was certainly a person authorized within the meaning of S 21 Lim. Act. We think therefore that so far as defendant 8 is concerned, the acknowledgment of 1915 is binding on him and there ought to be a decree against him.

The next question is as to defendant 6. The learned advocate for the appellants contends that the admission of execution before the Sub-Registrar amounts to an acknowledgment of liability within the meaning of S. 19, Lim. Act, and that being so the second acknowledgment in July 1921 would be within 12 years of the first acknowledgment, and the suit would not be barred. This point was raised before the Subordinate Judge, but in considering it he relied on three decisions in *Kandasami Reddi v. Suppammal* (1), *Muthukumara Mudaliar v. Chockalinga Mudaliar* (2) and *Lallu Mal v. Reoti Ram* (3) and held that the admission of execution before the Sub-Registrar would not amount to an acknowledgment. Now in *Kandasami Reddi v. Suppammal* (1) it appeared that in a former suit for specific performance the plaintiffs admitted the execution of the hypothecation deed which was the subject of the later suit and it was held that it was not an acknowledgment. The decision is not that such admission should never be taken as an acknowledgment. All that it means is that while in some circumstances it may amount to an acknowledgment there may be other circumstances in which it may not amount to an acknowledgment. In that case a person admitted execution of a document some years before and there was no occasion for saying whether the amount was paid or not, and it was therefore held that it was not an acknowledgment. *Muthukumara Mudaliar v. Chockalinga Mudaliar* (2), is a case in which the defendant admitted in a deposition the execution of the bond in question but no further question was put as to whether any amount was due on it. In *Lallu Mal v. Reoti Ram* (3) while execution of a document was admitted, it was pleaded that it was taken under undue influence, and in a prior suit, the execu-

tion was admitted. These are all cases in which from the circumstances in which admission of execution was made it was impossible to imply necessarily an acknowledgment of existing liability. On the other hand we have got *Swaminatha Odayar v. Subbarama Ayyar* (4) a decision of Reilly, J., and one of us in which it was held that from the surrounding circumstances an acknowledgment of liability may be inferred. In that case the anxiety of the party was to show that the transaction was real and that he was willing to pay on the note but for the unwillingness of the other party to receive. The Subordinate Judge refers to another case in *Labha Mal v. Imam Din* (5) which comes nearest to the case before us. In that case there was an admission of execution before the Sub-Registrar but a question was put to the executant whether he received consideration and he admitted the receipt of consideration also a circumstance which does not appear in the case before us. Merely on this ground the Subordinate Judge held that that case is distinguishable. We do not agree with that conclusion. Even if the receipt of consideration is admitted, one may suggest that it was really a benami transaction, in which case the executant may not really mean to admit liability. Except where a benami transaction is suggested, the admission of execution before a Sub-Registrar within four months after the execution of the document is to make the document operative. It will be the strongest case where a man is anxious to admit his liability. Even in a benami transaction for the purpose of misleading the outside world, a person purports to admit liability at the time, whatever the truth of the matter may be. The circumstance that there was an admission of receipt of consideration in *Labha Mal v. Imam Din* (5) does not necessarily distinguish that case from the case before us. In the present case, the contents of the documents show that the old accounts were locked into and a sum of Rs. 4,000 odd remained due, and for Rs. 4,000 out of this amount the mortgage deeds were executed. There was no new consideration to be received and there was no necessity for putting any

1. AIR 1922 Mad 104=70 IC 576=15 Mad 448.

2. AIR 1923 Mad 631=73 IC 952.

3. AIR 1924 All 70=74 IC 353=45 All 679.

4. AIR 1927 Mad 219=100 IC 10=50 Mad 548.

5. AIR 1928 Lah 869=76 IC 751.

such question about receipt of consideration by the Sub-Registrar. When a document is presented for registration, the executants not only admit the fact of its execution but admit the contents of the document, namely, their liability on it. In our opinion this is a case where acknowledgment of liability is necessarily implied. It is not necessary to deal with possible cases where there may be some difficulty in making such an implication. If admission of execution in such circumstances is an acknowledgment, it is admitted that the suit is not barred. We allow the appeal against defendants 6 and 8 with costs throughout.

P.R.S./K.S.

*Appeal allowed.***A. I. R. 1933 Madras 715**CURGENVEN AND SUNDARAM
CHETTY, JJ.

T. K. Abdul Razak Rowther — Defendant—Appellant.

v.

Abdul Rahiman Sahib and others—
Plaintiff and Defendants—Respondents.Appeal No. 403 of 1930, Decided on
31st March 1933, against decree of Sub-
Judge, Dindigul, in O. S. No. 17 of 1928.

(a) Transfer of Property Act (1882), Ss. 40, 82, 95 and 100—Family mortgage debt apportioned among brothers—Covenant that if one brother is forced to pay debt payable by another, the latter's property will be liable for such amount paid by former creates charge over the property — Purchase of defaulter's property with actual or constructive notice of covenant in partition-deed—Brother who has been forced to pay is entitled to enforce charge against purchaser—Purchaser is not entitled to subrogation if he has discharged some debts of his vendor—He may be entitled only to contribution under Ss. 82 and 95.

Where, on a partition among brothers, a mortgage-debt due by the family is apportioned and there is a covenant by which a defaulting member's share will be liable for any excess amount paid by another member, a charge is created over the property of the former for such amount paid by the latter; and the latter can enforce the charge so created against a purchaser of the former's property who has actual or constructive notice of the covenant. In such a case such member is not estopped from so doing, even though he has not warned the purchaser of the other member's default. The purchaser is not entitled to subrogation even if he has discharged some of the debts of his vendor and get priority over the member who has been forced to pay part of debts payable by his vendor as the principle is that a later purchaser or mortgagee who undertakes to pay two prior encumbrances but pays only one and not the other, cannot resist the claim of the encumbrancer not so paid, by

setting up the discharge of the other encumbrance as a shield and claiming priority for the amount paid in discharge of it. But he can claim contribution under Ss. 82 and 95: *Case law referred.*
[P 716 C 2; P 717 C 1, 2; P 719 C 1, 2]

(b) Interest — Indemnity clause entitling adequate compensation for loss sustained—Reasonable interest can be allowed as compensation.

Where an indemnity clause entitles a person to get adequate compensation for loss sustained by him, reasonable interest can be allowed by way of such compensation: *Ex parte Bishop In re, Fox, Walker & Co.*, (1880) 15 Ch D 400, Ref.
[P 720 C 1]

C. S. Venkatachariar and D. Rama
Swami Iyengar—for Appellant.B. Sitarama Rao, S. R. Muthuswami
Ayyar and C. A. Seshagiri Sastri—for
Respondents.

Sundaram Chetty, J. — This appeal arises out of a suit filed by the plaintiff (respondent 1) for the recovery of a sum of Rs. 8,710-6-9 which is made up of three different sums payable by defendants 1 to 3 respectively, which the plaintiff seeks to recover from them personally and also by the sale of the properties mentioned in Schs. 1 to 3, as they are subject to a charge in plaintiff's favour for the recovery of the aforesaid sums. The facts of the case are briefly as follows: The plaintiff and defendants 1 to 3 are the sons of the late Seeni Rowther who died on 4th January 1922. Subsequent to his death, a partition was effected among the four brothers with the intervention of mediators and a registered partition deed, Ex. B, was also executed on 1st August 1923. Even during the life-time of Seeni Rowther, there was a mortgage decree in O. S. No. 105 of 1914 on the file of the Madura Sub-Court in favour of Appavu Rowther, under which a sum of Rs. 36,000 was due on the date of the aforesaid partition deed. The family properties were all liable for the satisfaction of that decree. In that partition, there was a division of the properties and also the debts due by the family. The mortgage decree debt which amounted to Rs. 36,000 was partitioned among the four brothers, the plaintiff's share of that burden being Rs. 1,620, defendant 1's being Rs. 10,090, defendant 2's being Rs. 13,495, and defendant 3's being Rs. 10,795.

The partition deed provides that each of the brothers shall pay his share of the debt out of the specific properties allotted to him and that in case the

properties allotted to the share of one brother should be made liable for the debts due by the other brothers, they and the properties falling to their shares shall be liable for any loss caused thereby. The plaintiff's case is that in spite of the covenants contained in the partition deed, default was made by defendants 1 to 3 in the payment of their shares of the aforesaid mortgage decree debt. The result was that the properties allotted to the plaintiff's share were brought to sale by the decree-holder. In order to avert the sale of the properties in court-auction, the plaintiff and defendant 3 respectively mortgaged with possession some of their properties and deposited into Court Rs. 5,000 on 11th July 1925 and Rs. 13,080 on 10th August 1925. One-half of these amounts, namely, Rs. 9,040 was the plaintiff's contribution. Calculating interest thereon at $7\frac{1}{2}$ per cent per annum and deducting therefrom the sum of Rs. 1,620 payable by the plaintiff towards the said decree debt together with interest at the same rate, the amount due to the plaintiff on the date of plaint was Rs. 8,710-6-9 which was the amount paid by him in excess of what he undertook to pay. On a consideration of the evidence and after making the necessary calculations, the lower Court has found that out of the said amount, defendant 1 is liable to pay a sum of Rs. 3,647-11-11 and defendant 2 is liable to pay Rs. 5,062-10-10. Defendant 3 has not been found liable to pay anything to the plaintiff.

The sum payable by defendant 1 is made a charge on the properties mentioned in plaint Sch. (1), and similarly the sum payable by defendant 2 is declared to be a charge on the properties mentioned in Sch. (2). The properties in these two schedules are those allotted to the shares of defendants 1 and 2 respectively in the partition deed. Some of the other defendants who are impleaded in this suit as subsequent purchasers or alienees, set up the plea that they were bona fide purchasers for value without notice of the charge claimed in the plaint and that therefore those items should not be held liable for the plaintiff's claim. Some other contentions were also raised, but they were all overruled by the lower Court. Defendant 5 is one of the purchasers. He purchased

item 1, Sch. (1) from defendant 1 on 24th August 1926 for Rs. 10,000, and on the same date he purchased item 1, Sch. (2), from defendant 2 for a like price. Items 2, 4 to 6, 8 and 9 Sch. (1) were also bought by him from defendant 1 for Rs. 6,000 on 22nd April 1926. Against the decree of the lower Court, this present appeal has been filed by defendant 5 alone. He has confined the subject-matter of this appeal to the declaration of charge given to the plaintiff by the decree of the lower Court on his (defendant 5's) properties without consequential relief.

There is no dispute in this appeal as regards the correctness of the amounts found due to the plaintiff. The first point for consideration is, whether the plaintiff is entitled to a charge as claimed in the plaint. This question depends upon the nature of the stipulations contained in the partition deed, Ex. B. That deed sets forth the circumstances in which the division among the brothers came to be effected. The indebtedness of the family to a very large extent is mentioned. After the discharge of those debts, very little property would be available for partition. On representation to the plaintiff by the other brothers about such a plight and at their request, the plaintiff is said to have agreed to bring into hotchpot his own self-acquired properties and make them available for division as family properties among all the brothers. On the basis of this concession by the plaintiff, the division was effected among the brothers, allotting certain specific properties to the share of each of them and also a specific portion of the debts due by the family. The mortgage decree debt due to Appavu Rowther was also apportioned among the four brothers in different sums. After setting forth these facts, the covenants run as follows :

"Each of us shall discharge the debt falling to his share from the properties which have fallen to his share. If otherwise the properties falling to the share of one person are made liable for the debts due by other sharers, the other sharers and the properties allotted to their shares shall be liable for any loss caused thereby."

The indemnity clause in the aforesaid covenants undoubtedly creates a charge in favour of the person for any excess sum paid by him over and above his share of the debt, on the properties of the other sharers in proportion to the

sums which they should have paid, but defaulted to pay. The express undertaking to reimburse the person who sustains such loss, by paying the amount found due to such person from out of the specific properties allotted in the partition deed to their respective shares is sufficient to create a charge on those properties. In para. 15 of his judgment, the learned Subordinate Judge has referred to a number of cases in which it has been held that similar clauses gave rise to an express charge within the meaning of S. 100, T. P. Act. It is unnecessary to refer to those decisions in detail and the learned advocate for the appellant has not been able to show any authority to support the contention that the indemnity clause contained in Ex. B does not suffice to create a charge on the properties of the defaulter in favour of the person who sustains loss on account of such default.

It is next contended that the appellant (defendant 5) must be taken to be a bona fide purchaser for value without notice of the charge. On this question, we have no hesitation in holding that the whole trend of the evidence is against the truth of the alleged ignorance of defendant 5 of the covenants contained in Ex. B. In the first place, he is a close relation of the plaintiff's family. Appavu Rowther, the decree-holder in O. S. No. 105 of 1914, is the junior paternal uncle of defendant 5 and also the maternal uncle and father-in-law of the plaintiff. Defendant 5's mother and defendant 1's wife are sisters.

As would appear from his own evidence, defendant 5 was closely connected with the negotiations and discussions preliminary to the execution of the partition deed (Ex. B) and was actually staying at Madura for about a week or so in that connexion. He is the attester to this partition deed. In pursuance of this partition deed, defendant 5's wife filed a suit in 1922 for partition against the plaintiff's family in respect of her mother's property. Defendant 5 refers to the preparation of the lists of the assets and liabilities allotted to each of the brothers at the time of the execution of Ex. B. In the subsequent sale deeds obtained by him from defendants 1 and 2, namely, Exs. 5, 6 and 7, specific mention is made of this partition deed to account for the title possessed by the

vendor in each of these sale deeds to the properties sold under it. In the face of these telling facts, it is idle for defendant 5 to contend that he was not aware of the covenant in the partition deed, whereby a charge was created. There are adequate grounds for holding that defendant 5 was aware of the covenants contained in the partition deed. It is argued, that if he had such express knowledge, he would not have purchased the aforesaid items. It is further contended that the plaintiff who was also present when Exs. 6 and 7 were executed, did not apprise defendant 5 of his claim for reimbursement on account of the excess amount paid by him towards the decree debt of Appavu Rowther. There is nothing to show that defendant 5 was misled by any misrepresentation made to him by the plaintiff, that he would not enforce the charge created under the partition deed. On the other hand, the evidence shows that the plaintiff was urging his claim and was even stating that unless his claim was also satisfied he would not attest these sale deeds.

The fact remains that he did not attest them. Any man of ordinary prudence would have secured his attestation to the sale deeds as a safeguard against the enforcement of any such charge by him later on. There was no duty on the part of the plaintiff to give any warning to defendant 5. No tangible foundation has been laid in this case for setting up an estoppel against the plaintiff. On the other hand, defendant 5 must be deemed to have made this purchase with full knowledge of the arrangement come to among the brothers as set forth in the partition deed, and at any rate, he must be deemed to have had constructive notice of the covenants contained therein. He being an attester to the partition deed and mention of that deed having been made in every one of the sale deeds obtained by defendant 5, his omission to ascertain the contents of the partition deed should be construed as wilful abstention from an inquiry which he ought to have made: vide *Rajaram v. Krishnaswami* (1). The learned Subordinate Judge has come to a correct finding on this point, and it must be taken that the plaintiff is not estopped from enforcing his charge and

1. (1893) 16 Mad 301.

defendant 5 is a purchaser of the items in question with actual or constructive notice of the covenants contained in the partition deed, Ex. B, and the charge created thereby.

There is yet another contention raised by the learned advocate for the appellant which has been the subject of considerable discussion in the course of the arguments. It is admitted that out of the purchase money due under each of the sale deeds, Exs. 6 and 7, a sum of Rs. 7,650 was applied for the payment of Appavu Rowther's decree debt. The purpose for which the sale was effected under Exs. 6 and 7 was specified in them. In the course of the execution of the aforesaid mortgage decree, Appavu Rowther brought item 1, Sch. (1) and item 1, Sch. (2) to sale in Court auction and purchased them himself on 23rd February 1924 for a sum of Rs. 18760-0-0. There was still a small balance due under the decree and subsequent to its realization, the decree was recorded on 30th September 1925 as fully satisfied: (vide Ex. C). But defendants 1 and 2 had already applied for the setting aside of the sale of those items, and their petition was dismissed in the first Court. During the pendency of the appeal filed by them in the High Court, some time was given to them to deposit in Court a sum of Rs. 22300 in order to have the sale set aside. That sum was raised by means of the transactions evidenced by Exs. 1, 6, 7 and F on 24th August 1926 and on depositing this sum into Court on that date, the sale of those two items was set aside and subsequently possession thereof was delivered over to the purchaser (defendant 5). It is clear that out of the purchase money paid by defendant 5 under the sale deed, Exs. 6 and 7, a sum of Rs. 15,300 was paid into Court to make up the amount of Rs. 22,300. The remaining sum of Rs. 7,000 was raised under Ex. I and F. There is no doubt that the amount deposited in Court was the total of the sums paid by the alienees under the aforesaid deeds, though the physical act of depositing the same into Court was done by defendants 1 and 2. As held in *Ram Narayan v. Sahdeo Singh* (2), the alienees who contributed the sums for the deposit can claim to have discharged the mortgage debt by

2. AIR 1922 Pat 181=67 I C 221=1 Pat 332.

such payment, in order to claim any right of priority or subrogation. The moment the sale of the aforesaid two items was set aside, it results in some portion of the decree amount remaining as the balance still due.

By the deposit of the said sum of Rs. 22,300 to the credit of the decreeholder, the balance due was wiped out and the alienees who contributed this sum must be taken to have discharged the mortgage debt fully. Though what they paid was only a portion of the whole of the mortgage debt, still it was by that payment, what remained as the balance of the decree debt was discharged and the whole of the debt was thus wiped out. In exactly similar circumstances, priority was given in respect of such payment on the equitable principle of subrogation, though technically the amount paid would only be a portion of the debt: vide *Rupabai v. Audimulam* (3), *Saminatha Pillai v. Krishna Iyer* (4) and *Andi Thavan v. Nagaswami Chettiar* (5). In view of these circumstances, the appellant claims a right of priority and wants the Court to give a declaration, that item 1, Sch. (1) and item 1, Sch. (2) can be proceeded against by the plaintiff in enforcement of his charge, subject to a lien for Rs. 7,650 in defendant 5's favour on each of those items, together with interest thereon. Virtually, this is a claim of subrogation, treating the charge claimed by the plaintiff under the partition deed to be one which arose later than the mortgage lien of Appavu Rowther under the aforesaid decree, and setting up the payment of Rs. 15,300 out of the purchase money under the sale deeds Exs. 6 and 7 as having gone towards the discharge of the first mortgage. Ordinarily, the claim for subrogation in this simple form would be good. But in the present case, there are some other complications which go to the root of the claim set up by defendant 5. Strenuous arguments have been addressed by either side in this connexion.

A clear statement of facts disclosed in this case would pave the way for an easy solution of this problem. The covenants contained in Ex. B have been already referred to. As per one of those coven-

3. (1888) 11 Mad 345.

4. AIR 1916 Mad 637=28 I C 966=38 Mad 548.

5. AIR 1928 Mad 703=111 I C 266.

ants, defendant 1 has undertaken to pay out of the specific properties allotted to his share a sum of Rs. 10,090 towards the mortgage decree debt of Appavu Rowther, and defendant 2 has similarly undertaken to pay a sum of Rs 13,495 towards that debt. After taking into account the sum of Rs. 7,650 paid by each of them out of the purchase money realized from defendant 5, and giving credit to the same in their favour, the two sums decreed against them respectively by the lower Court are found due to the plaintiff. These sums represent the loss sustained by the plaintiff on account of the default committed by them in the fulfilment of their undertaking, and therefore the plaintiff is enforcing the charge created in his favour for those sums against the properties in Schs. 1 and 2 respectively. The covenant in Ex. B, namely,

"each of us shall discharge the debt falling to his share from the properties which have fallen to his share"

is not a mere personal covenant, and cannot be treated as a contract among the brothers having no reference to the properties allotted to their respective shares. The exclusive ownership of the properties allotted to the share of each of the brothers in a particular schedule attached to the partition deed, is derived from the adjustment of their mutual rights and obligations, and in consideration of the benefits derived from some of them and enjoyed by others, the apportionment of the debts due by the family was effected in a certain way and the payment of each one's share of the debts was expressly made an obligation with which his share of the properties was burdened. That being so, it seems to be a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property, within the meaning of S. 40, T. P. Act.

If the plaintiff is entitled to the benefit of such an obligation, he can enforce specific performance thereof not only against defendants 1 and 2, but also against any transferee from them with notice of such covenants. Defendant 5 has been found to be a subsequent purchaser with notice. The effect is to place defendant 5 in no better position than defendants 1 and 2 and he must be deemed to be one bound by the restrictive covenant or obligation as if he were

a party to such covenant. Can defendant 1 or defendant 2 claim priority or any right of subrogation in respect of the payment of Rs. 7,650 by each of them towards the mortgage decree debt of Appavu Rowther? Neither of them can claim such a right, because that sum is part of the debt which he undertook to pay out of the share of the properties allotted to him under the partition deed Ex. B. What is now claimed by the plaintiff in this suit as due from defendant 1 or defendant 2, represents only another portion of the mortgage debt undertaken to be paid by defendants 1 and 2 in the aforesaid manner. The general principle is that a later purchaser or mortgagee who undertakes to pay two prior encumbrances but pays only one and not the other, cannot resist the claim of the encumbrancer not so paid, by setting up the discharge of the other encumbrance as a shield and claiming priority for the amount paid in discharge of it: vide *Bissessar Prosad v. Lal Sarvam Singh* (6). A purchaser from such a purchaser with notice of the covenant cannot also claim any right of subrogation: vide *Lakshmi Achi v. Narayanaswami Naicker* (7). In the present case, it was by virtue of the mutual adjustment of rights among the brothers that each of them became the exclusive owner of certain specific items of properties at the time of the partition, and to such exclusive ownership of those properties the burden of paying a specific sum towards the mortgage debt of Appavu Rowther was annexed. Defendant 5 who has purchased the items from defendants 1 and 2 with notice of the aforesaid covenant is equally bound by it: vide *Power v. Standish* (8), and also *Prabhu Narain Singh v. Ramzan* (9).

The plaintiff being entitled to the benefit of that restrictive covenant, defendant 5 who is a purchaser with notice of that covenant cannot claim any right of subrogation to the prejudice of the plaintiff. The next question is whether the plaintiff can be allowed any interest. He claims it as part of the compensation for the loss sustained. The indemnity clause in Ex. B entitles him to adequate compensation for the loss.

6. (1907) 6 C L J 134.

7. AIR 1930 Mad 51=124 I C 497=53 Mad 188.

8. 8 Ir Eq R 526.

9. AIR 1919 All 235=49 I C 865=41 All 417.

It is proved that he raised the money for making the deposit, by mortgaging his properties with possession under Ex. D. That being so, a reasonable rate of interest can be allowed to him as compensation due to him under the indemnity clause: *Ex parte Bishop In re Fox, Walker & Co.* (10). Interest has been allowed to the plaintiff at the rate of seven and half per cent per annum. It seems to be a perfectly reasonable rate. We must point out that though defendant 5 is not entitled to any priority over the plaintiff's claim, his right to claim contribution under Ss. 82 and 95, T. P. Act, is available to him, when the need to enforce such a right arises. It is next contended for the appellant that the lower Court was wrong in having exonerated item 3, Sch. 1 from liability to the plaintiff's charge. The plaintiff has not chosen to file an appeal or memo of objections, as regards this item, but we think, that defendant 5 is entitled to question the correctness of the exoneration of this item, as a greater burden would be thrown on the items purchased by him. This item was bought by defendant 8 in Court auction in execution of a simple money decree which was obtained against Seeni Rowther. After his death, his sons (the plaintiff and defendants 1 to 3) were added as his legal representatives, in the course of execution. The sale certificate (Ex. X) does not state that the property was sold subject to any charge in favour of the present plaintiff under the partition deed Ex. B, though mention of this deed is made in it, as noted in the sale proclamation. The lower Court has held, that defendant 9 who is a later purchaser from defendant 8 under Ex. XII is a bona fide purchaser for value, without notice of the charge in plaintiff's favour. When reference to Ex. B was made in the sale certificate, this circumstance must have put defendant 9 on inquiry, and his abstention from making an inquiry is without any lawful excuse. He must be taken to have had constructive notice. But the exoneration of this item may be justified in another ground. In the absence of any evidence to the contrary, we may presume that the right, title and interest of all the legal representatives of Seeni Rowther in that item was at-

tached and sold. That being so, any charge which the present plaintiff had over that item should be deemed to have passed to the auction purchaser. We therefore think the exoneration of this item from the plaintiff's claim should stand.

There are still two more points to be considered. The decree of the lower Court is defective, as it stops with a mere declaration of a charge on the properties in Schs. 1 and 2. It seems to have failed to grasp the real scope of this suit, and has ignored the prayer for sale contained in para. 12 of the plaint. The plaintiff is surely entitled to that relief in this very suit. As a last resort, a request is made on behalf of the appellant, for a direction about the order in which the items in Schs. 1 and 2 should be put up for sale. In view of the fact, that the major portion of the purchase money paid by him for some of the items went towards the discharge of Appavu Rowther's mortgage decreed debt, it would not be unreasonable, if they are directed to be sold last, and there can be no prejudice to the realization of the decree amount by the plaintiff. Defendant 6 also has similarly contributed out of the purchase money for item 5, Sch. 2. Having regard to these facts and other circumstances in this case, we are inclined to give the necessary directions. Exception is taken to the lower Court's order, that defendant 5 is also personally liable for the full costs of the plaintiff. It is true that he has failed to substantiate many of his pleas. We are however of opinion that this order of the lower Court is rather drastic, and should not be upheld.

In the result, the decree of the lower Court is confirmed, subject to the following modifications. Three months' time is given for the payment of the sums decreed to the plaintiff. In case of default, the items of Sch. 1 (except item 3) and the items of Sch. 2, will be sold. Sch. 1 items will be put up for sale in this order, viz., 7, 10, 11, 2, 4, 5, 6, 8, 9 and 1. Sch. 2 items will be put up for sale in this order, viz., 9, 10, 2, 3, 4, 6, 7, 8, 5 and 1. The order making defendant 5 personally liable for the plaintiff's costs of suit is set aside. The appeal having substantially failed, the appellant should pay respondent 1's costs and bear his own. The other respondents will bear their own costs.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 721

RAMESAM AND CORNISH, JJ.

Official Receiver of Ramnad—Defendant—Appellant.

v.

K. R. Muthu, A. R. Arunachalam Chettiar and others—Plaintiffs—Respondents.

Appeal No. 54 of 1928, Decided on 8th May 1933, from decree of Sub-Judge, Sivaganga, in O. S. No. 113 of 1924.

(a) Madras Civil Courts Act (3 of 1873), S. 14—S. 14 does not prevail over Suits Valuation Act (1887), S. 8.

Section 14, Madras Civil Courts Act, does not prevail where it comes into conflict with S. 8, Suits Valuation Act: *A I R 1914 Mad 93*; *A I R 1916 Mad 942*; *13 I C 903*; *A I R 1924 Mad 360*, *Rel on.* [P 721 C 2]

(b) Madras Civil Courts Act (3 of 1873), S. 14—Valuation for purposes of suit should also guide valuation for purposes of appeal.

Jurisdiction conferred by S. 14 is regarded as always one and if a suit is to lie before a particular Court on the ground that the valuation for purposes of jurisdiction should be regarded as a certain amount, that should guide also the valuation for purposes of appeal. [P 722 C 1]

T. M. Krishnaswami Ayyar and K. V. Ramachandra Ayyar—for Appellant.

C. S. Venkatachariar — for Respondent 1.

Ramesam, J.—In this appeal a preliminary objection is taken that the appeal does not lie to this Court. For the purpose of deciding the objection we have to see what the nature of the suit is. The suit was for a declaration that the properties which are the subject matter of the suit do not belong to defendant 2, but belong to the plaintiff and defendants 3 and 4 and defendant 1 had no power to bring them to sale as the properties of defendant 2 and for a permanent injunction restraining defendant 1 from selling them. Under the Court-fees Act S. 7 (4) the plaintiff has got to value the injunction and pay court-fees ad valorem on it. Prior to the amendment of the Court-fees Act in 1922 the plaintiff might have given any valuation he liked. But the amendment prescribes a minimum valuation which is half the value of the land. Here the value of the suit properties is Rs. 8,000 and therefore the plaintiff had to value the relief at not less than Rs. 4,000. He accordingly valued it at Rs. 4,000 and brought the suit. The suit was originally dismissed. There was an appeal to the High Court by the plaintiff. No objection was taken. The High Court

reversed the decision of the District Judge and remanded the suit for fresh disposal. After the remand the Subordinate Judge of Sivaganga gave a decree to the plaintiff. Now defendant 1 files this appeal.

The objection is taken that if the value of the properties is only Rs. 4,000 the appeal lies to the District Court and not to this Court and for that purpose S. 8, Suits Valuation Act, is relied on. On the other side S. 14, Madras Civil Courts Act, was relied on and it is contended for the appellant that where S. 14, Civil Courts Act, comes into conflict with S. 8, Suits Valuation Act, it is the former that should prevail. As no rules have yet been framed by the Local Government under S. 3, Suits Valuation Act, we cannot say S. 14, Civil Courts Act, has been repealed. But all the same we have got the fact that S. 8, Suits Valuation Act, says that in certain suits, namely, those other than suits under S. 7, paras. 5, 6 and 9 and para. 10, Cl. (d) the value as determinable for the computation of court-fees and the value for purposes of jurisdiction should be the same. Whatever doubts one may entertain if the matter were res integra we find that the matter has been considered by a series of authorities of this Court and the view taken has always been uniform. We think we are not justified in differing from the view, even if we think there ought to be a different construction, and it is not clear that we think that S. 14, Civil Courts Act, should prevail over S. 8, Suits Valuation Act. In *Seshagiri Rao v. Narayanaswami Naidu* (1), Ayling, J., took this view. There was a Letters Patent Appeal. Sadasiva Ayyar and Phillips, JJ., confirmed his judgment in *Narayanaswami Naidu v. Seshagiri Rao* (2). The same view was taken by Miller and Sundara Ayyar, JJ., in the case in *Ramayya v. Ramaswami* (3). The same view was also taken in *Sundara Ramanujam Naidu v. Sivalingam Pillai* (4). In this last case one may say that the suit was one for possession and not a suit for mere specific performance. But if the suit is one for specific per-

1. *A I R 1914 Mad 98=24 I C 374=38 Mad 795.*
2. *A I R 1916 Mad 942=31 I C 104=39 Mad 873.*

3. (1912) *13 I C 903.*

4. *A I R 1924 Mad 360=77 I C 542=47 Mad 150.*

formance only, the decision supports the respondent. Some other cases have been referred to us, but in these decisions S. 14 was not referred to or discussed, for instance a decision of mine in *Balakrishna Nair v. Vishnu Numbudiri* (5) which on this account is not much of value. We are therefore inclined to follow the decisions first mentioned.

It is next contended by the learned Advocate for the appellant that even if one is to follow these decisions for the purpose of determining the forum at the time of the institution of the suit, still S. 14, Civil Courts Act, may be applied for the purpose of determining, the Court before which the appeal should be filed. But this is making a distinction as to the meaning of the words "jurisdiction conferred by this Act" according as the question arises for the purpose of institution and for the purpose of appeal. We do not see any justification for making this distinction. Jurisdiction conferred by the Act was regarded as always one and if a suit is to lie before a particular Court on the ground that the valuation for purposes of jurisdiction should be regarded as a certain amount that should guide also the valuation for purposes of appeal. We cannot apply S. 14 in one way for one purpose and in another way for another purpose. We think that this preliminary objection is well founded and the memorandum of appeal should be returned for presentation to the proper Court. The appellant will pay costs of this order in this Court. Costs on the half scale.

P.R.S./K.S. *Order accordingly.*

5. A I R 1931 Mad 375=132 I C 129.

A. I. R. 1933 Madras 722

WALSH, J.

Jamundas Ravuji Sait—Appellant.

v.

Puthan Marakar Kandiyil Krishan and others—Respondents.

Appeal No. 58 of 1929, Decided on 17th January 1933, against appellate order of Dist. Judge, South Malabar, D/- 17th July 1928.

Limitation Act (1908), Arts. 181 and 182—Surety bond executed by two persons to produce movables can be enforced without recourse to suit—Limitation runs from date of bond or date of failure to produce property—Proceedings taken against judgment-debtor in execution of decree or against one of the sureties for enforcing bond in which

other is simply impleaded without any relief being claimed against him, are not steps against other surety to enforce bond so as to save limitation—Civil P. C. (1908), S. 145.

Where a surety bond is executed by two persons for the production of movables which are attached, undertaking liability to pay any amount that may be ordered by the Court for non-production of the property, the sureties are not liable for the decree amount, but only for the amount that may be ordered by the Court. Such a bond can be enforced without recourse to a suit even though S. 145, Civil P. C., will not apply; and limitation for enforcing such bond begins to run either from date of bond or date of failure to produce the property. In such cases proceedings taken against the judgment-debtor in execution of the decree, or proceedings taken against one of the sureties to enforce the bond in which the other surety is simply impleaded without any relief being claimed against him are not steps as against the other surety so as to save limitation. *Case law referred.*

[P 723 C 1, 2; P 724 C 1, 2]

K. P. Ramakrishna Ayyar—for Appellant.

K. P. Raman Menon—for Respds.

Judgment.—This is an appeal against the order of the District Judge of South Malabar confirming an order of the District Munsif, Calicut, dismissing E. P. No. 3100 of 1926 to issue a warrant of arrest against one Baputti (the respondent) who stood as second surety for the production of certain articles attached in execution of a decree obtained in O. S. No. 417 of 1921.

The facts are fully stated in the judgment of the District Munsif. Those which are relevant to the appeal are that the decree-holder (appellant) put in E. P. No. 614 of 1922 on 3rd April 1922 for attachment of movables. They were left in the possession of this Baputti and another who executed a bond for their production. The material terms of the bond run :

"Agreeing that if any default is made in respect of the said properties, ourselves, the properties belonging to us, and our heirs in succession, would be liable for all the loss that may be sustained thereby, and for any amount that may be directed by the Court."

In a bond of this sort there is no reason for the sureties making themselves responsible for the decree amount, with which they are not concerned, and they are not liable for it unless they make themselves so in the clearest terms. It cannot be contended, and in fact has not been contended before me, that the words "for any amount whatever that may be directed by the Court," can make them liable for the decree amount.

It is conceded that the words refer to any amount for which the Court may hold them liable under the terms of the bond. On 6th July 1922 notice was sent to the sureties to produce the articles and they filed an application on 31st August 1922 that the properties should be sold at the place where they were kept as they consisted of logs of timber. This request was granted. They did not produce the articles. On 11th September 1922 the debtor and the first surety applied to the Court in M. P. No. 1090 of 1922 urging that as the decree-holder had failed to apply for the sale of the property within two months of the date of the precept the attachment was not in force, and they prayed that the surety bond might be cancelled. It was held that they were barred by estoppel and *res judicata* from raising the contention and this decision was confirmed in appeal.

On 20th November 1922, E. P. No. 618 of 1922 was put in to arrest the first surety. There was a further application dated 2nd March 1923 to the same effect. The first surety was arrested and kept in jail for six months the proceedings terminating in September 1923, when the petition was closed. On 18th January 1926 M. P. No. 126 of 1926, was put in for transfer and to have the assignment recognized in favour of the assignee decree-holder and a similar petition on M. P. No. 564 of 28th June 1926 to have the assignment recognized. On 18th August 1926 the present execution petition was put in by the assignee decree-holder to execute the decree by the arrest of the second surety, the respondent.

The District Munsif found it barred by limitation. He thought apparently that it came under Art. 182, Limitation Act. On appeal the learned District Judge held that in the form it was presented it was not maintainable and that in any case it was time-barred as against the second surety (respondent). I agree in every point with the view taken by the learned District Judge. In *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1) the Privy Council held no doubt that a suit is not necessary to enforce a bond like the present and laid

down the procedure, but their Lordships say at (p. 167 of 42 *All.*):

"It remains therefore that there is an unquestioned liability and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon the application to which the sureties are parties, that the properties charged be sold unless before a day named the sureties find the money."

In that case what was to be produced was money, here it is articles, but the bond was of the same sort. This has been interpreted by a Bench of this Court in *Sankunni Variar v. Vasudevan Nambudripad* (2) as follows:

"This is certainly authority for the proposition that although the case does not come within the terms of S. 145 the Court has inherent power to enforce the bond without recourse to a suit."

I am bound by this opinion and cannot therefore follow *Madho Prasad v. Pearey Lal* (3) which case was no doubt after the Privy Council decision, but in it the Privy Council decision is not alluded to at all, and it was apparently not brought to the notice of the Court. It is clear therefore that steps to enforce a bond of this sort do not fall under S. 145. Steps therefore taken in execution against the judgment-debtor are not steps against the sureties nor are steps in execution against the sureties, steps in execution of the decree itself. There is no authority at all to the contrary and the injustice and anomalies of any doctrine which would render steps in execution against the judgment-debtor steps against the sureties, who have only agreed to produce certain articles attached in execution are obvious. In the first place it would mean that even if the sureties have produced the articles, so that their obligation under the bond has been fully discharged yet execution is still somehow proceeding against them if subsequent execution is taken against the judgment-debtor for the balance not covered by the articles sold. It would also follow that where the sureties had not produced articles, of perhaps quite a trifling value and no steps had been taken against them to enforce their bond, the decree-holder could come up some 12 years afterwards, if he had kept execution of the decree alive by proceedings against

1. A I R 1919 P C 55=55 I C 550=46 I A 228 =22 O C 212=42 All 158 (P C.)

2. A I R 1926 Mad 1005=97 I C 787.

3. A I R 1921 All 220=62 I C 719.

the judgment-debtor, and say that limitation was saved.

In furnishing such security the sureties cannot have any legal knowledge imputed to them except that there has been a decree against somebody, that property has been attached in execution of it, and that they have made themselves responsible for its production to Court when called for. They need not even know who the judgment-debtor is nor do they undertake the smallest responsibility for his conduct or for paying the decree amount. The injustice therefore of counting steps taken against him in execution, with which they have no concern, and of which they may have no knowledge, to save limitation against them in enforcing their bond, if they have defaulted, is obvious. It is unnecessary to consider the converse case whether steps taken against the sureties will be steps against the judgment-debtors to save limitation. Consequently the petitions of 18th January 1926 and 8th June 1926 are not available to save limitation.

But it is argued that at least the petition for arrest taken out against the first surety on 2nd March 1923 which was not disposed of till September 1928 will make this execution petition against the second surety on 18 August 1926 in time. I agree with the learned District Judge that, looking at the decisions in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (1) and *Sankunni Variar v. Vasudevan Nambudripad* (2) the present application is governed by Art. 181 and not Art. 182, Limitation Act. Assuming that the execution petition of 2nd February 1923 could save limitation as against the first surety it is, I think, quite clear that it cannot do so with regard to the second surety. The mere fact that the name of the second surety is mentioned in that application, without any relief being sought against him is not enough: vide *Wazir Baksh v. Hari Rama*, A. I. R. 1922 Lah 208.

I may mention a case which came to my notice after arguments and to which I afterwards drew the attention of the learned advocates though, for reasons to be stated, I am not prepared to follow one of the opinions expressed in it. This is *Rami Reddi v. Gurumurthi* (4) recently decided by Madhavan Nair, J.

4. A I R 1933 Mad 219=142 I C 363

The learned Judge there held that the cause of action in a case of this sort arose on the date on which the conditional liability to produce the property came into existence, i. e., the date of the security bond, and not on the date that the surety defaulted in producing it. Of course if that view is correct the appellant is still more out of time as the date of the security bond is 7th April 1922, but I will assume for the purposes of the argument that the date is the one he contends for when default in production was made, which is put at 11th September 1922 when the sureties put in the petition asking that the bond should be cancelled.

Madhavan Nair, J., while, in the matter of holding that a suit to enforce the bond is not necessary, he refers to *Sankunni Variar v. Vasudevan Nambudripad* (2), states in an earlier paragraph that no authority had been quoted that the provisions of S. 145 will not apply and he says that resort is invariably had to S. 145, Civil P. C., in such cases.

In my opinion the two cases quoted above are clear authorities that S. 145 does not apply and the Bench in *Sankunni Variar v. Vasudevan Nambudripad* (2) has read the Privy Council decision in that sense. It would have been perfectly easy for their Lordships to have said that, though a suit is not necessary S. 145 will apply. Instead of that they give quite a different procedure which is to get an order from Court after notice to the sureties, that the bond is forfeited and then to proceed to execute that order. As I said above I am in any case bound by the Bench view on the point. Some argument was raised about estoppel or res judicata on account of the decision in M. P. No. 1090 of 1922. There, I consider, is no estoppel arising from that petition nor res judicata with regard to the contention that the present petition is in the wrong form and that it is time-barred. That petition C. M. P. No. 1090 of 1922 was one to declare the bond cancelled and the only effect of its dismissal was to settle that the bond was in force and executable then.

The execution petitions for arrest on the first surety were taken out subsequently to this and even if they could be res judicata as against the first surety on the point that the execution could be

taken out in this way, without an order of liability on the bond being passed by the Court, they could not possibly be res judicata against the second surety against whom no action was sought under them. In my opinion the procedure now adopted is misconceived being premature. It is necessary first to obtain an order of the Court declaring, the bond of the second surety forfeited. Even if the present petition were to be treated as such an application it is barred by limitation being made more than three years not only from the date of the bond (if the view of Madhavan Nair, J., in the case quoted above be taken as correct), but also from the date of the alleged default. The second appeal fails and is dismissed with costs.

P.R.S./K.S.

*Appeal dismissed.***A. I. R. 1933 Madras 725**

WALSH, J.

Ayyakannu Pillai and another—Plaintiffs—Appellants.

v.

Doraiswami Pillai and others—Defendants—Respondents.

Second Appeal No. 316 of 1929, Decided on 8th March 1933, from decree of Sub-Judge, Madura, D/- 9th August 1928 in A. S. No. 13 of 1928.

Chit fund — Subscriber agreeing to pay future instalments and in case of default of any one instalment, all future instalments to become due on date of default — Default clause is not penal.

Where a subscriber to a chit fund takes the chit in auction and executes a bond for payment of future instalments and agrees that, on default of any one instalment, all the future instalments shall become due on date of default, the latter clause is not penal; and hence the interest which has to be paid on such sum until the principal sum is paid is also no penalty: *AIR 1933 Mad 657, Foll; AIR 1922 Mad 67, Held Appr; AIR 1925 Mad 177, Diss from; AIR 1933 Mad 252, Ref.*

[P 726 C 1, 2]

K. S. Rajagopalachari for K. Rajah Ayyar—for Appellants.

K. Kuttikrishna Menon—for Respondents.

Judgment.—The suit was on a mortgage bond executed by defendant 1 in respect of a chit transaction conducted by the plaintiffs. The chit fund was started about 2nd May 1921 and it consisted of 50 chits. Defendant 1 was a subscriber for two chits and he took the chit in auction in the third instalment on 8th July 1921, for Rs. 197 and executed the suit mortgage bond as security

for payment of the future instalments. While the chit was going on he also took the other chit in auction in 30th instalment for Rs. 310 on 6th October 1923. The findings of fact are that towards the suit mortgage bond defendant 1 paid up the calls until 24th call only, and thereafter committed default. Under the terms of the bond all future instalments 25 to 50 became payable on the date of default. The plaintiff's case in the trial Court was that defendant 1 committed default in the fifth drawing, but the Court found that this default had been waived and, as I said, the finding is that default began after the 24th instalment. The plea of defendant 1 was that he had paid up to the end of the 27th instalment and that there was an adjustment as regards both the chits by means of Ex. 1. Ex. 1, has been found against.

The finding is that the plaintiffs' version that Rs. 310 due to defendant 1 for the second chit was adjusted towards the calls of the second chit and towards the amount due on some promissory note is correct. The trial Court following the decision of Srinivasa Ayyangar, J., in *Ramalinga Adaviar v. Meenakshi Sundaram Pillai* (1) found that the clause by which all future instalments became due on the date of default was penal. It accordingly only gave a decree for the instalments as they fell due at a certain rate of interest which is not clearly stated in the judgment and which it is unnecessary for the purpose of this appeal to work out. The rate stipulated in the bond is 30 per cent. The defendants appealed. The lower appellate Court held that the whole amount became due at the date of default, thereby impliedly dissenting from the view of the trial Court on that matter, but it held that the rate of 30 per cent was a penal clause added to this penalty for default and awarded interest only at 6 per cent. Although the whole argument recognized that the future instalments became due by non-payment of the 25th instalment, yet interest was only awarded from the date of the closing of the chit. No reason is given for this by the learned Subordinate Judge. This second appeal is preferred by the plaintiffs and is concerned only with interest.

1. *AIR 1925 Mad 177=85 I C 261.*

The first matter is that mentioned just now that interest must begin from the date of default and that is clearly so on the finding of the learned Subordinate Judge himself. The other matter urged is that the Court is wrong in holding that 30 per cent interest stipulated in the bond is by way of penalty. In *Vaithinatha Iyer v. Govindaswami Odayar* (2), it was held that this was not a penal stipulation even when added to the loss of commission by the defaulter and to his having to pay all the instalments on default in one. In *Muthukumara-swamiah v. Subramanian*, A. I. R. 1927 Mad. 1105, Ramesam, J., one of the Judges in *Vaithinatha Iyer v. Govindaswami Odayar* (2) referred to that case and it was argued that in the later case the learned Judge approved of the opinion of Srinivasa Ayyangar, J. As I read the case I do not think the learned Judge says that he approves of the test laid down by Srinivasa Ayyangar, J. If that test is correct it would unquestionably make the stipulation that the whole of the future instalments became due in default of payment of any of them in the case of these chit funds a penalty, because unquestionably these are debt instalments which are not due actually at the time of the bond. All that Ramesam, J., lays down in A. I. R. 1927 Mad. 1105, is that it cannot be said that the terms of a chit fund contract can never be penal.

The whole effect of Ramesam, J.'s, judgment as compared with the decision of Srinivasa Ayyangar, J., in *Ramalinga Adaviar v. Meenakshi Sundaram Pillai* (1) is considered by Anantakrishna Ayyar, J., in *Kunju Nair v. Narayanan Nair* (3), and I have nothing to add to the remarks made by that learned Judge there. However the matter has recently been set at rest by the decision in *Subbiah Pillai v. Muthiah Pillai* (4) in which it has been held dissenting from the view of Srinivasa Ayyangar, J., that the clause that all the future instalments shall become due on default of payment of any one instalment is not penal and *Vaithinatha Iyer v. Govindaswami Odayar* (2) is approved of. This sets the matter at rest and there can therefore be no doubt that this default clause in

Ex. A, is not a penal clause. If the whole sum becomes due and there is no penalty, then there is no reason to call the interest which has to be paid on such sum until the principal sum is paid a penalty: see also *Vaithinatha Iyer v. Govindaswami Odayar* (2), on this matter. No question was raised here that 30 per cent was per se an unduly high rate to be relieved against under the Usurious Loans Act. I am therefore of opinion that the plaintiffs are entitled to 30 per cent interest. Perhaps I may say this rate of interest was allowed by Ramesam, J., in A. I. R. 1927 Mad. 1105, the case quoted for the respondent. The appeal is therefore allowed with costs in this Court and the lower Court and a decree will be passed accordingly.

P.R.S./R.K.

Appeal allowed.

A. I. R. 1933 Madras 726

CURGENVEN, J.

Ramalingam Pillai — Plaintiff—Appellant.

v.

Ponnusami Goundan and others—Defendants—Respondents.

Second Appeal No. 110 of 1929, Decided on 12th December 1932, against decree of Sub-Judge, Cuddalore, in A. S. Nos. 372 and 383 of 1928.

(a) Civil P. C. (1908), S. 9—Claim to exercise right of worship is cognizable by civil Court.

A claim by a person to exercise a right of worship is a claim of a description cognizable by civil Court: A I R 1925 P C 36, *kel on*; 5 I C 76, *Expl.* [P 727 C 1]

(b) Civil P. C. (1908), O. 1, R. 3—Plaintiff obstructed in worshipping deity by some of villagers—All villagers not joined as defendants—Decree can be passed against those who are impleaded.

Where plaintiff is obstructed from worshipping the village deity by some of the villagers, and he impleads only such villagers as defendants in the suit and not all the villagers, the suit is not bad for non-joinder of all the villagers and a decree can be passed against the persons so impleaded; but he has to take the risk that obstructions may come from some other person, who is not bound by the decree: A I R 1921 Cal 622; and A I R 1924 Cal 1050, *Ref.* [P 728 C 1]

C. Padmanabha Ayyangar for T. E. Ramabhadrachariar—for Appellant.

U. Ramachandran for E. V. Sundara Reddi—for Respondents.

Judgment.—In disposing of A. S. No. 372 of 1926 the learned Subordinate Judge in my view has confounded two entirely different issues. In para. 6 of his judgment he proposes to himself the

2. AIR 1922 Mad 67=67 I C 995.

3. AIR 1933 Mad 252=140 I C 833.

4. AIR 1933 Mad 657.

question whether the plaintiff's claim is cognizable by a civil Court, which is the subject matter of issue 6. He then goes on to discuss what the claim amounts to and appears to be deciding the question whether the plaintiff has established a right to require the gods to be stopped at his house, which is the subject matter of issue 2, though he concludes by finding that the right claimed by the plaintiff is not cognizable by a civil Court. I must take it that he has restricted himself to a consideration of issue 6 and that he has left issue 2 undecided.

The case upon which he seems to have relied on in his somewhat confused discussion is *Krishnaswami Ayyangar v. Rangaswami Ayyangar* (1). There is no doubt that the brief passage in the judgment which is relevant upon this point concludes with the observation that the suit is not of a nature of which a civil Court can take cognizance. But the grounds given for coming to that conclusion are in the first place that the right claimed to stop the idol in front of the plaintiff's house is not part of the right to worship by a member of the community for whose benefit the temple has been dedicated, which, I think, must be regarded as a finding upon the merits of that particular case; another finding of the same description is that there can be no right to obstruct a highway for the purpose connected with the plaintiff's claim. I find it difficult to understand how the cognizable character of the claim can be decided on grounds such as these. It is unnecessary to canvass this case further because, in my view, the Privy Council case in *Manzur Hasan v. Muhammad Zaman* (2), which the learned Subordinate Judge dismisses as having no reference to the circumstances with which we are now dealing, is clear authority, as the learned District Munsif has taken it to be, that a claim by a person to exercise a right of worship is a claim of a description cognizable by a civil Court. Their Lordships have made reference to the differing views taken by the High Courts of Bombay and Madras and have expressed a preference for the Madras view, upheld by Calcutta, that a suit of this character is cognizable by a civil Court. Their

Lordships were dealing with the right to conduct a religious procession through a public street; but their decision sets at rest the more general question, whether a claim to conduct or to participate in public worships is actionable. There can be no doubt that, whether it be well or ill-founded, the plaintiff's claim, is one so to participate and I think it is quite clear accordingly that issue 6 in the suit must be answered in plaintiff's favour.

The learned District Munsif, who has decided all the issues, has given the plaintiff a decree with reference to the two deities, Gangai Amman and Ponni Amman, which formed the subject matter of A. S. No. 372 of 1926 before the Subordinate Judge. The learned Subordinate Judge has not proceeded to consider the other issues with the exception of one, namely, issue 7, on the question of non-joinder. The point here raised was that the villagers as a body constituted the trustees of the affairs of these deities, that the defendants in obstructing the plaintiff acted as such trustees and that it was necessary either to implead all the villagers or to bring a representative suit in order that an operative decree might be passed. The single case upon which the learned Subordinate Judge in accepting this contention has relied upon is *Haran Sheikh v. Ramesh Chandra* (3).

That was a case against servient owners as defendants by a plaintiff who claimed a right of way over land in which the servient owners had shares. One such servient owner was omitted, and the Court held that the non-joinder was a fatal defect on the ground that the decree, if made, must be infructuous. With all respect it is difficult to see why it should have been infructuous against those persons who were parties to it, and in a later case, *Surja Narain v. Chandra* (4), doubts have been expressed as to the correctness of this decision. In the present instance the plaintiff does not go so far as to say that the defendants' denial of his right is made as representing the trustees or that the trustees themselves had made any such denial of his right to participate in the worship. He has selected these defendants, he says, because they are the per-

1. (1909) 5 I C 76.

2. A I R 1925 P C 36=86 C 236=52 I A 61=47 All 151 (PC).

3. A I R 1921 Cal 622=62 I C 425.

4. A I R 1924 Cal 1050=34 I C 467.

sons who have by overt acts obstructed him in the exercise of his alleged right. In these circumstances I am unable to see why a decree should not be passed against these persons, the plaintiff of course to take the risk that obstruction may come from some other quarter, which would not be bound by the decree. I cannot find any valid ground in this objection. With regard to the other deity, Dropathi Amman, the subject of A. S. No. 383 of 1926 on the file of the Subordinate Judge's Court, the question of the cognizability of the claim has again been raised; but I think it is unnecessary to enter into it because in this instance the learned Subordinate Judge has found that, assuming it to be a claim which can be entertained by a civil Court, the plaintiff voluntarily abandoned the exercise of any right he may have possessed by giving up the celebration of the festival in 1920. This is a finding of fact on which both the lower Courts are concurrent and is sufficient to dispose of the case in this respect, and I therefore record no finding in this instance upon issue 6.

The result of my findings is that the portion of the Subordinate Judge's decree which relates to A. S. No. 372 of 1926 is set aside and the lower appellate Court will restore A. S. No. 372 of 1926 to its file and proceed to dispose of it after finding upon the remaining issues. The portion of the decree relating to A. S. No. 383 of 1926 is confirmed. The appellant will pay the respondents half the costs of the second appeal. The remaining half of the costs will abide and follow the result of A. S. No. 372 of 1926.

P.R.S./K.S.

Order accordingly.

* A. I. R. 1933 Madras 728

BARDSWELL AND BURN, JJ.

Public Prosecutor—Appellant.

v.

Malaipati Gurappa Naidu—Accused—Respondent.

Criminal Appeal No. 158 of 1933, Decided on 24th April 1933, from order of Joint Magistrate, Chandragiri, in C. C. No. 171 of 1932.

(a) Criminal P. C. (1898), Ss. 380 and 562 (2)—Magistrate to whom case is referred under S. 562 (2) has no power to set aside conviction under S. 380—He can only

either convict or make or direct further inquiry.

When an accused person on a reference under S. 562 (1) proviso comes before a Magistrate under S. 380, he can be treated only as a convicted person and it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him. He may if he thinks further inquiry or additional evidence on any point to be necessary, make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken, and if in any case he thinks the conviction to be improper, his proper action will be to refer the matter under the revision sections and not to set aside conviction under S. 380 : 2 U B R 55, Ref.

[P 729 C 1, 2]

*(b) Criminal P. C. (1898), Ss. 349, 380 and 562 — Distinction between case submitted under S. 562 and one submitted under S. 349 pointed out.

There is a very clear difference between S. 349 and S. 380. When a Magistrate of the Second or Third class submits proceedings under S. 349 he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under S. 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under S. 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted.

[P 729 C 1]

B. Manavola Chowdhry—for Accused.

Judgment.—The respondent to this appeal was convicted by the Second Class Magistrate of Tiruttani of an offence punishable under S. 212, I. P. C. for harbouring a person who had committed theft. That Magistrate not being empowered to take action under S. 562 (1), Criminal P. C., submitted the proceedings to the First Class Sub-Divisional Magistrate of Chandragiri. The Sub-Divisional Magistrate without giving notice to anybody found the respondent not guilty and acquitted him. The Government is appealing against his acquittal. The case has not been argued before us on the merits but merely with reference to the powers of a Magistrate under S. 380, Criminal P. C. When a case is referred, as was this case, to a Magistrate under the proviso to S. 562 (1), Criminal P. C., the Magistrate to whom it is referred has to dispose of the case in the manner provided by S. 380, and under S. 380 such Magistrate may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. What is argued for the respondent is that a Magistrate acting under S. 380 has exactly the same

powers as has a Magistrate to whom proceedings are submitted under S. 349, Criminal P. C. No authority of any High Court has been quoted on this subject but the Judicial Commissioner of Upper Burma has in *Mithi Hla v. Mi Kin* (1) held that the same powers can be exercised under S. 380 as under S. 349, and has expressed the opinion that it is difficult to suppose that the legislature intended anything else. The question is however not what the legislature intended or contemplated but what it has in fact enacted. There is a very clear difference between S. 349 and S. 380.

When a Magistrate of the Second or third class submits proceedings under S. 349 he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under S. 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under S. 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted. Such opinion as the referring Magistrate expresses being that on the conviction, action should be taken under S. 562. It is our opinion that when an accused person comes before a Magistrate under S. 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him. Normally a conviction can only be set aside on appeal or on revision. It is pointed out that a sentence of death can be set aside merely on a reference for confirmation but for that there is a special provision in S. 376. We think that the order which it is permissible for a Magistrate to pass under S. 380 can only be such an order as can be passed upon a convicted person and S. 408 provides, it may be noticed, for an appeal both against an order and a sentence passed under S. 380. It is true that under S. 380 the Magistrate may, if he thinks further inquiry or additional evidence on any point to be necessary, make such inquiry or take such evidence himself or direct such inquiry or evidence to be

made or taken. It is asked why such powers should be given. It may be for the purpose of satisfying the Magistrate that it really is a case for applying S. 562, and possibly such evidence might be taken with a view to seeing whether the conviction was correct. Even so in our view S. 380 does not allow of a Magistrate who acts under it to set aside a conviction.

Cases in which a Magistrate so acting thinks that the conviction is improper will probably be very few. If in any case he thinks it to be improper we think his proper action will be to refer the matter under the revision sections.

The respondent is an old man of 70 and we have not been asked to send the matter back to the Sub-Divisional Magistrate for proper disposal and so we pass no further order on this appeal apart from saying that the Sub-Divisional Magistrate's action in passing orders without any notice to either side was improper.

P.R.S./K.S.

Order accordingly.

* * A. I. R. 1933 Madras 729

CURGENVEN AND SUNDARAM
CHETTY, JJ.

(Sri Sri Sri) Palahari Mahant Raja Ram Doss Bavaji—Defendant—Appellant.

v.

(Sri Sri Sri) Gajapathi Krishna Chendra Deo Garu—Plaintiff—Respondent.

Appeal No. 46 of 1927, Decided on 1st February 1933, against decree of Sub-Judge, Berhampur, in O. S. No. 47 of 1925.

(a) Interest Act (1839), S. 1—Claims coming under Act—Interest can be allowed if conditions prescribed are satisfied.

In respect of claims coming within the scope of the Act, interest can be awarded, if the conditions therein prescribed are satisfied, and there is no need to prove actual loss or damages.

[P 733 C 2]

(b) Interest Act (1839), S. 1—Act is not repealed by Contract Act (1872), S. 73.

Section 73, Contract Act, cannot be taken to have impliedly repealed the Interest Act. In fact there is no real conflict between the two, since effect may well be given to S. 73, by holding that the award of interest, as compensation contemplated by that section, has reference to cases in which such award can be made without infringing the provisions of the Act: 20 Mad 481, *Rel. on.*

[P 733 C 2]

* * (c) Contract Act (1872), S. 73, *Illus. (n) and (r)*—Non-payment of money due itself constituting breach of contract—No interest can be allowed in addition to recovery

of money unless plaintiff gives adequate proof that by reason of breach of contract, special loss or damage was sustained and unless such claim for interest is not one coming under category of cases specified in Interest Act (1839), S. 1.

Where it is shown that the non-payment of money due is itself the breach of contract, and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of the money withheld. But if adequate proof is given that by reason of the breach of contract, special loss or damage was sustained by the plaintiff, for which the mere repayment of the amount due under contract, would not be an adequate compensation, but the proper measure of damages awardable, should include a reasonable rate of interest also on account of the loss proved to have been sustained, the Court can award interest as part of the damages, either under Illus. (u) or Illus. (r), S. 73. If the awarding of interest is deemed to be giving a remote damage, then such a relief will not be given under S. 73. But if the Court should find that in the special circumstances of a case, adequate compensation for the loss caused by the breach of contract, should include a certain rate of interest as its component, and the claim is not one coming under the category of cases specified in the Interest Act, effect may be given to Illus. (u) or Illus. (r), S. 73, without infringing the rule of Common law or the Interest Act. [P 734 C 1]

The defendant held a usufructuary mortgage over a part of an estate, of which the plaintiff was the zamindar. The mortgage deed provided that the mortgagee should pay annually a sum of Rs. 2,000 towards the peishcush, and the land cess due upon the portion mortgaged. The defendant defaulted in making these payments, so that the plaintiff was himself compelled to pay them. To recover as damages the amounts so paid, he filed a suit demanding interest from date of payment to date of suit:

Held: that the case did not come under the Interest Act and that in the absence of proof of special loss or damage, such interest could not be allowed: *Case law discussed.* [P 734 C 2]

V. Govindarajachari and N. Vasudeva Rao—for Appellant.

B. Jagannadah Doss — for Respondent.

Curgenvén, J. — The defendant, the Mahant of Balaga mutt, holds a usufructuary mortgage over a part of the Nandigam estate, of which the plaintiff is zamindar. The mortgage deed provides that the mortgagee shall pay annually a sum of Rs. 2,000 towards the peishcush, and the land cess due upon the portion mortgaged. The defendant defaulted in making these payments for Faslis 1330 and 1331, so that the plaintiff was himself compelled to pay them. To recover as damages the amounts so paid he has filed two successive suits. That out of which this appeal arises is the second, and relates to part of the

payment for Fasli 1330 and the whole of the payment for Fasli 1331. The defendant raised various defences, the chief defence pressed at the trial being that the mortgage was not binding upon the mutt. This was decided against him, and has been abandoned on appeal. The points taken before us are, firstly, that the interest which the lower Court awarded upon the amounts paid, from dates of payment up to suit, is inadmissible; secondly, that no proof has been adduced that the amount claimed as land cess paid for Fasli 1331 is correct; thirdly, that subsequent interest has been calculated not only upon the principal amount due but also upon the pre-suit interest.

Dealing first with the question whether interest up to suit is admissible, it cannot seriously be contended that the Interest Act (32 of 1839) empowers the Court to award it. The amount claimed as damages is neither a debt nor a sum certain payable by virtue of a written instrument at a certain time, since the occasion for its payment only arose upon a breach of the terms of the mortgage-bond, and upon the plaintiff making good the defendant's default. Nor to satisfy the second stipulation of the Act has any proof of a written demand of payment been given. Some legal basis other than the Act furnishes must therefore be found if the claim is to be admitted.

We are asked to hold that, independently of the Interest Act, interest is payable as damages under S. 73, Contract Act. The Act itself closes with a proviso "that interest shall be payable in all cases in which it is now payable by law;" and S. 73, it is said, supplies the legal provision necessary. Before referring to authority on this point it is, I think, necessary to clear up an aspect of the matter which in the present case has led to attempts to distinguish certain cases, English as well as Indian, which are not in my view distinguishable. The proposition is advanced that while interest as damages for the non-payment of a debt or other sum due under contract may not be awardable under S. 73, it is otherwise when the interest is claimed upon a principal sum due as damages, and as a component part of those damages. It is urged that S. 73 empowers the Court to make such an

award because it is no more than part of the compensation for loss or damage which naturally arose from such breach and there is nothing in the section itself to exclude the award of damages in this shape. Indeed Illus. (n) and (r) to the section expressly contemplate the award of such interest. Leaving aside for a moment the question of the effect of these illustrations, a little consideration will I think, show that whatever be the nature of the obligation to pay the principal sum—whether for example it originates in contract or in tort—interest can only be claimed upon it as damages for the reason that payment of it has been improperly withheld. In the present instance so soon as the plaintiff had paid to Government the sums in the payment of which the defendant had defaulted, he became entitled to be reimbursed them in the shape of damages. Those sums and those alone were the measure of the damages due for the breach; and if any interest upon them was payable it could only be because the defendant had further defaulted in promptly compensating the plaintiff for the loss occasioned by the breach—in other words, had improperly withheld money due to be paid.

If this be sound reasoning the case is no more than a particular instance of the general class of claims to interest as damages for the non-payment of a pecuniary obligation, and cases which decide the general question, even although the principal subject-matter of them may not be a claim to damages are not really distinguishable. That upon this question the law in this country is substantially the same as in England is not disputed. Our Interest Act reproduces Lord Tenderden's Act, and S. 73, Contract Act, is based upon the Common law. Accordingly the judgment of the House of Lords in *London Chatham Dover Ry. Co. v. South Eastern Ry. Co.* (1), which had the effect of settling what the English law was, may be accepted, as indeed it has been accepted, as equally a guide to the law of India upon this point. In an earlier English case, *Best, C. J.*, had said:

"However a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavoured to obtain payment of

it, the jury may give interest in the shape of damages for the unjust detention of the money."

This as Lord Herschell, L. C., says, "is a very clear expression of principle and a rule sufficiently definite;" and he proceeds to make it equally clear that upon such broad grounds interest is not awardable. The earlier case of this Court, and one which deals with the matter upon these lines, is *Kisara Rukkamma Row v. Cripati Viyanna Dikshatulu* (2). It is enough however to go only so far as *Kamalammal v. Peeru Meera Levvai Rowthen* (3), a case in which the above cited judgment of the House of Lords was followed. The learned Judges then consider the effect of S. 73, Contract Act, coupled with Illus. (n), and point out the conflict which would arise if the section were held to allow the award of interest not admissible under the Interest Act. If the proviso to the single section of that Act—"provided that interest shall be payable in all cases in which it is now payable by law"—enabled so all embracing an application of S. 73, the Act would become a superfluity. This case was followed in *Subramania Ayyar v. Subramania Ayyar* (4). The course which decisions have since taken in this Court has been traced quite recently by Venkatasubba Rao and Madhavan Nair, JJ., in *Nanchappa Koundan v. Ittichathara Mannadiar* (5), and it can now be said, I think, that the departure from the generally accepted position marked by *Abdul Saffur Rowther v. Hamida Bivi Ammal* (6), which went beyond the English law and awarded interest upon broad equitable principles, [a case which I myself followed in *Krishnan Nambudripad v. Ambu Kurup* (7)] has since been definitely disapproved. Indeed but a short time later Sir John Wallis, C. J., in *Rajah of Pittapur v. Ballapragada Pallamraju* (8), reaffirmed the earlier cases *Kisara Rukkamma Row v. Cripati Viyanna Dikshatulu* (2) and *Kamalammal v. Peeru Meera Levvai Rowthen* (3), basing himself upon the law as it had been settled in England,

2. (1863) 1 M H C 369.

3. (1897) 20 Mad 431=7 M L J 263.

4. (1908) 31 Mad 250=18 M L J 245.

5. AIR 1930 Mad 727=127 I C 620=53 Mad 549.

6. AIR 1919 Mad 164=52 I C 505=42 Mad 661.

7. AIR 1927 Mad 59=98 I C 802.

8. AIR 1921 Mad 76=60 I C 353.

1. (1893) A C 429=63 L J Ch. 93=69 L T 637=53 J P 36.

that at Common law interest could not be given as damages for the non-payment of debts. This too forms the basis of the Privy Council's decision in *Main & New Burnswick Electrical Power Co. Ltd v. Alice M. Hart* (9), a case from New Burnswick but subject to substantially identical provisions of law. The equitable jurisdiction of the Court, it was found, was not involved, and the parties were left to their remedies at law.

Reference may now be made to two cases of this Court which relate to damages for breach of contract and are therefore more directly in point. *Boddu Sanyasiraju v. Kotra Ramamurthi* (10), was an ordinary case of failure to deliver goods according to contract, and the question arose whether interest could be allowed upon the damages assessed. It was held that interest was not allowable upon unliquidated damages. Tyabji, J., notices the argument which has been advanced before us, that the Court ought to have the power to place the aggrieved party in the position he would have enjoyed if the contract had been fulfilled; but he felt constrained by the weight of authority against allowing a remedy of this kind. He qualifies his acceptance of the general position by adding that, if the plaintiff had alleged and proved that having been deprived of the use of the money he had suffered loss, there might have been less difficulty in his recovering damages for the loss so caused.

A similar view had been taken in *Surja Narain Mukhopadhyaya v. Pratap Narain Mukhopadhyaya* (11), and a cognate exception is to be found in English law, where the plaintiff's money has been used and interest made upon it: (21 Halsbury, p. 40). But without such proof a claim to interest is unsustainable. The other case in which a claim to interest on unliquidated damages was disallowed is *Kavutu Purnarandam v. Lakshminarasimhacharyulu* (12). The respondent here has attempted to argue that, because the principal amount of the damages cannot, from the nature of the case, be in question, the damages are not unliquidated but liquidated. This is to misconceive the meaning of

"liquidated damages," a term not used in the Contract Act, but employed to denote a sum named in the contract as the amount to be paid in case of a breach. S. 74 deals with such a case, while S. 73 relates to a contract the damages for the breach of which are unliquidated; and the only effect of holding that, we are here dealing with a question of liquidated damages, would be to take the case out of S. 73.

It may be that no two opinions are possible as to the amount of the damages due, but it is not possible to found a distinction upon the relative case and certainty with which the quantum of damages is ascertainable. Accordingly I can discover no grounds for differentiating between a case like the present and any other case of breach of contract. It is equally true of all that an interval must elapse between the date upon which loss occasioned by the breach accrues to the plaintiff and the date upon which he receives compensation for that loss, and that in the meanwhile he is out of pocket. Unless he can resort to some positive provision of law, such as the Interest Act, that circumstance cannot as the law at present stands be met by the award of interest.

In the Full Bench case, *Kandappa Mudaliar v. Muthuswami Ayyar* (13), it was decided that a person who sues to recover an advance made for the supply of goods, the contract being broken, is not entitled to interest upon the amount of the advance. Of the three learned Judges who took part in that decision, Coutts-Trotter, C. J. and Beasley, J., (as he then was) held as above, while Ramesam, J., dissented. The last named learned Judge took the view that *London Chatham & Dover Ry. Co. v. South Eastern Ry. Co.* (1) was not against the respondent (who claimed interest) because the case "related to sums recovered in performance of contract and was therefore covered by the Act," i. e., Lord Tenderden's Act. His view seems to have been that while in cases "covered by the Act," which I take to mean cases of the class—based on the contract—to which alone the Act applies, the test of admissibility of interest is of one kind, it is otherwise with cases not "covered by the Act," e. g., a case of damages. It

9. AIR 1929 P C 185=119 I C 615 (P C).

10. (1913) 21 I C 543.

11. (1899) 26 Cal 955.

12. AIR 1915 Mad 938=26 I C 429.

13. AIR 1927 Mad 99=50 Mad 94=99 I C 609 (F B).

seems to me that this is a distinction somewhat difficult to maintain. It will be agreed that interest claimed as damages is claimed quite independently of the Act. That it was so claimed in the House of Lords case is shown by the following passage in Lord Herschell's judgment (p. 437):

"But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenderden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of the debt."

The Full Bench may be taken to have decided the significance of the illustrations (n) and (r), S. 73, that they mean no more than that interest, if otherwise payable, will be a proper component of the damages. This had been previously so held in *Kesara Rukkamma Row v. Cripati Viyanna Dikshatulu* (3): see Pollock and Mulla's Contract Act, Edn. 6, p. 430. I conclude accordingly that the interest up to suit awarded by the Court below must be disallowed.

Upon this finding the third point taken for the appellant does not arise. There remains the question of the correct amount of land cess to be charged to him for fasli 1331. According to the statement filed with the plaint, the amount claimed was Rs. 1,530-15-4. The lower Court has found (para. 12) that only half the amount of land cess due upon the mortgaged area minus Rs. 16 was payable by the defendant, and so far there is no dispute. But most unfortunately for the plaintiff, no proof whatever was given of the correctness of the plaint figure, and no admission of it was obtained from the defendant. We cannot therefore confirm the decree in this respect, nor do we find any justification for remanding the suit to have the omission supplied. The only course is to accept the figure which the defendant admits to be his share, viz., Rs. 458-4-6, substituting this for the figure Rs. 749-7-8 found by the lower Court. The result of this, and of the disallowance of interest, will be that the sum of Rs. 4,633-9-0 named in the decree will be replaced by the sum of Rs. 3,659-4-6, with the consequential alterations in subsequent interest and costs. The parties will pay and receive proportionate costs of the appeal.

Sundaram Chetty, J. — I agree and wish to state briefly what I have got to

say on the somewhat difficult question, relating to the award of interest in this case. The Interest Act (32 of 1839) provides for the award of interest in certain categories of cases, viz., claims relating to debts or sums certain, payable at a certain time or otherwise, if they are payable by virtue of some written instrument at a certain time, but if no time is fixed for payment in the instrument, interest can be awarded only when a demand in writing giving notice to the debtor that interest would be claimed, has been given, in which case interest will run only from the date of such demand. The proviso to this section exempts from the operation of this Act, all cases in which interest is made payable by law. It is clear, that in respect of claims coming within the scope of the Act, interest can be awarded, if the conditions therein prescribed are satisfied, and there is no need to prove actual loss or damages. The Court is enabled to award interest in such cases, on the strength of this statutory provision. In the category of cases specified in the Act, no interest can be awarded, if the requirements laid down in the Act are not complied with. Otherwise, it would be an infringement of the provisions of this Act. What about claims not coming within the scope of the Act itself? Claims for damages on account of breach of contract are dealt with by S. 73, Contract Act, and a number of illustrations are given. For the purpose of the present case, illustrations (n) and (r) are relevant. As held in *Kamalammal v. Peeru Meera Levvai Rowther* (3), this later enactment cannot be taken to have impliedly repealed the Interest Act. The following observation at p. 483 is important:

"In fact, there is no real conflict between the two, since effect may well be given to S. 73, by holding that the award of interest, as compensation contemplated by that section, has reference to cases in which such award can be made without infringing the provisions of the other Act."

The claim dealt with by the learned Judges appears to be one coming within the scope of the Interest Act, and no interest can be awarded, as the requirements of that Act have not been fulfilled. The decision in *Kamalammal v. Peeru Meera Levvai Rowther* (3), has been followed in a series of later decisions of this High Court. The question is, whether in respect of claims not

covered by the Interest Act, the Court can award interest by way of damages, under S. 73, Contract Act, as component of the compensation to be fixed for the loss caused to the plaintiff by reason of the breach of a contract. S. 73, being declaratory of the English Common law as to damages, this section cannot be deemed to abrogate the rule of Common law in the award of damages.

Under the Common law, which is now well settled in England, interest cannot be awarded as damages for the mere wrongful detention of money. I take this to mean, that where it is shown that the non-payment of money due is itself the breach of contract, and nothing else is proved to make out the claim for compensation for such breach, no interest can be awarded in addition to the recovery of the money withheld. But if adequate proof is given, that by reason of the breach of contract, special loss or damage was sustained by the plaintiff, for which the mere repayment of the amount due under the contract would not be an adequate compensation, but the proper measure of damages awardable, should include a reasonable rate of interest also, on account of the loss proved to have been sustained, I think, the Court can award interest as part of the damages, either under *illus. (n)* or *illus. (r)*, S. 73. If the awarding of interest is deemed to be giving a remote damage, then such a relief will not be given under S. 73. But if the Court should find that in the special circumstances of a case, adequate compensation for the loss caused by the breach of contract, should include a certain rate of interest as its component, and the claim is not one coming under the category of cases specified in the Interest Act, effect may be given to *illus. (n)* or *illus. (r)*, S. 73, without infringing the rule of Common law of the Interest Act.

The observations of Banerjee, J., in *Suraj Narain Mukhopadhyaya v. Pratap Narain Mukhopadhyaya* (11), at pp. 964 and 965, bring out this aspect clearly. I am of opinion, that on such special proof of loss or damage, interest can be awarded as a component part of compensation, payable for the breach of contract, when the claim is one outside the category of claims mentioned in the Interest Act. In the present case, it can be stated that the claim is not one

coming within the purview of the Interest Act, but no proof of special loss or damage as required by S. 73, for awarding interest as damages is adduced. I am therefore of opinion that no interest prior to suit is awardable. I agree with my learned brother in the order proposed by him.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 734

WALSH, J.

Thambu Bashyam Ayyangar and another—Defendants—Appellants.

v.

N. Srinivasachariar and others — Plaintiffs—Respondents.

Second Appeal No. 1719 of 1931, Decided on 17th March 1933, against decree of Dist. Judge, Chingleput, D/- 19th February 1931, in A. S. No. 243 of 1930.

Legal Practitioner—Vakalatnama providing “*avasyamanal* (if necessary or expedient) you are to compromise suit or raise contest” —Compromise is in the discretion of pleader and not of Court.

Where the vakalatnama which was executed by a client contained among other things the following clause “*avasyamanal* (if necessary or expedient) you are to compromise the suit or raise contest.”

Held: that to decide whether it was necessary or expedient to compromise the suit, was within the discretion of the pleader, and not the Court, and that a compromise entered into by him was binding on his client: *Case law reviewed.*

[P 735 C 1; P 736 C 2]

R. Somasundaram Ayyar — for Appellants.

K. V. Sesha Ayyangar and R. Thirumalathathachariar—for Respondents.

Judgment.—The question involved in this second appeal is as to the power of the pleader to compromise the case for defendants 1 and 3. The suit was brought by the worshippers of a certain temple for a declaration that a usufructuary mortgage executed in favour of the father of defendants 1 to 3 is not binding on the suit temple and for recovery of properties or in the alternative, if the Court held that the mortgage was binding on the temple, for recovery of the properties on payment of Rs. 263. The defendants contended that the mortgage was binding on the plaintiff temple and that the plaintiffs were not entitled to any relief. Issues were framed and when the suit came on for hearing the pleaders on both sides represented that the matter was settled between the parties. Defendants 1 to 3

had a common pleader. Both the pleaders, plaintiff 2 and defendant 2 endorsed on the plaint the terms of the settlement. The suit was then adjourned to 16th April 1930 to enable the plaintiffs to deposit Rs. 240 into Court in pursuance of the terms of the settlement. The plaintiffs deposited the amount that day but defendants 1 and 3 appeared in person and stated that they did not agree to the compromise. The learned District Munsif held that they were bound by the compromise and decreed the suit in terms of the compromise. This was confirmed on appeal and the second appeal is preferred against that decision. The material terms of the vakalath are given in the judgment of the lower appellate Court and it is not disputed that the translation is correct. It is as follows:

" You are to appear for us in the above suit, file answer, etc., and conduct and examine all proceedings that may be taken in connexion with the application for execution of any decree or order that may be passed therein and *avasyamanal* (if necessary or expedient) you are to compromise the suit or raise contest therein. . . "

It is not disputed that in the context *avasyamanal* must mean, as translated by the District Judge, "if necessary or expedient" because there cannot be any such thing as legal necessity to compromise a suit. The learned District Judge held that to decide whether it was necessary or expedient to compromise the suit was within the discretion of the pleader. The case relied on for the appellants are *Thenal Ammal v. Sokkammal* (1), *Mehra v. Ahmad*, A. I. R. 1929 Lah. 746, *Ghasi Ram v. Haribux*, A. I. R. 1930 Cal 477, *Jagapathi Mudaliar v. Ekambara Mudaliar* (2), *Taru Bala v. Sourendra* (3), *Krishnamachariar v. Chinnammal* (4), *Sourendranath Mitra v. Tarubala Dasi* (5), *Neale v. Garden Lennox* (6), *Braunstein v. Accidental Death Insurance Co.* (7), at 21, *Venkatarayudu v. Surya Rao*, A. I. R. 1929 Mad. 416 and *Bank of New South Wales*

v. Owston (8). Most of these cases can be eliminated as not relevant. *Mehra v. Ahmad*, A. I. R. 1929 Lah 746, was a case of a mere general power of attorney. *Ghasi Ram v. Haribux*, A. I. R. 1930 Cal. 477, was a case where counsel in Court consented to a decree without consulting his client though he was there. It was not a question of authorization under a vakalath. In *Jagapathi Mudaliar v. Ekambara Mudaliar* (2) the terms of the vakalath were quite general. *Venkatarayudu v. Surya Rao*, A. I. R. 1929 Mad. 416, a decision of myself, was not a case where there was any vakalatnama and I held that it was a question of fact whether a party's pleader was authorized to state that his client would abide by High Court's decision in another suit, and that with such a question of fact the High Court cannot interfere in revision. *Neale v. Garden Lennox* (6) was a case of express prohibition by the party to counsel who nevertheless compromised. This case was alluded to by Maccardie, J., in *Welsh v. Roe* (9) with regard to the powers of a solicitor. *Bank of New South Wales v. Owston* (8) is merely a decision about the authority of an agent which is wholly useless in determining the power of a pleader under a vakalatnama in Court. *Sourendra Nath v. Tarubala Dasi* (5), a Privy Council case is really, as far as it goes, against the appellant. Their Lordships say that any advocate when briefed in a suit (including a suit in the Court of a Subordinate Judge), has the implied authority of his client to settle the suit by a compromise. On the matter of the vakalath they express no opinion but merely say

"where the legal representative in Court of a client derives his authority from an express written authority, such as a vakalatnama, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion."

Braunstein v. Accidental Death Insurance Co (7) is merely quoted to explain the meaning of the word "necessary." The question there was as to a clause in an insurance policy that the directors might call for evidence if necessary and it was held that this meant only such evidence as the direc-

1. AIR 1918 Mad 656=41 I C 429=41 Mad 233.
2. (1898) 21 Mad 274=8 M L J 40.
3. AIR 1925 Cal 866=88 I C 369.
4. (1913) 18 I C 369.
5. AIR 1930 PC 158=123 I C 545=57 I A 133=57 Cal 1311.
6. (1902) A C 465=71 L J K B 939=87 L T 341=51 W R 140=65 J P 757=18 T L R 791.
7. (1862) 31 L J Q B 17=1 B & S 712=8 Jur n s 506=5 L T 550.

8. (1879) 4 A C 270=48 L J P C 25=40 L T 500.
9. (1918) 87 L J K B 520=118 L T 529=34 T L R 187=62 S J 269.

tors might reasonably require. That really does not assist us at all in a matter of this sort. *Taru Bala v. Sourendra* (1) deals with a pardanashin lady compromising. Practically the one case on which the appellants rely is *Taru Bala v. Sourendra* (1). The head-note summarises the vakalath as containing a provision authorizing the vakil

"to present if necessary petitions for razinama for withdrawal and for referring to arbitration and to sign the razinama, etc., petitions."

The learned Judges say "the Courts below have held that the plaintiffs were bound by the compromise as the vakalath given by them to their vakil expressly enables him to enter into a compromise. We do not think that the word *avasyamanal* supports this conclusion. We understand the expression to mean that the vakil is to do certain acts when and if the occasion arises. The acts themselves are subsequently enumerated. They are (a) to sign the petition for entering into the compromise or for withdrawing the suit, and (b) to sign the final compromise petition to the Court. These two enumerated powers show that the plaintiff did not intend that the vakil should have unlimited powers to settle the claim of his clients."

It is therefore clear that the learned Judges here decided that the powers conveyed under the expression *avasyamanal* referred to the powers enumerated in the two following clauses as regards the signing of documents. Those clauses are not found in the vakalatnama in the present case which is therefore clearly distinguishable. On the other hand there is a clause in it which to my mind renders the interpretation put upon it by the learned District Judge clearly correct. It is stated there "*avasyamanal* you are to compromise the suit or raise contest therein." If according to the appellants' contention, the pleader had no authority under this to compromise the suit without further reference to his client, then he had no authority to raise any contest in it without a further reference which is an impossible conclusion. So also the contention, which in any case, I consider to be clearly incorrect, that the Court is, in the case of a compromise where no minors are concerned, to judge of the expediency of the compromise, would render it necessary for the Court also to Judge whether contest is to be raised in the suit. On the other side is quoted *Jang Bahadur Singh v. Shankar Rai* (10) at p. 276 where it is said

"when the authority of vakils to bind their

clients is called in question, that authority must depend entirely on the terms of the particular vakalatnama. For my part I should read a vakalatnama widely and liberally, unless it appears that the client intended to limit the authority of his vakil."

That no doubt appears to conflict with the dictum in *Taru Bala v. Sourendra* (1) that a very strict interpretation should be put upon vakalaths containing powers of this kind. However that may be, as I have pointed out above, the terms of the vakalath in *Taru Bala v. Sourendra* (1) are quite different from the terms of the one with which we are concerned. I see no reason to differ from the concurrent view of the law taken by both the lower Courts. The appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 736

RAMESAM AND CORNISH, JJ.

Pichai Moideen Rowther—Plaintiff—Appellant.

v.

Chathurbuja Das Kushal Das & Sons and others—Defendants—Respondents.

Appeal No. 174 of 1931, Decided on 15th March 1933, from decree of Sub-Judge, Trichinopoly, D/- 8th April 1930.

(a) Mortgage — Mortgage with power of sale—If mortgagee exercises right of sale given to him bona fide, Court will not interfere even though sale is disadvantageous, unless price is so low as to be evidence of fraud—T. P. Act (1882), S. 69.

A mortgagee with a power of sale is strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better, to realize his mortgage debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud: *Warner v. Jacob*, (1882) 20 Ch D 220; *Haddington Island Quarry Co. Ltd. v. A. W. Huson*, (1911) A C 722, Rel on.

[P 741 C 2]

(b) Specific Relief Act (1877), S. 22 (2)—"Hardship on the defendant."

The term "hardship on the defendant" in S. 22 (2) is used in the sense of some collateral hardship and not merely the diminution of the purchase money.

[P 742 C 2]

(c) Specific Relief Act (1877), S. 12—Specific performance should not be refused on ground of mere technical plea or imaginary hardship.

Persons who have entered into contract to carry out certain things should not be allowed lightly by Court to break their given word on the ground of mere technical pleas or imaginary hardship. In the absence of adequate grounds, specific performance should not be refused.

[P 742 C 2]

Advocate-General, T. Rangachariar and K. G. Srinivasa Ayyar—for Appellant.

S. Varadachariar and S. V. Vengopalachariar—for Respondents.

Ramesam, J.—This appeal arises out of a suit for specific performance. Plaintiff is the appellant before us. The facts out of which the suit arises are as follows. The suit property which consists of four-fifths share in Mudikandum village in Trichinopoly District belonged to the family of T. Sadasiva Tawker and others who were carrying on business in Madras under the name and style of T. R. Tawker & Sons. On 11th April 1924 the property was mortgaged by the owners to defendant 1 (who is the firm of Chathurbuja Das Kushal Das & Sons carrying on business in Mint Street, Madras), under Ex. 6. Under this document the mortgagees have got a power of sale without the intervention of Court. T. R. Tawker & Sons having failed in their business they were adjudicated insolvents and their properties are vested in the Official Assignee of Madras, who is defendant 5 in the case. Defendant 2 is Kissen Das Girdar Das a partner and the authorized agent of defendant 1's firm. He went to Trichinopoly in May 1927 and got a notice published proclaiming the sale, by public auction, of this and other properties. One property (not the subject of this suit) was to be sold on 7th May at 5 p. m. in Veedi Vadangam and on the 8th May the suit property was to be sold in Mudikandum village (Ex. B). It would appear that, at the last moment, i. e., after the sale of the first property was actually effected at Veedivadangam, the persons who were conducting the auction, i. e., defendant 2 and his legal adviser Mr. P. S. Krishnamurthi Ayyar, Advocate of Trichinopoly, changed their mind and informed the persons who were present there that the sale of Mudikandum would be effected in the house of the advocate at Trichinopoly itself on 8th May. A messenger was also despatched to Mudikandum to inform the possible intending purchasers accordingly.

On 8th May the auction was held in the house of Mr. Krishnamurthi Ayyar and four persons made the initial deposit of Rs. 100 required under the conditions of sale, viz., (1) Pichai Moideen Rowther (plaintiff in the present suit), (2) another Mahomedan gentleman, (3)

Palaniandi Pillai (who is defendant 3 in the suit) and (4) Sundaram Ayyar (a clerk of Mr. Krishnamurthi Ayyar). The bids began with Rs. 4,000. Up to Rs. 7,000 all the four depositors took part in the bids. Afterwards the present plaintiff and Palaniandi Pillai were the only bidders. The bids went up to Rs. 12,550, the last bid being that of Palaniandi Pillai and the sale was knocked down in his favour: vide Ex. B-1. Under the conditions of sale the successful bidder should deposit 25 per cent of the purchase money immediately after deducting the deposit of Rs. 100 and the balance of the purchase money should be paid on the 15th day after the sale. In default the deposit shall be forfeited, the sale shall stand cancelled and a fresh auction shall be held and the defaulting purchaser shall be liable for any deficiency that may arise on the resale. The evidence shows that the successful bidder (defendant 3) instead of paying 25 per cent of the purchase money paid Rs. 300 in addition to the deposit and

"expressed inability to pay the balance at that late hour of the night and promised to pay it before 10 a. m. on the 9th."

He executed an agreement to that effect along with one Ratnam Pillai. What exactly happened on the 9th and 10th is the subject of some difference between the parties. All that we know is that the balance amount was not paid and on 10th May Mr. Krishnamurthi Ayyar sent a registered letter (Ex. F) to defendant 3 in which he mentions the facts as above stated and says that

"at 9 a. m. on 10th May defendant 3 pleaded his inability to pay and set up false and frivolous excuses. My client apprehends that you are acting at the instigation of the raiyats of Mudikandum and that you were acting fraudulently in bidding in competition at the sale without evidently having the means of conforming to the conditions of sale. My client attempted to effect a resale and had after great trouble and persuasion to settle a private sale to S. Pichai Moideen for a price of Rs. 9,000."

He also says in this notice that defendant 3's contract stands cancelled and he has forfeited the sum of Rs. 400. Pichai Moideen referred to in this letter is the plaintiff. This letter refers to an agreement to effect a private sale in favour of the plaintiff. This agreement is contained in Exs. C and C-1. Ex. C-1 is a varthamanam executed by the plaintiff in favour of defendant 1 under which

Rs. 2,250 was paid in advance, the balance of the purchase money, viz., Rs. 6,750 was to be paid within 30 days and he was to have a sale-deed engrossed on a proper stamp paper at his own expense. The vendors are to put him in possession of the property. There was a suit in respect of the suit village pending in the Subordinate Judge's Court of Trichinopoly (O. S. No. 101 of 1925). The vendors themselves were to conduct that litigation. Ex. C, is the counter part and it contains similar terms. These documents were attested by Mr. Krishnamurthi Ayyar (the above mentioned advocate) the local agent of the Official Assignee of Madras, and a clerk of Tawker & Sons. In addition Ex. C was also attested by a clerk of defendant 1. Meanwhile two vakils of Trichinopoly (Messrs. Kuppuswami Ayyar and Avadhani) sent registered notices on the same day to defendant 1. These notices are Exs. O and 8. They are copies and are identical in terms. One was sent to defendant 1 directly (Ex. 8) and the other though addressed inside to defendant 1 was sent to Mr. Krishnamurthi Ayyar. Defendant 2 received Ex. 8 on 13th May, but Ex. O was received by the advocate on 18th he having been temporarily absent.

The registered notices Ex. F on the one hand and Exs. O and 8 on the other crossed each other. Mr. Krishnamurthi Ayyar replied to Ex. O on 23rd (Ex. Q) and this was replied to by defendant 3's vakils (Ex. U dated 27th May). According to the version of defendant 3 he went on 9th May to Mr. Krishnamurthi Ayyar with money and put some questions about the title to the property but was not able to get satisfactory replies. On 10th May he again went with the money and repeated his questions relating to the title to the property but got no satisfaction. Defendant 3 therefore asserts that he is entitled to a sale deed for Rs. 12,550 and for damages, and that the sale settled in favour of the plaintiff for Rs. 9,000 is not binding on him. Meanwhile the Official Assignee of Madras sent Ex. D dated 16th May 1927 to the plaintiff approving of the sale arranged in his favour. On the same date he also sent Ex. 1 confirming the auction sale for Rs. 12,550 in favour of defendant 3. These letters must have been drafted mechanically for if he had applied his

mind to the matter the Official Assignee could not have approved of both the sales or it may be that while knowing that only one of them can ultimately fructify he intended to ratify that which will finally come off. Anyhow he had no objection to the sale in favour of the plaintiff. On 17th May defendant 1 addressed Ex. O (1) to Mr. Krishnamurthi Ayyar enclosing the Official Assignee's letters mentioned above. Meanwhile defendant 2 left Trichinopoly for Madras and from Madras he proceeded to Ahmedabad in the Bombay Presidency. This fact was intimated by defendant 1 firm to Mr. Krishnamurthi Ayyar by Ex. R. 1. One Dr. A. Mathuram (who was in charge of a dispensary in Trichinopoly) is the owner of the neighbouring village Thulukampatti and it would seem he was also anxious to purchase Mudukandam.

He sent his agent to Mudukandam for bidding at the auction as originally advertised on the 8th but when the agent found that there was no auction there he went to Trichinopoly. According to Mr. Krishnamurthi Ayyar the agent was actually present at the sale but he did not bid. According to the defendant's version by the time he went to the spot the sale had been completed and he accordingly returned to his master. Anyhow, Dr. Mathuram was not one of the bidders at the sale. He seems to have sent a registered notice at about this time contending that there ought to have been a second auction and that as there was no second auction the sale in favour of the plaintiff would be void. This notice is Ex. R. 2. It was received by defendant 1 at Madras and sent along with Ex. R. 1 to Mr. Krishnamurthi Ayyar. Defendant 2 then writes Ex. S on 28th May from Ahmedabad in which he acknowledges Mr. Krishnamurthi Ayyar's letter of the 22nd and Dr. Mathuram's notice and suggests that the whole matter may be postponed till his arrival. The plaintiff purchased a stamp paper for the intended sale deed on 18th May (Ex. G. 1) and submitted a draft on 30th May (Ex. G). On 8th June defendant 1 firm addressed Ex. T to Mr. Krishnamurthi Ayyar in which it was observed that the delay in the execution of the sale deed was due to the absence of defendant 2 in Bombay and it was hoped that the plaintiff would have no

objection to the execution of the document before the end of the month. Mr. Krishnamurthi Ayyar was requested to inform the plaintiff that the delay was due to this unavoidable circumstance.

Defendant 2 wires from Bombay on 9th June (Ex. T 1) saying that he was detained on urgent work. Ex. H, is letter addressed by defendant 1 from Madras to the plaintiff in which he was assured that the matter would be positively finished by the 20th instant. Ex. H is a letter of 10th June from the plaintiff to defendant 1 asking that the transaction may be completed without any delay. Defendant 2 wires from Bombay on 11th June (Ex. H-2) requesting Mr. Krishnamurthi Ayyar to obtain an extension from the plaintiff till the 25th instant. Ex. T-2 is a telegram of 19th June to Mr. Krishnamurthi Ayyar informing that defendant 2 had arrived in Madras and would be leaving for Trichinopoly the next day, i. e., 20th. So far, the conduct of all the parties is as if they were all very anxious to finish the intended sale in favour of the plaintiff. On 20th June defendant 2 writes Ex. 7 to Mr. Krishnamurthi Ayyar in which he says he arrived that morning from Bombay which somewhat contradicts Ex. T-2. He then observes

"that the Official Assignee considers that the price of Rs. 9,000 is too low and that a fresh sale is desirable. His attestation to the conveyance cannot be secured."

This is the first indication of a desire on the part of defendants 1 and 2 to resile from the agreement in favour of the plaintiff and the Official Assignee's unwillingness to attest the conveyance is mentioned as the excuse. What exactly happened after this up to 23rd June we do not know. On 23rd June defendant 2 executes a sale deed (Ex. L=Ex. 9) in favour of defendant 3 for Rs. 12,550 thus resuscitating the auction bid of 8th May which was cancelled by Ex. F. On the same day defendant 3 executed a sale deed (Ex. L-1=Ex. 10) in favour of Dr. Mathuram for Rs. 12,900. On the same day defendant 2 acting in the name of defendant 1 firm informs the plaintiff that they are unable to complete the sale in his favour and

"they would not be duly discharging their duties as mortgagees exercising a power of sale if they complete the transaction for Rs. 9,000," and offer to return the advance amount paid by the plaintiff with interest. This

letter is Ex. 3. They also obtained an indemnity bond from Dr. Mathuram (Ex. K=Ex 11 dated 24th June). Thus the contract in favour of the plaintiff was broken and the present suit was filed by the plaintiff on 4th July 1927, for specific performance of the contract. Dr. Mathuram was made defendant 4 in the case. Defendant 1 filed written statement (which was adopted by defendant 2) in which they pleaded (1) that the plaintiff's conduct in inducing defendant 2 to agree to sell the property for Rupees 9,000 within two days of the auction by private sale was fraudulent; (2) as he did this with full notice of the contract in favour of defendant 3 he was not entitled to specific performance; (3) the agreement to sell in favour of the plaintiff was subject to the condition that if defendant 3 should perform his contract the plaintiff's agreement should stand cancelled; (4) the plaintiff did not pay the balance of the purchase money within the stipulated time; (5) the draft conveyance submitted by the plaintiff included other properties which could not be sold; and (6) the plaintiff is not entitled to damages as he fraudulently induced defendant 2 to exercise the power of sale. Defendant 3 repeated his pleas which were contained in the notices (Exs. 8 O and U) issued on his behalf by Messrs. Kuppuswami Ayyar and Avadhani, viz., that he was ready with his money but the amount was not accepted, that his sale could not be cancelled and that time was not of the essence of the contract. It says nothing about the questions put by defendant 3 to Mr. Krishnamurthi Ayyar and his not having received satisfactory replies. He also pleaded that the agreement between the plaintiff and defendant 1 was subject to the condition that it should stand cancelled if the sale in his favour was completed. The written statement of Dr. Mathuram is the same as that of defendant 3. It is unnecessary to make any reference to the written statement of defendant 5, the Official Assignee.

A number of issues were framed (28) rather out of proportion to the simple nature of the suit. The Subordinate Judge found on the first issue that the contract in favour of the plaintiff was a valid and bona fide transaction brought about in the best interests of both the parties though it was for Rs. 9,000 a

sum lower than Rs. 12,550 for which it was knocked down in the auction. He found issues 2 and 3 in favour of the plaintiff. On issue 4 he found that the agreement to sell in favour of the plaintiff was not induced by fraud. On issue 5 he found that the agreement in favour of the plaintiff was not subject to any condition that it should stand cancelled if defendant 3's contract was completed. On issue 6 he found that the plaintiff was always ready and willing to perform his contract. On issue 7 he found that it was specifically enforceable. He found issue 8 also in favour of the plaintiff. On issue 10 he found that the plaintiff was entitled to damages in the alternative. On issue 11 he found that the mortgagees were not trustees for the mortgagors. Issue 12 is the same as issue 4. Issues 13, 14, 15 and 19 he found for the plaintiff. On issue 20 he found that Ex. D was binding on defendants 3 and 4. On issue 22 he found that the auction sale in favour of defendant 3 was cancelled by Ex. F. On issue 18 he found that the plaintiff must be deemed to have taken undue advantage of the situation in which defendant 2 was placed and dictated his own terms. He therefore held that the plaintiff was not entitled to specific performance. He finally gave a decree for damages to the extent of Rs. 3,550 being the difference between the amount of the plaintiff's contract and Rs. 12,550. He also directed a refund of the advance money paid by the plaintiff with interest. The plaintiff files this appeal.

On issue 18 I am unable to agree with the finding of the Subordinate Judge that the plaintiff took any unfair advantage of the situation in which defendant 2 found himself. It is true that the amount for which the property was agreed to be sold to the plaintiff is much less than the figure up to which the bids at the auction proceeded. But this may be merely due to auction fever. We find there were only two bidders, viz., the plaintiff who was obviously very anxious to purchase the property and defendant 3 who as I will presently show was merely a speculator, and who was bidding merely with a view to make some profit out of the transaction. It is contended by the learned Advocate for the respondents that Dr. Mathuram's evidence as D. W. 4 shows that

he instructed his agent to bid up to Rs. 15,000. If he really was so instructed it is rather surprising that he did not bid up to that amount. The suggestion for the respondents is that he went there too late for the bidding. But this is contradicted by the plaintiff and Mr. Krishnamurthi Ayyar both of whom say that Dr. Mathuram's agent was present. Dr. Mathuram's agent himself has not given evidence. The truth probably is that though Dr. Mathuram was willing to purchase the property even for such a large amount as Rs. 15,000 because this village abuts another village of his own it may be he gave instructions to his agent not to bid against defendant 3 because he knew that defendant 3 could not raise the necessary fund for carrying out the terms of the contract without borrowing somewhere and he expected to find an opportunity of finishing the sale on more favourable terms.

It was suggested in one portion of the case by the plaintiff that defendant 3 himself was at the time of the auction really acting on behalf of Dr. Mathuram or at any rate that he was in league with him (vide para. 14 of the Subordinate Judge's judgment). But I am not able to accept this suggestion. I do not see any reason why a man of the position of Dr. Mathuram while sending his own agent to bid at the auction should also have added a second string to his bow in the shape of defendant 3 and if they were really in league why the transaction did not fructify. It seems to me that defendant 3 was bidding on his own account. Though he had no money of his own probably he thought that Dr. Mathuram would be willing to pay something more to him and in that way he expected to make some profit. He thought that he could get the necessary 25 per cent either from Dr. Mathuram himself or from some other person as a loan. No doubt in this expectation he ultimately failed. Dr. Mathuram certainly would not lend him because he hoped to obtain the village on easier terms. Defendant 3 has given evidence that he took money on the 9th and 10th. Mr. Krishnamurthi Ayyar swears that he did not come with any money. Even if the matter rests merely on the evidence of P. W. 2 Krishnamurthi Ayyar on the one hand and

that of defendant 3 on the other I would have no hesitation in accepting Mr. Krishnamurthi Ayyar's evidence and rejecting that of defendant 3. But we have got a statement of Dr. Mathuram in Ex. R-2. In this letter he says

"As however the said Palaniandi Pillai failed to deposit 25 per cent of the purchase money it appears that the suit properties were sold privately and without any notice again."

If as a matter of fact defendant 3 took money with him such a statement would not have been made by defendant 4 in Ex. R-2 for defendant 4 was by that time probably acting in league with defendant 3 or at any rate he was interested in attacking the validity of the agreement with the plaintiff. That validity depends upon whether the contract in favour of defendant 3 was properly cancelled or not. If defendant 3 did carry money with him on 9th and 10th and committed no default Mr. Krishnamurthi Ayyar would not be justified in cancelling the sale by Ex. F but if he did not take money then the cancellation would be valid. It is inconceivable therefore that defendant 4 would make a statement of this kind in Ex. R-2 which would not serve his purpose. I have therefore no hesitation in holding that defendant 3 was not ready with his money either because nobody would oblige him or for some other reason and the sale in his favour was properly cancelled. Dr. Mathuram then found at the last moment that the agreement for sale was executed in favour of the plaintiff and he was anxious to somehow circumvent it. Finally on 23rd June defendant 2, 3 and 4 must have agreed to resuscitate the old auction bid and to effect the sale for Rs. 12,550 followed by a second sale deed for Rs. 12,900 the difference of Rs. 350 being defendant 3's profit in the matter. Thus we see that though Dr. Mathuram might be willing to pay a high price in the last resort, somehow he did not instruct his agent to bid for a large amount at the sale on 8th May. Now we must remember that Mr. Krishnamurthi Ayyar is a vakil of 20 years standing and knows the condition of affairs in Trichinopoly and it is clear from Ex. F that they were all very apprehensive whether they would secure a bargain even for Rs. 9,000. Ex. F refers to "after great trouble and persuasion." We are not therefore jus-

tified in thinking that the sale in favour of the plaintiff for Rs. 9,000 was a transaction entered into in haste and without care merely because in the events that turned out there was a purchaser willing to purchase the property for Rs. 12,900. That gentleman somehow kept himself in the back ground and there is not the smallest doubt that defendant 1 firm and their local legal advisor Mr. Krishnamurthi Ayyar were apprehensive whether they would get a bargain for Rs. 9,000.

Mr. Varadachariar the learned advocate for the respondents at one stage suggested that Mr. Krishnamurthi Ayyar was colluding with the plaintiff and brought about an improper sale to the detriment of defendant 1 firm. But in other parts of his argument he said it was not necessary for him to go so far and he would content himself with showing that Mr. Krishnamurthi Ayyar was mistaken and under his mistaken advice defendant 2 acted in a hurry. If defendants 1 and 2 had since discovered that Mr. Krishnamurthi Ayyar was not discharging his duties as their honest legal advisor or acted under a mistake they would have raised the point in their written statement but there is not the faintest indication about it in their written statements. All that we have got in the written statement is :

"that the plaintiff's conduct in taking unfair advantage of the situation in which defendant 2 was placed and inducing him to sell the property for Rs. 9,000 was fraudulent."

The evidence shows that the plaintiff and defendant 2 did not even meet. The agreement was settled between the plaintiff and Mr. Krishnamurthi Ayyar. I think there is nothing in the evidence to support the suggestion of misrepresentation by Mr. Krishnamurthi Ayyar to his clients whether honest or otherwise. In my opinion all the parties thought at the time that Rs. 9,000 was all that they could get and if so a mortgagee with a power of sale is justified in entering into such a transaction. The position of a mortgagee with a power of sale was described in *Haddington Island Quarry Co. Ltd. v. A. W. Huson* (1). The Judicial Committee quote with approval the dictum of Kay, J., in *Warner v. Jacob* (2), Kay, J., said :

1. (1911) A C 722.

2. (1882) 20 Ch D 220=51 L J Ch 642=46 L T 656=30 W R 721.

"A mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his mortgage debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."

Now in my opinion all the evidence in the case shows that the price is certainly not so low as in itself to be evidence of fraud and that there is absolutely no evidence of collusion or corruption either on the part of defendant 1 or on the part of Mr. Krishnamurthi Ayyar. There is nothing in the case to show that any unfair advantage was taken by the plaintiff of the situation in which defendant 2 found himself. When it was pointed out to him that he bid at the auction up to Rs. 12,550 the plaintiff must have said that he had to do so as against defendant 3's bid but now that there was not the competition of defendant 3 he was not prepared to pay more than Rs. 8,000. Ultimately the bargain was settled at Rs. 9,000. The decision in *Kennedy v. De Trafford* (3) also shows that the only requirement is that the mortgagee should act in good faith. Mr. Varadachariar the learned Advocate for the respondents referred to *National Bank of Australia v. United Hand in Hand and Band of Hope Co.* (4). But that was a case where the mortgagee himself purchased the property in execution of the decree obtained collusively between the mortgagor and the Directors. He also relied on *Chabildas Dallubhai v. Dayal Mowji* (5) where there were some negotiations for a compromise and the bidders had thereupon left.

The compromise failed and the old bidding was taken and the sale was knocked down in favour of the last bidder. It was rightly held that the sale was not one which ought to be upheld. I do not think these cases will help the respondents. In my opinion defendant's 1 firm through their authorised agent defendant 2 acted entirely bona fide in entering into the agreement on 10th May with the plaintiff for selling the property for Rs. 9,000. Neither their conduct nor the conduct of Krish-

namurthi Ayyar can be questioned. That being so, unless some good reasons can be given for not giving specific performance it ought to be decreed. Respondents relied on S. 22, Cl. (2), Specific Relief Act, but obviously the term "hardship on the defendant" in this section is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term hardship is used in the same sense as it is used in English law (vide Fry on Specific Performance, Ch. 6). The inadequacy of consideration is separately discussed in Ch. 7 and as already stated it is not clear that any inadequacy in this case has been established. Reference has been made to S. 28 (b), Specific Relief Act, but I have already shown that the evidence does not disclose that the consent of defendant 2 was obtained by misrepresentation or undue influence of the other party to the contract or of any other person. So this section does not help the respondents. In my opinion it is very desirable that persons in the position of defendant 1 firm should carry out their contracts and should not be allowed lightly by Courts to break their given word on the ground of mere technical pleas or imaginary hardship. In my opinion there are no adequate grounds for refusing specific performance.

At one time it was suggested by Mr. Varadachariar that this is not a contract in which time was the essence of the contract. He relied on *Jamshed Khodaram v. Burjorji Dhunjibhai* (6). Whatever resemblance there may be in the terms of this and the terms of that contract there are certainly important differences. That was a private contract whereas the case before us is a case of auction. The time allowed in that case for the completion was two months and apparently such a long time was allowed in that case for investigation of title. There is neither investigation of title nor any long interval in the case before us. But apart from these circumstances it is certain that even if time was not of the essence of the contract in the beginning it was made so afterwards. In the present case a further agreement was executed on 8th May by

3. (1897) A C 180=66 L J Ch 413=76 L T 427=45 W R 671.

4. (1879) 4 A C 391=40 L T 697=27 W R 889.

5. (1907) 31 Bom 566=34 I A 179=9 Bom L R 1062 (P C).

6. AIR 1915 P C 88=32 I C 246=48 I A 26=40 Bom 289 (P C).

defendant 3 and Ratnam according to which they took some further time. This document was handed over finally to defendant 4 and has not been produced in the case. It is said by defendant 3 that it was destroyed. We presume that if produced its terms would go against the defendants. At least by the second arrangement if not from the beginning time was certainly of the essence of the contract. So this argument will not avail the defendants. I would therefore allow the appeal and give the plaintiff's suit a decree for specific performance and possession (in substitute for the damages decreed by the Court below) with costs throughout. All the defendants will be liable for costs in the Court below. In appeal defendant 4 only will be liable for costs.

Cornish, J.—I agree that the appeal should be allowed. It has been proved by the evidence of P. W. 2, the Vakil Krishnamurthi which the Subordinate Judge was entitled to believe, that when Palaniyandi on the evening of 8th May, after the property had been knocked down to his bid, was unable to furnish the 25 per cent deposit required by the sale conditions, the mortgagee-vendors gave him an extension of time till 10 O'clock next morning; it being agreed that if the money was not then paid the contract should be cancelled. This agreement was reduced to writing and executed by Palaniyandi and one Rathnam. It has not been produced. There is evidence that it has been destroyed. P. W. 2 says it was handed over to Dr. Mathuram at the time of the sale deed subsequently executed in his favour by Palaniyandi. Mathuram says he never saw it. Palaniyandi says that Rathnam tore it up as unnecessary after the execution of the sale deed in favour of Palaniyandi. I think it very probable that Palaniyandi is speaking truth, and that the document has been destroyed. But the evidence of its contents is sufficiently proved to enable us to hold that it was expressly agreed between 2nd defendant-mortgagee and Palaniyandi that he was to pay the 25 per cent deposit before 10 a. m. on the 9th and that the contract was to be cancelled if he did not. S. 55, Contract Act, provides that if a party to the contract has failed to do a certain thing which he has promised to do before a specified time, the contract

is voidable at the option of the promisee if the intention of the parties was that time was of the essence of the contract. Their Lordships in *Jamshed Khodaram v. Burjorji Dhunjibhai* (6) have stated that S. 55 lays down no principle different to those which obtain under English law as regards contracts for the sale of land. But in order that time shall be regarded as essential the intention must be clearly expressed in the agreement. In the case above cited their Lordships say :

“The language will have this effect if it plainly excludes the notion that these time limits were merely of secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation.”

I think that the terms of the agreement which have been deposed to, and the circumstances in which it was made, leave no doubt that the stipulation that payment should be made before 10 a. m. on the 9th went to the very root of the agreement, and that the parties intended that if payment was not made within that time limit the contract of sale was to be cancelled. The defendant mortgagees acted entirely within their rights in giving notice (Ex. F) of cancellation to Palaniyandi, on his failure to make the deposit within the stipulated time, and from that moment the contract to sell the land to him was at an end. The only question is whether there are any grounds why the Court should decline to enforce the defendant mortgagee's contract to sell the land to plaintiff. The only ground that they raise in their pleadings by way of defence to his claim to specific performance is that plaintiff fraudulently and speculatively induced defendant 2 to sell for Rs. 9,000 with full notice of the contract in favour of Palaniyandi. The answer to this allegation is to be found in the letter Ex. F already referred to. It was written by the vakil Krishnamurthy on the instructions of defendant 2, and defendant 2 has said that its statements are correct. In this letter Palaniyandi was told that defendant 2 suspected him of dishonestly running up the bids at the auction without any intention of purchasing the property and that defendant 2

“had after great trouble and persuasion to settle a private sale to S. Pichai Moideen (the plaintiff) for a price of Rs. 9,000.”

So that what defendant 2 was putting forward at the time of the sale was that only after great trouble and persuasion had he been able to induce the plaintiff to offer Rs. 9,000. There is not the faintest indication in this letter that it was defendant 2 whose will was overborne by the inducements of the plaintiff. Defendant 2 says that he did not see the plaintiff personally, but that Krishnamurthy acted for him and after some negotiation Krishnamurthy came and told him that he had settled for Rupees 9,000. Obviously defendant 2 was content to accept this price, and he executed Ex. C to plaintiff in which it is recited :

"Hence in consideration of the fact that the price might go down if there were any further delay in effecting a sale of the lands in the said village we have agreed to take the aforesaid price."

Krishnamurthy's evidence is that after Palaniyandi's backsliding defendant 2 was anxious to sell by private treaty, and at his request the witness sent for plaintiff, the next highest bidder at the auction. Accordingly, the plaintiff was sent for. The witness proceeds :

"Defendant 2 then asked him to accept the property for Rs. 12,500 according to his bid at the sale. He (i. e., plaintiff) refused to take it for anything over Rs. 8,000. Defendant 2 wanted at least Rs. 10,000. And as a middle course he finally accepted Rs. 9,000. Plaintiff also agreed to pay that amount. There was an agreement and counter agreement to that effect : Exs. C and C-1. Plaintiff at once paid 25 per cent of the agreed price to defendant 2. Then defendant 2 asked me to prepare a notice (Ex. F) to the effect that defendant 3's (Palaniyandi) sale was cancelled and that a sale for Rs. 9,000 had been concluded."

The Subordinate Judge has rightly held that the defendant's contract with plaintiff was not induced by any fraud on his part. But he appears to have thought, by his reference to S. 28, Specific Relief Act, that specific performance could not be decreed because the difference between Rs. 9,000 which the plaintiff agreed to pay on 10th and Rs. 12,500 which he bid at the auction on the 8th is evidence of undue advantage taken by the plaintiff. I think that S. 28 has no application. The section relates to contracts that cannot be enforced because they are invalid on account of fraud, undue advantage, misrepresentation, etc. The contract here has been found to be a valid contract, and plaintiff has been given damages for its breach. The ap-

propriate section is therefore S. 22, which provides that

"the Court may properly exercise a discretion not to decree specific performance where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part."

The test is, did the plaintiff in the particular circumstances take an improper advantage of his position or the difficulties of the defendant ; *Davis v. Maung Shwe Go* (7). The portions of the documentary and oral evidence which I have set out satisfy me that there was no unfairness in dealing on the part of the plaintiff. He and defendant 2 stood on terms of equality in the negotiations for the re-sale, and defendant 2 had his legal adviser at his side. It is clear that defendant 2 had made up his mind that Palaniyandi had run up the bidding with the object of frustrating the auction sale, and that in the circumstances a private sale was expedient. The plaintiff was entitled to make the best bargain he could and there were no competitors to force up the price. Be it admitted that plaintiff got the property much below its value. But, as is observed in *Fry on Specific Performance*, p. 213 :

"to make a contract for an insufficient consideration incapable of enforcement by the purchaser would be practically to prevent a man from selling his property at less than its value however desirous he might be to sell it for the price actually obtained and however unwilling or unable the purchaser might be to purchase at its full value."

In my judgment the bargain was perfectly fair, and plaintiff is entitled to enforce it against the defendants. It has also been contended that the Court would be justified in refusing specific performance under Cl. 2, S. 22 on the ground of hardship. The hardship suggested is the possible liability of the defendant mortgagees to the mortgagors for breach of duty in selling the property for less than its value. But in as much as the Official Assignee of Madras, representing the mortgagors, has consented to the sale to the plaintiff I think there is no substance in the suggestion or in the contention founded on it.

P.R.S./K.S.

Appeal allowed.

7. (1911) 38 Cal 805=11 I C 801=33 I A 155 (PC).

A. I. R. 1933 Madras 745

WALSH, J.

Appavoo Nainar--Appellant.

v.

Lakshmana Reddi and others--Respondents.

Appeal No. 146 of 1929, Decided on 23rd February 1933, from appellate order of Sub-Judge, Cuddalore, D/- 3rd November 1928.

(a) Civil P. C. (1908), S. 11—Execution—Dismissal of—Want of notice to judgment-debtor will not prevent operation of *res judicata* against judgment-creditor.

The want of notice to the judgment-debtor will not make the dismissal of an execution petition put in by the judgment-creditor any the less *res judicata* against the latter: *A I R 1914 Mad 532; A I R 1926 Mad 698, Ref.* [P 746 C 1]

(b) Limitation Act (1908), Art. 180—Judgment-debtor preventing delivery by obstruction must take consequences of his action—Sale confirmed on 30th August 1921 and delivery petition on 22nd September 1921—One item not delivered and petition “closed”—Subsequent petitions for delivery on 23rd September 1924 on which delivery was ordered by 9th December 1924 and again on 11th March 1926—Latter petition dismissed as time-barred—Held fresh petition on 3rd March 1927 was neither barred by time nor by rule of *res judicata* by order of dismissal of petition of 11th March 1926 as that order was simply the dismissal of misconceived petition—Decree—Execution.

Where a judgment-debtor has by his obstruction prevented a delivery ordered by the Court being carried into effect he must take the consequences of his action and that, unless, the Court calls on the decree-holder to take further action to enforce the delivery order, he cannot say that the decree-holder petitioner must move in the matter and not himself. [P 747 C 2]

On the confirmation of a sale on 30th August 1921 a petition for delivery of the property was put in on 22nd September 1921. One of the items was not delivered owing to the obstruction of the judgment-debtor and the petition was marked “closed.” Subsequent petitions for delivery were put in on 23rd September 1924, on which an order to deliver by 9th December 1924 was passed, and again on 11th March 1926. The latter was dismissed as time barred under Art. 180 as being beyond three years from date of confirmation of sale. Thereupon a fresh application was put in on 3rd March 1927.

Held: that the order “closed” on the petition of 22nd September 1921 was not a proper disposal, and that the petition of 3rd March 1927 should be regarded as a reminder to the Court to proceed with the original petition on which delivery was ordered and which was never properly disposed of and that it was not therefore time barred.

Held further: that it was not barred by *res judicata* because the order dismissing the petition filed on 11th March 1926 was only valid in the light of this being a fresh execution petition, but that as it was misconceived, its dismissal could not prevent this reminder petition being put into the Court to proceed with the original petition which remained undisposed of: *A I R 1926 Mad 453, Rel on; A I R 1926 Mad 385; and A I R 1922 Bom 238, Ref; A I R 1919 Mad 1001, Dist.* [P 748 C 1]

N. Sivarama Krishna Ayyar--for Appellant.

M. S. Venkatarama Ayyar--for Respondents.

Judgment.—The respondent is a judgment-creditor who purchased in Court sale certain properties which he had brought to sale under his decree. His sale was confirmed on 30th August 1921 and he got possession of some of the properties. On a delivery petition filed by him on 22nd September 1921, item 6, however, a house, was not delivered. On 23rd September 1924 he put in another delivery petition stating that the house in question and the garden attached thereto could not be delivered to him in the previous delivery order as the said house was locked and the house and garden were in the possession of the judgment-debtors. The order passed on this was “deliver 9th December 1924” and is dated 13th November 1924. On 11th March 1926 he put in another petition wherein he stated that even though order for delivery was sent he could not get possession from the defendants as the said house was under lock and key and was still under lock and key. This Execution petition was dismissed as time barred on the authority of *Viswasundara Rao v. Paidigadu* (1), which held that Art. 180, Lim. Act, applied to such a case and that the application being made more than three years after the date of sale was time barred. The present application was filed on 3rd March 1927. It was allowed by the learned District Munsif who relied on *Kannan v. Arvulla Haji* (2) and on *Varadaraja Mudali v. Murugesam Pillai* (3). The order was confirmed in appeal by the learned Subordinate Judge and against this the present appeal is

1. *A I R 1926 Mad 385=91 I C 485.*

2. *A I R 1927 Mad 288=99 I C 677=50 Mad 403.*

3. *A I R 1916 Mad 728=30 I C 707=39 Mad 923.*

filed by the legal representative of one of the judgment-debtors. Two questions arise for consideration: 1. Is the present application per se barred by limitation? 2. If it is not per se barred, is it barred on the principle of res judicata by the decision on the Execution Petition presented on 11th March 1926?

I will deal with the latter point first. The learned Subordinate Judge held that it was not barred on the principle of res judicata because notice had not been sent to the judgment debtors and also because the former order had proceeded on the view of the law that then existed as to procedure and that it is laid down in *Varadaraja Mudali v. Murugesam Pillai* (3), that a decision especially on procedure cannot be treated as res judicata when the law relating to procedure is held to be different. For the first position he quotes no authority and it is clearly not sustainable. The want of notice to the judgment debtor will not make the dismissal of the Execution Petition put in by the judgment creditor any the less res judicata against the latter: vide *Vyapuri Goundan v. Chidambaram Mudaliar* (4) followed in *Ramalinga Rowthan v. Ibrahim Sahib* (5) and *Lalumia v. Hannissa* (6). With regard to the second position, *Varadaraja Mudali v. Murugesam Pillai* (3) has not been quoted accurately. What was laid down there was that a decision especially on procedure cannot be treated as res judicata when the procedure itself is changed by the Statute Law. It is not contended that there has been any change in the Statute Law here. The learned Subordinate Judge while he mentions that notice was not served on the judgment-debtor does not say that he relies on this and he rests his decision on the ground, which has also been taken before me, that the petitioner is entitled to ignore the petition of 11th March 1926 as the original delivery petitions had not been disposed of. The final order on the first petition of 22nd September 1921 was simply "closed" and on the petition of 23rd September 1924 "deliver 9th December 1921" after which there is no further order on it. There seems to be very little authority on the

question as to what is the position of a decree-holder who purchases in Court auction and being obstructed, by the judgment debtor asks that the obstruction should be removed, gets an order of delivery, but leaves the matter there. The decision in *Kannan v. Arvulla Haji* (2) which was given on 14th September 1926 does not appear to me easy to reconcile with the decision in *Visvasundara Rao v. Paidigadu* (1) which was passed on 24th July 1925 and the latter decision is not referred to in the former.

Each is by a Bench of two Judges of this Court. In the former case it was held that an application for delivery of possession by a decree-holder who had purchased in Court auction was a step-in-aid of execution of his decree, and was so even though not made in the course of a pending execution. In *Visvasundara Rao v. Paidigadu* (1) it was held that an application for delivery of possession of immovable property purchased by a person at a sale held in execution of a decree falls under Art. 180, Lim. Act, and must be made within three years of the date on which the sale becomes absolute. The fact that during that period an order for delivery had been passed but delivery not effected owing to his the decree-holder's own default does not extend the period of limitation. It is not clear whether in this case the auction purchaser was the decree-holder or not, and the obstructor the judgment-debtor. If the petitioner was not the decree-holder the decision may be consistent with *Kannan v. Arvulla Haji* (2) but it would not be applicable to the present case. If he was the decree-holder then I must follow the later decision and hold that such application for delivery is a step-in-aid of execution of the decree and therefore comes under Art. 182, Lim. Act. As I said above the question of the position of a purchasing decree-holder who is obstructed by the judgment-debtor and gets an order of delivery which is not further executed seems to be almost bare of authority.

We may however look at the class of cases where the decree-holder cannot proceed with his execution because of a stay imposed by Court. The view of the Full Bench of Allahabad is that he

4. A I R 1914 Mad 532=18 I C 607=37 Mad 314.

5. A I R 1920 Mad 546=53 I C 161.

6. A I R 1926 Mad 698=95 I C 718.

has three years after the removal of the stay to renew his petition after which it would be barred under Art. 181, Lim. Act: vide *Chhattar Singh v. Kamal Singh* (7). But a case reported of our High Court in *Pattannayya v. Pattayya* (8), seems to hold that there is no limitation in such cases, as the original petition must be disposed of and till it is disposed of remains pending. It was held in that case that an application of 1915 was not barred in 1921 and that the application made in the latter year was neither a further application for execution nor an application to revive that of 1915 but was only intended to call the intention of the executing Court to the fact that the application of 1915 had to be proceeded with and that the application of 1921 was therefore not barred. This being the position of our High Court it would follow that if the delivery petition of 1st October 1921 or 23rd September 1924 had been stayed by a Court order the present petition would not be time barred. Is this principle to be applied where there has been obstruction by the judgment-debtor which the purchasing decree-holder has made an attempt to remove but has not persisted in such an attempt? On that point I can find no authority. There are however certain remarks in *Visvasundara Rao v. Paidigadu* (1) which though they are obiter are some guide. In that case the application was held to be time barred not having been made within three years of the confirmation of the sale but the learned Judges say at p. 74:

"where the Court is unable to give effect to its order by reason of the absence of the petitioner who is bound to be present in order to take delivery or owing to causes over which he has no control it is not the duty of the Court to give notice to show cause why the petition should not be dismissed. It would be different if the delivery was obstructed by the judgment-debtor. If owing to anything that the judgment-debtor does or owing to causes which are beyond the control of the auction purchaser the delivery is not effected it may be said that the order for delivery remains in force and a subsequent application to execute that order is a valid application even if that application is made more than three years after the date of the sale being made absolute."

They agreed however with Oldfield, J. in *Nandur Subbayya v. Venkataramayya*

7. A I R 1927 All 16=100 I C 692=49 All 276 (FB).

8. A I R 1926 Mad 453=92 I C 782.

Appa Rao (9) that Art. 180 was the proper article applicable to a case where the decree-holder was at fault. Now in the present case it may be noticed that the alleged obstruction has never been denied in any counter put in by the judgment-debtor. I am of opinion that the order "closed" was not a proper disposal of the petition of 22nd September 1921 and all the subsequent petitions for delivery must be taken to be simply reminders to the Court that this petition was pending. As regards the dismissal of the petition of 11th March 1926 as time barred, that order would be simply the dismissal of a misconceived petition which, regarded as a fresh petition for execution was out of time: vide *Ramachandra v. Shrinivas* (10). It has frequently been held that orders such as "closed" and "recorded" made for statistical purposes are not disposals of execution applications.

It may be that the Court could have called on the decree-holder to take further steps to get the obstruction removed on pain of having his execution petition dismissed, and if he had failed to do so the dismissal of the execution petition might have been proper. It is unnecessary to express any opinion on this point because the Court did not take any such step. On the whole it appears to me that where the judgment-debtor has by his obstruction prevented a delivery ordered by the Court being carried into effect he must take the consequences of his action and that unless possibly as mentioned above, the Court calls on the decree-holder to take further action to enforce the delivery order, he cannot say that the petitioner must move in the matter and not himself. It is objected that in the present petition the petitioner has asked that the order dismissing the petition dated 11th March 1926 as time barred should be set aside. I do not think it material that petitioner may have misconceived his remedy in this respect and it is also to be noted that in para. 3 (5) he urges that there is no limitation for that petition which is not an incorrect way of putting it if that petition is regarded as a reminder to the Court that the first execution petition is pending.

9. A I R 1919 Mad 1001=43 I C 155.

10. A I R 1922 Bom 238=66 I C 940=46 Bom 467.

In my opinion then the answer to the two questions propounded at the beginning of this order are: (1) The present petition should be regarded as a reminder to the Court to proceed with the original petition on which delivery was ordered and which was never properly disposed of. It is not therefore time barred and according to the ruling in *Pattannayya v. Pattayya* (8) no time runs against the presentation of such a reminder petition. (2) It is not barred by res judicata because the order dismissing the petition filed on 11th March 1926 was only valid in the light of this being a fresh Execution petition. As a fresh execution petition it was misconceived and its dismissal will not prevent this reminder petition being put into the Court to proceed with the original petition which remains undisposed of. In the result the appeal fails and is dismissed with costs.

P.R.S./K S.

Appeal dismissed.

A. I. R. 1933 Madras 748

CURGENVEN AND SUNDARAM
CHETTY, JJ.

M. S. Gopalaswami Chettiar—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Appeal No. 45 of 1927, Decided on 10th February 1933, against decree of Sub-Judge, Salem, D/- 24th August 1926.

(a) Cotton Duties Act (2 of 1896), Ss. 6, 8 and 9—Power of Collector to make assessment given by S. 9 cannot be limited either by any defect in return or even by absence of any return.

It is true that the Cotton Duties Act does not expressly provide for the consequences of failure to submit a return, but that is not to say that no power remains to collect the duty. S. 9 gives the Collector power to assess the duty payable, and the mere fact that it is described as "payable in respect of the period to which the return relates" cannot be read as meaning that if no return be made there can be no period in respect of which it is payable. The section is so worded, because it has in contemplation the normal case, when the mill-holder complies with the terms of the Act. But the power of the Collector to make the assessment, so given, cannot be limited either by any defect in the return or even by the

absence of any return. The return in fact is only intended to facilitate assessment and cannot be described as an indispensable pre-requisite of it. [P 749 C 2]

(b) Interpretation of Statutes—Legislature enables something to be done—Power, to do everything which is necessary for purpose of carrying out the purpose in view is implied.

One of the first principles of law with regard to the effect of an enabling Act is that, if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view: *Scott v. Legg*, (1876) 2 Ex D 39 and *Dutton v. Atkins* (1871) 6 Q B 373, Ref. [P 750 C 1]

(c) Interpretation of Statutes—Statute imposing duty should be strictly construed in so far as imposition of such duty is concerned—This principle does not extend to procedure to collect it—Cotton Duties Act (2 of 1896), S. 9.

It is no doubt true that a statute which imposes a duty must be strictly construed, but only, in so far as the imposition of the liability is concerned. The principle does not extend to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost: *Werele v. Colquhoun* (1889), 20 Q B D 753, Ref. [P 750 C 2]

(d) Cotton Duties Act (2 of 1896), Ss. 8 and 25—Fine imposed under S. 25 is not "duty."

A fine imposed under S. 25 for failing to make a return under S. 8 is in no sense duty and the duty would still remain unpaid. [P 751 C 1]

(e) Cotton Duties Act (2 of 1896), Ss. 8 and 9—Assessee failing to make return under S. 8 cannot plead lapse of time between production of goods and initiation of steps to assess them by way of defence to a claim for arrears of duty.

A person who has become liable to pay duty, and who fails to submit the return required by S. 8 of the Act, cannot plead lapse of time between the production of his goods and the initiation of steps to assess them, as a defence to claim for arrears of such duty accruing over a period of years: *A I R 1930 Mad 200*, Dist. [P 752 C 2]

(f) Cotton Duties Act (2 of 1896), S. 9—Owner of goods failing to submit return cannot escape duty though assessed after he had sold factory.

Where an owner of goods fails to submit a return under S. 8 when called upon to do so, he does not escape from liability to pay duty even though the assessment is made after he has sold the factory to another, as he is the person who has made profit from goods which were liable to duty. [P 752 C 2]

K. V. Sesha Ayyangar—for Appellant.
Government Pleader—for Respondent.

Curgenvn, J.—The plaintiff, now appellant, sued to recover a sum of Rupees 6,300 from the Government in the following circumstances. In 1913 he started the Salem Knitting Factory and

remained its proprietor until March 1923, when he sold it to the Salem Industries. The factory produced cotton banians and it is not disputed that its products were liable to duty under the Cotton Duties Act, 2 of 1896. Although the duty was payable monthly; no steps were taken to collect it until February 1923, when the Revenue Divisional Officer called upon the plaintiff to submit a return showing the quantity and value of goods produced in the factory up to 31st December 1922, so that the duty might be assessed and levied. The plaintiff did not answer this reference, and a further demand was made on 5th April 1923. This also met with no response and on 11th July the Revenue Divisional Officer passed orders assessing the goods produced at the factory from its establishment up to the end of 1922 at Rs. 6,300. The plaintiff, who had, as already stated, ceased to be proprietor paid this sum in instalments under protest and filed this suit to recover it as an illegal levy. He bases his claim upon three separate grounds ; firstly, that no duty can be assessed or collected in the absence of a return made by the proprietor ; secondly, that the Act does not provide for the collection of arrears ; thirdly, that the liability, if any, has devolved upon the company which purchased the mill.

To understand the first contention it is necessary to look at some of the provisions of the Cotton Duties Act. S. 6 directs that there shall be levied and collected at every mill in British India upon all cotton goods produced in such mill a duty at the rate of $3\frac{1}{2}$ per centum of the value of such goods. Under S. 8 the owner has to prepare and deliver to the Collector each month a return of the cotton goods produced at his mill during the preceeding month, stating quantity and value. This return has to be delivered within three working days and at most within seven days of the period to which it relates. Sub-S. 1, S. 9 runs as follows :

" The Collector shall assess the duties payable in respect of the period to which the return relates, and unless the amount thereof is immediately tendered shall cause a notice in such form as may be prescribed by any rules under this Act, to be served on the owner requiring him to make payment of the amount assessed within 10 days of the date of service of notice."

Section 11 provides that if the duty so assessed is not paid within the time fixed a sum not exceeding double the amount may be levied, recovery being in the manner provided in S. 30, Income-tax Act (2 of 1886). Upon these provisions the learned advocate for the appellant bases the argument that no duty whatever is leviable unless the mill owner submits the return required by S. 8. His contention is in brief that the Act provides a certain definite procedure for the realization of the duty and that if any essential part of that procedure is wanting the remainder must remain inoperative. In other words if no return is made there can be no assessment, because the assessment is made upon the data supplied by the return, and without assessment there can of course be no collection. He draws our attention to other Acts dealing with the collection of taxes or duties, which make provision for an alternative procedure in the case of a default occurring. S. 22, Income-tax Act, for instance, requires a return to be made of the total income during the previous year and, if a failure to make this return occurs, under S. 23 (4) the Income-tax Officer shall make the assessment to the best of his judgment. Similarly, under S. 80, Madras Local Boards Act (14 of 1920), certain landholders have to furnish the Collector with lists of the lands held by them, together with certain other particulars to afford a basis for the assessment of land cess, and under S. 83, if no such list be furnished within the time allowed, the Collector shall himself fix the annual rent value of the lands held by the defaulting landholder. It is true that the Cotton Duties Act does not expressly provide for the consequences of failure to submit a return. But that is not to say that no power remains to collect the duty. S. 9 gives the Collector power to assess the duty payable, and the mere fact that it is described as " payable in respect of the period to which the return relates " cannot be read as meaning that if no return be made there can be no period in respect of which it is payable.

The section is so worded because it has in contemplation the normal case, when the millholder complies with the terms of the Act. But the power of the

Collector to make the assessment, so given, cannot be limited either by any defect in the return or even by the absence of any return. Under S. 16 the Collector is given wide powers of inspection, examination of records, and accounts of the mill, etc., for the purpose of testing the accuracy of any return or of informing himself as to any particulars regarding which information is required for the purpose of the Act, and under R. 3 of the Rules framed under the Act he has to check the return in any manner that may appear to him desirable and may for such purpose examine and compare the records and accounts of the mill. Ample provision is thus made for arriving at a correct assessment of the duty independently of the information furnished by the return. The return in fact is only intended to facilitate assessment and cannot be described as an indispensable pre-requisite of it. But even if the Act and the rules thereunder were less explicit, I think that, the liability to duty being clear, it would be improper to conclude that no means exist of realizing it unless the language of the Act compelled such a view :

"One of the first principles of law with regard to the effect of an enabling Act is that, if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view."

(Craies on Statute Law, Edn. 3, p. 227). "It seldom happens," says Cleasby, B., in *Scott v. Legg* (1):

"that the framer of an Act of Parliament or the legislature has in contemplation all the cases which are likely to arise, and the language therefore seldom fits every possible case. Whenever the case is clearly within the mischief, the words must be read so as to cover the case, if by any reasonable construction they can be read so as to cover it, though the words may point more exactly to another case; this must be done rather than make such a case a casus omissus under the statute."

A case decided upon these principles, raising a question somewhat similar to that with which we are dealing, is *Dutton v. Atkins* (2). Under the Vaccination Act of 1867, a justice had the power upon information laid, of summoning a parent to appear before him with the child and of ordering the

child's vaccination. A parent who was so summoned refused to produce his child and the justice deemed himself unable to make an order on the ground that the appearance of the child was necessary in order to give him jurisdiction. Upon this, Blackburn, J., observed :

"The meaning of the Act seems to be this. In the first instance, the parent is to be summoned; and he is to be directed to bring the child with him; but it cannot be a condition precedent to the Magistrate's jurisdiction to make an order that the child is brought, otherwise the absurdity would follow, that by appearing without the child the parent might always defeat the operation of the statute. If the child is brought, the examination of the child might be sufficient, but evidence would probably have to be taken; and if, without examination of the child, the Magistrate is satisfied, after examination of evidence, that the child has not been vaccinated, he may, if he thinks fit, make an order."

Mellor, J., delivering judgment to the same effect, observed :

"If the parent refuses to produce it, it is not to be supposed that that is to obstruct the operation of the Act and prevent the Magistrate from proceeding and making an order, if, after examination of the evidence, he finds that the child has not been vaccinated."

Similarly here the return which the mill-owner has to submit would afford good prima facie evidence of the quantity and value of the goods produced at the mill. But if the owner refuses to make the return he must not thereby be allowed to obstruct the working of the Act and prevent the Collector from obtaining the required information in some other manner and so making the assessment. It is no doubt true that a statute which imposes a duty must be strictly construed, but only, I think, in so far as the imposition of the liability is concerned. The principle does not extend to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost. A case which emphasises this distinction is *Werele v. Colquhoun* (3), where the contention was raised that the Crown could not assess a firm of wine merchants operating from abroad to income-tax because they possessed in England no such agent or factor as was contemplated by the statute. This consideration was characterised by Lord Esher M. R. as only a matter of machinery and in no way limiting the right to make an assessment; and similar language was used by Fry,

1. (1876) 2 Ex D 39.

2. (1871) 6 R B 373=40 L J Mc 157 = 19 W R 799=24 L T 507.

3. (1888) 20 Q B D 753=57 L J Q B 323=96 W R 613=52 J P 644=58 L T 756.

L. J. Dealing with the principle that a person should not be permitted to profit by his own default, Lord Esher M. R. in *Gowan v. Wright* (4), says :

"I find in Maxwell on the Interpretation of Statutes, p. 184 (p. 180, Edn. 7), in a section headed, 'construction against impairing obligations of permitting advantage from one's own wrong,' the principle resulting from the various authorities there collected expressed as follows.

"On the general principle of avoiding injustice and absurdity any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong."

The learned Master of the Rolls proceeds to summarise a number of cases illustrative of this principle. The only argument that remains to be considered under this head is that the statute does in fact provide an alternative procedure, because under S. 25 a penalty not exceeding Rs. 1,000 is awardable for the offence of omitting to make the return required by S. 8. If the argument is that by resorting to a prosecution a sum of money equal to the duty may be extracted the answer is in the first place that the amount of the fine lies in the discretion of the Court and not of the revenue authorities, and secondly that a fine imposed for failing to make a return is in no sense duty and the duty would still remain unpaid ; nor does the Act provide any means whereby, even if a prosecution is resorted to and a fine imposed, the owner can be compelled to furnish the return. We are not here concerned with the precise means adopted by the Revenue Divisional Officer in assessing the duty in the absence of any information, supplied by the mill-owner. Not only did the latter fail to submit any returns, but he failed to maintain or at any rate to preserve the registers and accounts which the Act required him to keep, so that in the absence of them an estimate had to be formed of the value of the goods produced upon the best information available. If it be granted that the power to assess independently of any return is given by the Act the method and result of such assessment may be the subject of departmental appeal, but so long as

it conformed to ordinary notions of fairness it cannot be questioned in a suit of this character.

The second contention is that even if the Act allowed an assessment to be made in the circumstances of this case, it does not authorise the collection of arrears of duty, at any rate, arrears accruing over a period of years. Admittedly it does not expressly impose any time limit, but it is contended that there is implied in its provisions a more or less immediate assessment and collection of the duty. The duty, it is said, is leviable on a monthly basis in the interests of the producer, so that he may be in a position to fix the price of his goods and to dispose of them ; and it would work hardship if it were allowed to remain for any length of time unassessed and uncollected. There are, I think, several considerations which weaken the force of this argument. In the first place the producer can be under no misapprehension as to his position because he will know the quantity and value of the goods produced, and the duty is fixed by the Act at three and half per cent of the value. No restriction is imposed upon the disposal of the goods pending the completion of the process of collection under the Act. Lastly, the argument from convenience comes somewhat ill from a party whose grievance, if any, arises from his own failure to comply with the Act. It may be that collection and assessment of the duty was fixed upon a monthly basis in the interests of the assessee as well as of the revenue, but if the return which was to form the initial step in such a procedure is withheld, it would be unreasonable to insist that it is still incumbent upon the revenue department either to assess the duty month by month or to forego their revenue altogether. Where there is a liability and no express provision limiting its realization, it is to be inferred that it may be realized at any time after it arises.

I can find nothing in the Act to preclude the Collector from so collecting it. Indeed Mr. Sesha Ayyangar frankly admits that he cannot formulate any exact rule upon this point. But unless there be such a rule, it is not possible to say that, in respect of the duty payable for any particular month, the assessment

and demand are out of time. S. 34, Income-tax Act, affords an example of the existence of such a provision, income which has escaped assessment in any one year being assessable if a notice be served within one year of the end of that year. We have been asked to find another analogy in the payment of profession tax under the Madras City Municipal Act (4 of 1919) and some reliance has been placed upon *Prince of Arcot v. Corporation of Madras* (5), which deals with a case arising under that Act. In respect of an allowance received from Government the Commissioner of the Corporation assessed the Prince of Arcot to profession tax in September 1926, for the ten-half years commencing from the second half year of 1920-21 and the question arose whether this assessment could be made so as to comprise such arrears. The answer given by the Bench was in the negative, the scheme of the Act requiring that the assessment must be made during the period to which it relates. I do not think that this decision affords much help in the present case. In the first place it lay upon the Municipality and not upon the tax payer to take the initial step and some consideration was given to the inconvenience or hardship which would be involved in such arrear collections.

There was no question in that case of a default on the part of the assessee. It was also held that the tax was in the nature of a licence which has to be paid contemporaneously, whereas here it is recoverable after the expiry of the period to which it relates. In their discussion of the question whether the tax was "due" I do not understand the learned Judges to mean that liability had never arisen for its payment, because S. 113, Madras City Municipal Act, clearly makes residence ipso facto give rise to liability, thereby differing from the case of water cess dealt with in *Raja Ramachandra Appa Rao v. Secy of State* (6). There was in fact a liability to the tax, but it was not "due" until it had been assessed, and the same is true in the present case. But that does not affect the question whether or not liability for arrears can be enforced. Some attempt has also been made to derive assistance

from the Sea Customs Act (8 of 1878) several of the provisions of which have by S. 10, Cotton Duties Act, been applied to the assessment and recovery of duties under that Act. S. 39 provides that where customs duties have been short-levied the deficiency shall be recoverable on demand made within three months from the date of the first assessment. This is one of the sections which has been extended, but it can be of no help to the appellant, even if it applied to circumstances like the present, because the three months is to run not from the date when the liability arises but from the assessment of it. I must find accordingly that a person who has become liable to pay duty and who fails to submit the return required by S. 8 of the Act cannot plead lapse of time between the production of his goods and the initiation of steps to assess them as a defence to the claim.

The third point taken is that the duty is payable by the owner, and that the owner of the factory at the time when the assessment was made was the plaintiff's vendee. I do not think it is necessary to decide the general question which would have arisen had the requirements of the Act been complied with. There is no doubt that at the time when the plaintiff was called upon to submit a return and failed to do so he was the owner of the factory. Had he duly complied there is equally little doubt that he would have been liable to make the payment. It is not possible to hold that he escapes by reason of his failure to comply with the direction. He was the person who made a profit from the goods which were liable to duty and I think he was properly called upon to pay it. The result of these findings is that the levy of duty made by the defendant was legally valid and that the plaintiff's suit for refund has been rightly dismissed. The appeal is dismissed with costs.

Sundaram Chetty, J.—I agree.

P.R.S./K.S.

Appeal dismissed.

5. AIR 1930 Mad 200=122 I C 260=52 Mad 866.

6. (1911) 35 Mad 197=10 I C 633.

A. I. R. 1933 Madras 753

WALSH, J.

Settipalli Narasayya — Counter-Petitioner—Appellant.

v.

Chintalapudi Ramagovindam — Petitioner—Respondent.

Appeal No. 79 of 1929, Decided on 23rd February 1933, from decree of Sub-Judge, Bezwada, D/- 18th December 1928.

Civil P. C. (1928) O. 21, R. 89—Decree-holder attaching one of two properties of judgment-debtor with wrong description—Sale held and certificate issued under erroneous description but application for delivery of possession dismissed—Application to amend sale certificate—Sale set aside by consent of parties, judgment-debtor taking time to pay—Judgment-debtor cannot subsequently contend that setting aside of sale was without jurisdiction.

The decree-holder, having obtained a decree, brought one item of the judgment-debtor's property to sale, and himself purchased the same. The defendant judgment-debtor owned two pieces of land bearing different survey numbers, and in executing his decree, the plaintiff decree-holder purported to attach one of these pieces; but in describing that piece, mentioned the survey number and the extent of one of the two pieces and the boundaries of the other piece. Under these conditions the sale was confirmed and a sale certificate issued under the same erroneous description. The decree-holder applied for delivery of possession of the property comprised within the boundaries stated in the execution petition saying that the survey number and extent had been wrongly given. The application was dismissed as the number given was wrong. Then the decree-holder filed an application to amend the sale certificate by substituting the right number and the extent of the land comprised within the boundaries. The judgment-debtor opposed this but by consent of both parties the sale was set aside. The judgment-debtor, who took time for complying with the decree did not pay, and when the decree holder filed an execution petition for recovery of the decree debt together with the costs of the prior execution proceedings, the judgment-debtor opposed the petition, contending that the order setting aside the sale was passed without jurisdiction and therefore the execution petition was not maintainable.

Held: that the defendant had the advantage of the sale of the properties being set aside by his own consent and by his promise to pay the decree amount, and that he could not be heard to say that the Court had no power to set aside the sale: *Case law referred.* [P 755 C 1]

P. Satyanarayana—for Appellant.

V. Govindarajachari—for Respondent.

Judgment.—The decree-holder in this case having obtained a decree brought one item of the judgment-debtor's property to sale and himself purchased the property. The defendant owned two pieces of land bearing different survey numbers and in executing his decree the

plaintiff purported to attach one of these pieces but in describing that piece mentioned the survey number and the extent of one of the two pieces and the boundaries of the other piece. Under these conditions the sale was confirmed and a sale certificate issued under the same erroneous description. The decree-holder applied for delivery of possession of the property comprised within the boundaries stated in the execution petition saying that the survey number and the extent had been wrongly given. That application was dismissed as the number given was wrong. Then the decree-holder filed an application to amend the sale certificate by substituting the right number and the extent of the land comprised within the boundaries. The judgment-debtor opposed this, but by consent of both parties the sale was set aside on 1st May 1928. The judgment-debtor, who took time for complying with the decree, did not pay, and when the decree-holder filed an execution petition for recovery of the decree debt together with the costs of the prior execution proceedings, the judgment-debtor opposed the petition contending that the order setting aside the sale was passed without jurisdiction and therefore the execution petition was not maintainable. The learned District Munsif allowed the execution to proceed and his order was confirmed on appeal by the Principal Subordinate Judge. Against this the judgment-debtor has preferred this second appeal.

The only ground taken is that the sale having been confirmed, the Court had no jurisdiction to set it aside. Reliance is placed on *Radha Kishen v. Hari Singh* (1), *Bihari Lal v. Ramchand* (2), *Collector, Ahmednagar v. Rambhau*, *A I R 1930 Bom. 392 (F B)*, *Nanhelal v. Umrao Singh* (3) and *Jagannadha Rao v. Basavayya* (4) and for the position that consent of parties cannot confer jurisdiction which does not exist *Minalshi v. Subramanya* (5) is quoted. I do not think that any of these rulings applies to a case of this sort. *Radha Kishen v. Hari Singh* (1) is a decision by

1. A I R 1927 Lah 337=100 I C 800.
2. (1928) 110 I C 773.
3. A I R 1931 P C 33=130 I C 686=58 I A 50=27 N L R 95 (P C).
4. A I R 1927 Mad 835=104 I C 614.
5. (1888) 11 Mad 26 = 14 I A 160 = 5 Sar 54 (P C).

a Single Judge where the Court had set aside a sale which was confirmed on the ground that the balance of the purchase money had not been paid. The time for payment of the balance of the purchase money can be extended with the consent of the parties. Obviously in such a case the Court could not set the sale aside. *Bihari Lal v. Ramchand* (2) is a case by the same Judge and merely alludes to the former decision. *A I R 1930 Bom. 392* is a Full Bench case but is on a quite different matter. A sale certificate granted to the purchaser by the Court had only a four annas stamp though it should have borne a stamp of of eight annas. It was held that when the Judge had signed the certificate on the first occasion he was functus officio and therefore he was not acting judicially in allowing the second four annas stamp to be attached. *Nanhelal v. Umrao Singh* (3) is a Privy Council case. There, when the sale had been confirmed, the decree-holder and the judgment debtor tried to defeat the purchaser's right by saying that the decree had been satisfied out of Court. No application had been made under O. 21, R. 92, and their Lordships held that it was obligatory on the Court to confirm the sale. *Jagannadha Rao v. Basaranyya* (4) was a case where the decree-holder purchasing the property found that the judgment-debtor had no saleable interest. Instead of asking the Court to set aside the sale under O. 21, R. 91, Civil P. C., he asked for execution of the decree. It was argued that the decree was not satisfied because the judgment-debtor has no saleable interest in the properties sold and the decree-holder had consequently failed to get possession. This view was negatived and it was held that he must take the remedy allowed under the Code. None of these cases is like the present.

For the respondent has been quoted *Krishnaswamy Chetty v. Sitarama Chetty* (6) a case where the plea of limitation had been given up and the defendant admitted his liability before the Court. It was held that he cannot afterwards turn round and plead that the suit had become barred by limitation. In *Bunwari Lal v. Abdul Ghafur Khan* (7) the parties to the decree came

into Court with an agreement to alter its terms and the Court passed an order modifying the terms of the decree in accordance therewith. It was held that both parties were estopped from denying the validity of the order. In *Dinonath Sen v. Gooroochurn Pal* (8), a judgment-debtor entered into an agreement with his judgment-creditor for the payment of the amount due under the decree with interest by instalments, and the parties acted upon the arrangements as if it had become part of the decree to the extent of moving the Court to credit payment made in satisfaction thereof. It was held that the judgment-debtor was precluded by his own conduct from saying that the judgment-creditor is bound to execute the original decree or to bring a regular suit upon the kist-bundee. A case very similar to the present is *Ramprasad v. Ram Charan Singh* (9), where after a sale in execution of the decree, the decree-holder was paid the amount of his decree and there was a concurrent wish of the parties that the sale should be set aside. It was held that the Court although not warranted by any provisions of R. 89 and onwards of O. 21, Civil P. C., to set aside the sale, might treat the sale as being of no effect and might decline to confirm it. Jenkins, C. J., says:

"... the decree-holder was paid by the judgment-debtor the decretal amount. That decretal amount was accepted by the decree-holder in full satisfaction of his decree and the decree-holder, as any honest man would do, brought this to the notice of the Court and asked that the sale should be set aside. The learned Judge before whom this reasonable application was made seems to have felt that his action was paralyzed because this particular predicament did not fall within the precise words of R. 89 and onwards of O. 21. But I venture to think that where a case of this kind arises, it certainly is open to the Court not to confirm the sale and to treat the sale as being of no effect, that being the concurrent wish of the parties and the obvious requirement of the case."

With regard to the argument that the consent of parties cannot give the Court jurisdiction, it has always been held that there is a clear distinction between want of jurisdiction and want of power to proceed in a certain way. In *Raghavachariar v. Murugesu Mudaliar* (10) it was held that O. 21, R. 92, Civil P. C., is no bar to the Court exercising its inherent power to re-

8. (1874) 21 W R 310=14 B L R 287.

9. (1915) 27 I C 601.

10. A I R 1923 Mad 635=72 I C 545=46 Mad 583.

6. (1912) 17 I C 513.

7. (1909) 1 I C 48.

fuse to confirm the sale even though no party has applied to cancel the sale. With regard to the consent of parties not giving the Court jurisdiction, in the very case relied on by the appellant, *Minakshi v. Subramanya* (5), it is stated, quoting from the judgment delivered by Lord Watson in *Ledgard v. Bull* (11) at p. 2023:

"... there are numerous authorities which establish that when, in a case which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

Here the Court is undoubtedly capable of executing the decree and if the parties consented to an irregular procedure in its doing so the Court would not be exceeding its jurisdiction in adopting that procedure. The appellant had the advantage of the sale of the properties being set aside by his own consent and by his promise to pay the decree amount and he cannot now be heard to say that the Court had no power to set aside the sale. The second appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

11. (1887) 3 All 191=13 I A 134=4 Sar 741 (PC).

A. I. R. 1933 Madras 755

RAMESAM, J.

Su. Ellappa Mudaliar — Plaintiff—Petitioner.

v.

A. Swaminatha Mudaliar—Defendant—Opposite Party.

Civil Revn. Petn. No. 357 of 1930, Decided on 1st May 1933, from decree of Sub-Judge, Chingleput, in Sm. C. C. S. No. 187 of 1929.

Partnership—Partner made to pay whole debt of partnership is entitled to contribution—Contribution.

A partner, who is made to pay the whole of the decree amount for a partnership debt is entitled to maintain a suit for contribution as against other partners: 18 *Mad* 134, *Ref.*; 43 *I C* 217; 32 *Mad* 203 and *AIR* 1927 *Mad* 650, *Dist.* [P 756 C 1]

M. S. Venkatarama Ayyar—for Petitioner.

N. Visvanatha Ayyar and *N. V. Nagarajan*—for Opposite Party.

Judgment.—This is a revision petition against the decree of the Court of the Subordinate Judge of Chingleput, dismissing the plaintiff's suit in S. C. S.

No. 187 of 1929. The plaintiff alleged that he and the defendant had dealings with another firm and in connexion with those dealings, that firm obtained a joint and several decree against the plaintiff and the defendant to the extent of Rs. 612-3-0. Execution was taken against the plaintiff alone and the plaintiff had to pay up the whole decree amount. He therefore brings the suit for contribution of half the decree amount against the defendant. The defendant pleaded that the plaintiff, the defendant and a third party, named Balasubramania Mudali, carried on business as partners and the liability incurred by the plaintiff, and the defendant was in connexion with the business of that partnership. He also pleaded that the plaintiff discharged the debt out of the assets of the partnership which he had in his hands. But as to this plea he took no issue nor adduced any evidence. He contended that the partnership was still subsisting and is not dissolved and that the present suit is not maintainable, the plaintiff's only remedy being to claim the suit item in a general suit for taking the accounts of the partnership.

The Subordinate Judge found that the matter in respect of which the decree was obtained against the plaintiff and the defendant was really a matter connected with the partnership of the plaintiff, the defendant and Balasubramania Mudali. Having come to this conclusion he held that the suit was not maintainable and so he dismissed the suit. He also found that if the plaintiff was entitled to a decree, it would be for one-third of the amount of the decree obtained against the plaintiff and the defendant and not for half. This last finding of the Subordinate Judge was not questioned by the learned advocate for the petitioner. The plaintiff files this revision petition. On the findings of the Subordinate Judge, we must take it that the decree represents a partnership debt. But this fact does not conclude the question whether the suit is maintainable. As pointed out in *Subbarayudu v. Adinarayudu* (1), to the general rule, that advances made by one partner to the partnership concern can only result in matters of account and cannot be made the subject of a separate

1. (1895) 18 *Mad* 134.

suit, there are exceptions. One of the exceptions mentioned in that case is:

"When two partners borrow from a bank on their joint promissory note and apply the money borrowed to the partnership concern and one of the partners is compelled to pay more than his share of the debt, the transactions have been considered to be separate."

In the present case the decree has been obtained by a stranger in respect of a partnership debt and the plaintiff alone had to pay up the whole of the decree amount. Prima facie therefore he is entitled to recover one-third of the decree amount from the defendant. The learned advocate for the respondent relied on a judgment of Sadasiva Ayyar, J., in *Damodara Shanabhagga v. Subraya Pai* (2). In that case the District Munsif found as a fact that if the partnership account was fully gone into nothing would be due to the plaintiff's assignor from the defendant even making allowance for the item which was the subject of dispute. The case in *Sadhu Narayana Ayyangar v. Ramaswami Ayyangar* (3), has no bearing on the present point because it is a case of partnership at will. The case in *Santhanakrishna Naidu v. Chelluppa Ayyar* (4), was a suit for damages for breach of covenant contained in one of the terms of the partnership. In *Arunachalam Serrai v. Nottam Beer Vannu Rowther* (5), the suit was held to be maintainable because, after the partnership was dissolved, the debt was borrowed by the partners and a decree was obtained on it.

In my opinion in the present case the suit is maintainable and the plaintiff is entitled to a decree for one-third of the amount which he had to pay to the decree-holder in E. P. No. 110 of 1929. Reversing the decree of the Subordinate Judge, I give a decree to the plaintiff for Rs. 204-1-0 with further interest at 6 per cent from 12th February 1929, up to the date of payment. In the Court below the parties will give and take proportionate costs. In this Court the petitioner will have his costs.

P.R.S./K.S.

Order accordingly.

2. (1917) 43 I C 217.

3. (1909) 32 Mad 203=3 I C 486.

4. AIR 1927 Mad 650=101 I C 300.

5. AIR 1923 Mad 588=110 I C 434.

A. I. R. 1933 Madras 756

RAMESAM AND CORNISH, JJ.

T. N. S. Firm—Plaintiff—Appellant.
v.

V. P. S. Muhammad Hussain and others—Defendants—Respondents.

Appeal No. 299 of 1926, Decided on 1st February 1933, against decree of Sub-Judge, Tuticorin, in O. S. No. 79 of 1924.

(a) Evidence Act (1872), S. 34—Mere filing of accounts and exhibiting them does not prove various items in them—Other corroborative evidence is necessary—Accounts.

The mere filing of accounts and exhibiting them does not prove the various items in them without some more evidence. The accounts may corroborate the oral evidence and there must be the evidence of some person who knows the transaction personally and can swear to them.

[P 753 C 1]

(b) Contract Act (1872), S. 135—Giving time does not mean mere forbearance to sue.

Under S. 135 by giving time is meant not merely forbearance to sue, but entering into a binding engagement by which the creditor precludes himself from suing within a certain time.

[P 753 C 2]

(c) Contract Act (1872), S. 135—Mere taking of additional security does not discharge surety.

The mere taking of additional security does not discharge the surety. Along with the taking of additional security there must be an express or implied contract to give time: *English case law referred.*

[P 759 C 2]

(d) Contract Act (1872), S. 135—Giving of time.

Acceptance of interest in advance amounts to giving of time: 9 *Beng L R* 261, *Rel on.*

[P 760 C 2]

(e) Minor—Law of Ceylon—Age of majority is 21.

According to the law of Ceylon, the age of majority is 21. Hence a person who is 18, though a major under the Indian law, is exempt from liability on account of his minority under Ceylon law: *English cases referred.*

[P 763 C 1, 2]

K. Rajah Ayyar, V. Ramaswami Ayyar and R. Sethurama Sastri—for Appellant.

S. T. Srinivasa Gopalachari, S. Parthasarathy and V. K. Thiruvenkatachari—for Respondents.

Ramesam, J. — This is an appeal against the judgment of the Subordinate Judge of Tuticorin dismissing the plaintiff's suit against defendants 2 to 9. The plaintiffs are two brothers, Chockalingam Chettiar and Subramaniam Chettiar, carrying on business under the name of T. N. S. Firm in Ceylon. Defendant 1 is a Mahomedan merchant also carrying on business in Colombo, defendant 2 is his brother-in-law and son of defendant 3. Defendant 3 died while the

suit was pending and defendants 4 to 9 were brought on record as his legal representatives along with defendant 2 who was already on record. The suit was brought to recover a sum of Rs. 15,895, consisting of Rs. 12,767, principal, and Rs. 3,128, interest, said to have been advanced by the plaintiffs to defendant 1 for the purpose of his business. Defendant 2 was impleaded on the ground that he was a prior endorsee of certain bills given to the plaintiffs by defendant 1's agent as security. Defendant 3 was impleaded on the ground that he gave a letter of guarantee dated 28th November 1922 holding himself responsible for the amounts advanced to defendant 1 for the purpose of his trade. The amounts were advanced between January and May 1923 and the suit was filed on 15th November 1924. The Subordinate Judge granted a decree against defendant 1, but dismissed the suit against defendant 2 and the other representatives of defendant 3. Defendant 1 did not appear.

Defendant 2 pleaded (1) that he was the minor at the time of the suit transactions having been born in September 1905, and (2) that he went to Ceylon for the purpose of sightseeing at the end of 1922; and at the time of the delivery of the bills by defendant 1 to the plaintiff, the plaintiff asked him fraudulently to affix his signature as a witness for the delivery of the bills; and he must have signed accordingly, but did not sign as a prior endorsee. Defendant 3 pleaded:

"This defendant has not given to the plaintiff either the guarantee note or letter spoken of in plaint, para. 9. There was no need to give in that way. It appears that defendant 1 and the plaintiff have made some fraudulent arrangements." (Para. 5 of the written statement). "Even if the guarantee note spoken of by the plaintiff is perhaps true, it appears that according to Ceylon law it is invalid. As it is in Ceylon that debit and credit transactions were carried on and the guarantee was utilized, that also is not valid." (Para. 6 of the written statement). "The plaintiff has not made a demand of this defendant either in person or by postal notice. And this defendant never delayed saying he would give." (Para. 8 of the written statement).

The defendants also put the plaintiffs to proof of all the items which made up the suit amount. On these pleadings on 14th January 1925 five issues were framed. Issue 2 was "Are the plaintiff dealings true?" Issue 3 related to the genuineness of the letter of guarantee,

Ex C. Issue 4 ran thus: "Is the letter not valid and enforceable?" Obviously this was raised on the plea of defendant 3 that it was not valid according to Ceylon law. Later, on 13th November 1925, four more issues were framed. Issue 6 related to the minority of defendant 2 and issue 7 to the point raised by him that he signed as a witness. The case was taken up for trial on 22nd January 1926, three witnesses having been previously examined on commission in June 1925. In the course of the examination of P. W. 5, one of the partners of the plaintiff firm, the plaintiffs prayed for time and the trial was adjourned to 2nd February on the plaintiffs paying the day's costs. In the interval the plaintiffs were able to secure additional evidence to prove Ex. C, and the further trial was taken up on 6th February and closed on 24th February. The judgment was delivered on 16th March. Neither the B Diary nor the Notes paper shows that any further issues were framed as they should have done.

But the judgment actually delivered shows that four more issues were framed numbered as 10 to 13. It is suggested that the points covered by these issues arose in the cross-examination of the plaintiff's fifth witness and the points were argued and therefore the issues were framed as part of the judgment. In my opinion this is highly irregular. Issues ought to be framed then and there. However to meet the points now raised in issues 12 and 13 the plaintiffs prayed for permission to amend the plaint by a petition dated 30th January 1926 and it was ordered on 16th March 1926 which is the date of the judgment. In my opinion these two issues ought not to have been raised, but however it is now immaterial. Issue 10 ought not to have been allowed to be raised at all. But so far as issue 11 is concerned, it is a pure question of law arising on the face of the plaintiffs' case and whatever delay there might be in raising the point it cannot be ignored, and as it will turn in the sequel the plaintiffs' suit fails on this issue.

I will first take some of the points decided by the Subordinate Judge against the plaintiffs on which we are not able to agree with him. First he finds that the suit individual items were not pro-

perly proved. It is true that it has often been held that the mere filing of accounts and exhibiting them does not prove the various items in them without some more evidence. The accounts may corroborate the oral evidence and there must be the evidence of some person who knows the transactions personally and can swear to them. (After examining the evidence, his Lordship held that the items were proved and the judgment proceeded). The next point that arises for consideration is whether Ex. C is genuine. (His Lordship after examining the various circumstances held that Ex. C was genuine and proceeded). I must now come to issue 4. As I already observed, this issue was originally framed with reference to the plea of defendant 3 that Ex. C was not valid according to Ceylon law. No such ground was made either in the lower Court or before us. But it was contended both in the lower Court and before us that Ex. C which was a request to the plaintiffs to advance moneys to defendant 1 up to a limit of Rs. 20,000 for his trade purpose covers only a single item of Rs. 20,000 and does not amount to a continuing guarantee. On the face of it we think it is a continuing guarantee: see also Illus. (a) and (b) as contrasted with Illus. (c), S. 129, Contract Act. Therefore I am unable to agree with the finding of the Subordinate Judge on issue 4.

Another point was raised with reference to this issue, viz., that the latter expects a reply from the plaintiff firm and as no such reply was given there is no acceptance of the letter of guarantee. As I said this point was not raised originally in the written statement and there is no jurisdiction for raising any later issue involving such a ground. On the facts as found above the conversation between the plaintiff firm and defendant 3 in September 1922 and the plaintiffs' willingness as expressed then to take a letter of guarantee from defendant 3 is the offer and defendant 3's letter Ex. C is the acceptance. No further acceptance of the acceptance is necessary. The only thing that had got to be done was to act upon it and the plaintiffs began to act upon it by advancing moneys to defendant 1 from January 1923. If defendant 3 had any doubt in the matter he could easily have ascertained by writing a further

letter inquiring whether his letter of guarantee was accepted. Presumably he must have known through defendant 1, his son-in-law, that the letter of guarantee was acted upon and that the plaintiff firm was actually obliging his son-in-law by making advances, and he must have been content with that state of things. I therefore think that there is nothing in this point. On issue 4 I find that the letter was valid and enforceable.

The next question we have got to deal with is the point covered by issue 11. As already observed, though this issue was framed late, still the point is one staring us in the face of the transaction and cannot be ignored. The point raised by defendant 3 is this: The plaintiffs gave time to defendant 1 and therefore the surety is discharged. This rule of law is embodied in S. 135, Contract Act, a section no doubt based on the equitable doctrine of English law. It is well established that by giving time is meant not merely forbearance to sue, but entering into a binding engagement by which the creditor precludes himself from suing within a certain time. Now to understand the point we have to consider the nature of the transactions between January and May. Some items in the accounts Ex. E show that amounts were advanced on bills handed over by defendant 1 which were afterwards presented for being honoured. Five such bills were given on 28th January 1923 which were afterwards honoured. Another set of five such bills were given on 14th February. They were also honoured. These items are cross items in the account. There are other such cross items which cancel each other and which do not form part of the suit amount, for instance, an item of Rs. 1,060 on 1st February, an item of Rs. 1,105 on 21st February and Rs. 268-12-0 on 22nd February.

These three items have got cross items for them. Omitting these and taking the remaining items the suit amount consists of advances either by cash or by cheque on 30th January, 31st January, the unexplained item of 17th February and certain items on 2nd, 3rd, 5th and 25th March and 19th April. As against these there is only a single debit of Rs. 20-12-0 on 14th April. The net result of these items came to Rs. 13,789-4-0 shown opposite to 24th April. The account shows the result of the transactions

each day. The item shown against 28th April may be ignored as it was afterwards paid off. Thus on 1st May leaving aside the Rs. 1,000 on 28th April which was borrowed on the pledge of a cheque defendant 1 was indebted to the extent of Rs. 13,789-4-0. What happened on that day was that nine bills which were really accommodation bills drawn by defendant 1's agent in favour of defendant 1 himself, as if defendant 1 himself is the creditor of the agent, and in the case of two of them by constituents (Exs. D-3 and D-7) and afterwards endorsed by the agent in the capacity of an agent in favour of defendant 2, then endorsed by defendant 2 and finally endorsed in favour of the plaintiffs, were handed over to the plaintiff firm.

They were all to mature on various dates up to 26th June. They were negotiated in favour of the P. & O. Banking Corporation and the Imperial Bank. Now it is clear that the advances themselves were originally made without any security, that on 1st May these bills were given as security and the result of accepting these bills was that the plaintiff firm precluded themselves from suing until the maturity of the bills. When they were actually dishonoured on the respective dates no doubt the liability of defendant 1 revived.

The parties expected them to be honoured and so the plaintiff's firm held its hands. Not only was security taken out but interest from the date of the advance up to the date of maturity of the bills was actually calculated along with the discounting charges and it was found to be Rs. 807-15-3. That was added to the debit making a total sum of Rs. 14,597-3-3. Towards the extra amount of Rs. 597-3-3, cash of Rs. 10 and a cheque for Rs. 587-3-3 (Ex. F) were given. This cheque also was dishonoured. It is therefore clear on the face of the transactions themselves that by the acceptance of these securities and the calculation of interest the plaintiffs bound themselves not to sue up to the dates of maturity of the bills. The matter was made very clear by the evidence of P. W. 5. In cross-examination he says:

"The nine bank notes mentioned by me in chief examination for Rs. 13,000 were given about 1st May 1923. There was no cash loan to defendant 1 on 1st May 1923. The nine notes were given on account of the previous balance of

Rs. 14,700 odd. The plaintiff was demanding payment of the said balance of Rs. 14,700 odd. Defendant 1 was not in a position to pay. He wanted time and with a view to give him time he gave the nine bank notes giving further time for payment. Time was given up to the dates mentioned in the several bank notes. Plaintiff levied vattam (discount) on the bank notes, also interest. The amount levied was Rs. 807-15-6 * * * * * The last of the bank notes was dishonoured on 28th June 1923. * * * * * I used to demand payment of the balance from defendant 1's agent after the notes were all dishonoured. He wanted time a second occasion. I gave him time several times."

Now it is clear that the granting of time on 1st May when these nine notes were taken is dissimilar to the granting of time several times referred to in the last sentence of the deposition. When the witness says "I gave him time several times" that was merely as a matter of grace. It did not amount to a binding contract and that sort of giving time does not discharge the surety. But what happened on 1st May cannot be regarded in the same light. It is inconceivable that having taken these nine bills as additional security the plaintiff could have sued on them within the dates of maturity or could have sued on the original cause of action. It is true that the mere taking of additional security does not discharge the surety: *Overend & Co. v. Gurney* (1). Along with the taking of additional security there must be an express or implied contract to give time.

In *Samuel v. Howarth* (2) it appears that according to the usage of the trade a certain credit was given to the debtor, but the creditor thereafter renewed the bills which the debtor had previously accepted without any communication to the surety. It was held that the surety was discharged by the renewal of the bills. In *Combe v. Woolf* (3) the defendant guaranteed payment of porter to be delivered by the plaintiff to a dealer. The custom of the trade was to give six months and then sometimes to take a bill at two months; but the plaintiff after the lapse of the two months, after the six months, took a bill for three months thus altogether giving eleven months instead of eight months by the custom of the trade. It was held that the surety was discharged. In the present case it cannot be said that the taking of

1. 7 Eng & Ir A C 361.

2. 3 Mer 272.

3. 8 Bing 156.

the bills was a custom of the trade. All the suit items were items incurred without the accompaniment of any bill at all and the bills were afterwards given as security on 1st May.

In *Howell v. Jones* (4) an account was opened by a banker in favour of C. B gave a letter of guarantee. It was part of the custom of trade to give acceptances occasionally for the balance. In February 1828 the banker took an acceptance of the debtor at three months for one of the bills without communicating it to the surety. It was held that by the taking of acceptance and the giving of time the surety was discharged.

The cases are all collected in Rowlatt's *Principal and Surety*, pp. 249 and 250.

In *Goldfarb v. Barlet and Kremer* (5) a bill was drawn on 11th August by two partners B and K and accepted by a French Company and endorsed to the plaintiffs on 21st August. The bill became due on 11th October, but before that date another bill was given by B to the plaintiffs dated 1st October and payable on 31st October. B asked the plaintiffs not to present the bill of 11th August for payment. It was held by McCardie, J., that K was discharged by the taking of the second bill. The learned Judge observed:

"The effect of the plaintiffs renewing the bill of 11th August in my opinion was that the plaintiffs by necessary implication gave time to the defendant Bartlett in respect of the payment of the bill of 11th August."

Here one must notice that K, though he may be in the position of a surety under the English law, would not be in the position of a surety under the Indian law, but only in the position of a principal debtor. But apart from this distinction the case is authority for the discharge of the surety by the taking of a fresh bill which involves the creditor waiting for a longer time. The cases cited by Mr. Rajah Ayyar, viz., *Bell v. Banks* (6) and *Twopenny v. Young* (7), are cases of mere taking of additional security without involving the giving of time. The case of *Pring v. Clarkson* (8) is a decision on the facts, it being held that the bill was taken as merely collateral security, which cannot be held to

be the case here. In *Midland Motor Showroom v. Newman* (9) the principal fell in arrears, and in February a friend offered a cheque for £20. The creditor accepted the cheque and stipulated that the rest of the arrears should be paid within one month. It was held that there was giving of time and the surety was discharged. The facts like those of *Midland Motor Showroom v. Newman* (9) show that the law of guarantee is a very rigid law and the smallest kindness on the part of the creditors may involve their being caught in the trap by the discharge of the surety.

In *Kali Prasanna Roy v. Ambica Charan Bose* (10) Markby, J., observes to the same effect at p. 274, where he refers to the serious consequences of the ignorance of the law on the subject. The last case is also authority for the position that acceptance of interest in advance amounts to giving of time. In the present case it has been contended that the calculation of interest up to the dates of maturity amounts to giving of time. However it is unnecessary to consider this aspect of the case. In my opinion the surety is discharged by the acceptance of the bills. I therefore hold that the legal representatives of defendant 3 are not liable. As to defendant 2, the Subordinate Judge finds that he was a minor at the date of the transaction and I agree with him. (His Lordship examined the evidence on this point and the judgment proceeded). Apart from his minority defendant 2 would not be exempt from liability because so far as he is concerned his liability arises by reason of the bills and therefore there can be no extension of time by reason of the plaintiffs accepting them.

But there is also another ground on which it is contended that defendant 2 is not liable. According to the law of Ceylon the age of majority is 21 and although he may be 18, a major according to the Indian law, the question arises whether he is not exempt from liability on account of his minority under the Ceylon law. The rule with reference to this is Excep. 1 to R. 158 of Dicey's *Conflict of Laws*, Edn. 4, p. 599. And though at one time the preponderance of authority was in favour of applying the law of domicile as regards the capa-

9. (1929) 2 K B 256=93 L J K B 490=141 L T 230=45 T L R 499.

10 (1872) 9 Beng L R 261=18 W R 416.

4. 1 C M & R 97.

5. (1920) 1 K B 635=89 L J K B 258=64 S J 210=122 L T 588.

6. 133 E R 1140.

7. 3 B & C 205=5 D & R 259.

8. 1 B & C 14=2 D & R 78=1 L J (o s) K B 24.

city to enter into contracts [vide *Cooper v. Cooper* (11)] still as to ordinary mercantile contracts the preponderance now seems to be the other way. Dicey stated the exception in the earlier edition with the word "probably" but the word is now omitted. The very early decision of Lord Eldon in *Male v. Roberts* (12) and the decision of Creswell, J., in *Simorin v. Mallao* (13) are not touched by the language of the Court of appeal in *Sottomayer v. De Barros* (14) as explained by Sir J. Hannen. The latest decision seems to be *M'Feetridge v. Stewarts, Lim.* (15) but unfortunately the case is not available. Following the rule as stated in Dicey I think defendant 2 is not liable under the law of Ceylon. The position seems to be assumed in *Soltykoff, In re ex parte Margrett* (16). On this ground also defendant 2 is not liable. The result is the appeal must be dismissed. As all the defendants raised many untenable pleas, and as the ground on which defendant 3's legal representatives succeed was not raised in the original written statement, I disallow the costs of the defendants in the Court below, but in appeal they are entitled to their costs.

Cornish, J.—I agree. I think that Ex. C was intended by defendant 3 to guarantee a series of transactions between the plaintiff firm and defendant 1 and was not to be confined to a single credit. Ex. C is expressed to guarantee for purposes of defendant 1's trade "credit and debit transactions to the extent of Rs. 20,000," and in the covering letter defendant 3 requests plaintiff to have regular dealings with defendant 1. If necessary for the construction of the document the Court may look at the surrounding circumstances:

"not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee; *Heffield v. Meadows* (17)."

The evidence of the circumstances in

11. (1889) 13 A C 88=59 L T 1.
12. (1799) 3 Esp 163.
13. (1860) 29 L J P & M 97=2 Sw & Tr 67=6 Jur (n s) 561=2 L T 327.
14. (1879) 5 P D 94=49 L J P 1=41 L T 231=27 W R 917.
15. (1913) S C 733.
16. (1891) 1 Q B 413=60 L J Q B 339=39 W R 337=55 J P 100=8 Morrell 27.
17. (1869) 4 C P 595.

which Ex. C came to be given shows that it was intended as a continuing guarantee. The plaintiff had been approached by defendant 1 to advance him moneys for extending his business transactions, and the guarantee was for advances to be made thenceforward for those purposes. The Subordinate Judge has discovered reasons for holding Ex. C to be a forgery. They are quite inadequate, in my judgment, to displace the evidence in favour of its genuineness. If genuine, Ex. C will bind defendant 3 unless he has in some way been discharged of his liability.

A surety is discharged if, without his assent, the creditor binds himself by agreement with the principal debtor to give him time. And, with reference to the discharge of a surety, "giving time means the putting it out of the power of the creditor to sue during the extended time:" per Maule, J., in *Bell v. Banks* (3). It appears that advances on the strength of the guarantee began in January. By May a balance of Rupees 13,000 odd was found due by defendant 1. This indebtedness was not covered by security. The plaintiff demanded payment. Defendant 1 asked for time and gave plaintiff bills payable at a future date as security. Time was accordingly given by plaintiff to defendant 1 up to the dates of the bills. Interest was charged, and in due course the bills were presented for payment and dishonoured. These facts are deposed to by P. W. 5. The evidence of this witness leaves no doubt that in consideration of the bills given by defendant 1 the plaintiff agreed to suspend his right to recover payment during the currency of the bills. That sufficed to discharge defendant 3: *Midland Motor Showroom v. Newman* (9). A different complexion would have been put upon the case if it had been shown that the bills were given by defendant 1 to the plaintiff as part of the original agreement. But this is not the plaintiff's case in the pleadings or upon the evidence. P. W. 5 describes the course of dealings when defendant 1 did give security, but he does not depose that it was the practice for defendant 1 to give security for advances. In fact it appears from the accounts that except for the bills given in respect of the first Rs. 5, 00 advanced, no cover was given for the subsequent advances.

With regard to defendant 2 I think the evidence of D. W. 6 that he was born in September or October 1905 should be accepted. That would make defendant 2 under 18 years of age in April 1923, the date of his indorsement of the bills. So that he would be a minor under the Ceylon Ordinance and likewise by the law of British India; and he would not be liable upon indorsements made during minority: *In re Soltykoff* (16). The result is that plaintiff's appeal must be dismissed with costs. But I think that the circumstances of defendant 3 succeeding on a defence which he did not raise and failing on the defences which he did raise, and that the conduct of defendant 2 in making in his written statement an unfounded charge of fraud against the plaintiff, are sufficient grounds for depriving these defendants of their costs in the trial Court.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 762

SUNDARAM CHETTY AND WALSH, JJ.

Gurusami Naidu—Defendant—Petitioner.

v.

Govindappa Naidu and others—Plaintiffs—Opposite Parties.

Civil Revn. Petn No. 1562 of 1931, Decided on 2nd August 1933, from order of Dist. Munsif, Ranipet, D/- 12th September 1931.

Civil P. C. (1908), O. 34, R. 7—Suit for declaration of mortgage as invalid and for possession—Portion of mortgage found to be valid and decree for possession conditional on payment of certain amount within certain period which was made charge on property—Decree is redemption decree and Court has power under O. 34, R. 7, to extend the time for payment.

The power to extend the time vested in the Court can be exercised even if the decree is virtually one for redemption of a mortgage and it is not necessary that the suit also is strictly in the form of a redemption suit.

Reversioners filed a suit for a declaration that certain mortgage executed by the widow was invalid and for possession. It was found that part of the mortgage debt was valid and binding and a decree for possession was passed conditional on payment of certain amount within certain time which was made a charge on the property:

Held: that even though the suit was not for redemption of a mortgage, the decree was in the form of a decree for redemption, and that the Court had discretion to extend the time for payment under O. 34, R. 7: 16 I C 217, *Ref.*; A I R 1920 Mad 90, *Expl.*; AIR 1921 All 301 and A I R 1920 All 173, *not Foll.* [P 763 C 1, 2; P 764 C 1]

K. Rajah Ayyar and N. G. Krishna Ayyangar—for Petitioner.

K. Bhashyam Ayyangar and T. R. Srinivasan—for Opposite Parties.

Sundaram Chetty, J.—This revision petition has been filed by defendant 3 against the order of the District Munsif of Ranipet in C. M. P. 605 of 31 in O. S. No. 12 of 1920, extending the time for payment of a sum of money, which according to the terms of the decree was to be paid by plaintiffs within 6 months before recovering possession of the suit properties from the defendants. The District Munsif construed the decree to be one substantially in the nature of a redemption decree, and in the exercise of his discretion under sub-R. (2), R. 7, O. 34, Civil P. C., granted an extension of time. The amount has also been paid into Court. The correctness of this order is questioned in this Civil Revision Petition. It is urged that the lower Court is wrong in construing the decree as in the nature of a redemption decree, and that it had no jurisdiction to extend the time fixed in the decree for payment. It is further argued by Mr. Rajah Ayyar for the petitioner, that the soundness of the decision in *Idumba Parayan v. Pethi Reddi* (1) on which the order of the lower Court rests, is open to doubt, and that decision requires reconsideration. Before discussing this point, let me state briefly the facts of this case. The plaintiffs (as reversioners) filed O. S. No. 12 of 1920 in the District Munsif's Court, Ranipet, for a declaration of their reversionary right and of the invalidity of a mortgage and sale effected by the widow (defendant 1). During the pendency of the suit the widow died, and the plaintiffs appear to have got the plaint amended, by the addition of a prayer for recovery of possession of the suit properties free from all incumbrances created by the widow. After a due inquiry the Court seems to have found that a portion of the mortgage debt was valid and binding on the reversioners (plaintiff) and consequently they could not recover possession unconditionally. It looks as if the Court thought that without paying a certain sum of money to the extent of redeeming the mortgages binding on plaintiffs, they should not recover possession. The decretal portion of the judgment is worded thus:

1. AIR 1920 Mad 99=51 I C 451=48 Mad 357.

"The plaintiffs will therefore recover the suit properties from defendant 3 on paying Rupees 2,814-9-11. Six months' time is granted for payment of the money. The properties will be a charge for the money till then. I pass a decree accordingly."

Against this decree there was an appeal to the first appellate Court, and the matter went up to the High Court which ended in plaintiffs' favour on 12th January 1931. The present petition for extension of time for the payment was put in subsequently and granted by the District Munsif. The point for consideration is what is the nature of the decree in question. A decree for redemption can ordinarily be passed in a suit in which a mortgage is involved as the subject-matter. Unless there is a mortgage lien on the property (or a charge thereon for which the same remedy has to be sought), a decree directing the payment of money by one party to another cannot strictly be termed a redemption decree. In the present case, there is no insurmountable difficulty in regarding the decree as one in the nature of a redemption decree, as the amount which the plaintiffs were directed to pay was for a mortgage or mortgages held to be binding on them. The effect of the decree is, that without redeeming the mortgage by payment of the declared amount, possession cannot be recovered by the plaintiffs. It is however contended by Mr. Rajah Iyer that the suit was not a suit for redemption, and the decree in such a suit cannot be called a redemption decree. I am unable to agree with this contention. If a mortgagor sues for recovery of possession, alleging that the mortgage debt has been fully discharged, and frames the suit as one in ejectment, but the Court finds that some amount is still due under the mortgage and the plaintiff cannot recover possession without discharging the debt, can it not pass a conditional decree, and is not such a decree virtually a redemption decree? The decree is, in my opinion, one for redemption, though the frame of the suit is not akin to a suit for redemption of the mortgage. If authority is needed for this, the decision of a Bench of two learned Judges of this High Court (Sundara Ayyar and Sadasiva Ayyar, JJ.) supports this view, (vide *Ranganatha Pillai v. Paripurnam* (2)).

If the decree passed can be reasonably

treated as a decree directing the redemption of a mortgage, and if for that purpose it fixes a period of time for payment of the money, there is, in my opinion, no bar to the exercise of the discretionary power for extending such time, as provided in sub-R. (2), R. 7, O. 34, Civil P. C. The decision of a Bench of this High Court in *Idumba Parayan v. Pethi Reddi* (1) is distinctly in favour of the plaintiffs' contention. In that case a decree for recovery of possession of certain properties from the alienees, on payment of a sum of money by a certain date, was passed without any provision as to the consequence of non-payment. Such a decree was passed in a suit for partition.

It was not a suit for redemption of a mortgage, nor does it appear that the amount which the plaintiffs were directed to pay was for redeeming any mortgage. Still it was held that the decree was in terms and in effect one for redemption, so that the Court would have jurisdiction to extend the time for payment under O. 34, R. 7. For the purposes of the present case, it is not necessary to go so far as the learned Judges went in *Idumba Parayan v. Pethi Reddi* (1). Where the payment of the amount, within a certain time fixed as a condition for the recovery of the property, is one in respect of a mortgage by way of redemption, (as in the present case), I fail to see why the Court is not competent to extend the time under the aforesaid rule. There may be some force in the appellant's contention, if the liability for the payment of the amount imposed on the plaintiff does not arise out of a mortgage or has no connexion at all with a mortgage. Our attention is drawn to two decisions of the Allahabad High Court, viz., *Kandhiya Singh v. Mt. Kundan* (3) and *Nandkunwar v. Sujan Singh* (4). The decision in *Idumba Parayan v. Pethi Reddi* (1) has been dissented from. The learned Judges of the Allahabad High Court seem to hold that the Court would have no jurisdiction to extend the time for payment under O. 34, Civil P. C., unless the suit was expressly one for redemption of a mortgage, and the decree is also a redemption decree. This view is opposed to the decision of our High Court in

2. (1912) 16 I C 217.

3. AIR 1920 All 173=57 I C 16=42 All 639.

4. AIR 1921 All 304=57 I C 1006=43 All 25.

Ranganatha Pillai v. Paripurnam (2) already referred to. In an earlier case of the Allahabad High Court: *Kalyan v. Sadho Lal* (5), a compound decree in plaintiffs' favour was passed, which was a decree for redemption coupled with a decree for sale, but the suit was not in form a suit for redemption.

It was however held that the Court had jurisdiction to extend the time fixed in the decree for redemption under O. 34, Civil P. C. This decision seems to have been approved in *Nand Kunwar v. Sujan Singh* (4). With respect, I should think, it would be too strict an interpretation of R. 7, O. 34, Civil P. C., to hold that the power to extend the time vested in the Court cannot be exercised even if the decree is virtually one for redemption of a mortgage, unless the suit also is strictly in the form of a redemption suit. If the effect of non-payment of the amount within the time fixed is also specified in the decree by means of a penalty clause such as, "the suit will stand dismissed" or the plaintiff is debarred from redeeming, there may be room for some doubt as to whether the Court can still extend the time or should only allow the decree to work itself out. Even in such a case the Allahabad High Court went the length of holding that the Court could extend the time: vide *Het Singh v. Tika Ram* (6). In the present case no penalty clause of that kind is found in the decree, and there is nothing in the decree itself to fetter the hands of the Court in the matter of extending the time for payment. In my view the extension of the time granted by the lower Court in this case was not without jurisdiction. I would affirm that order and dismiss this petition with costs. Pleader's fee is fixed at Rs. 100.

Walsh, J.—I agree.

P.R.S./K.S. *Petition dismissed.*

5. (1913) 35 All 116=18 I C 14.

6. (1912) 34 All 388=14 I C 240.

A. I. R. 1933 Madras 764

BEASLEY, C. J. AND BARDSWELL, J.
National Insurance Co. Ltd., Calcutta
—Appellant.

v.

Seethammal—Respondent.

Original Side Appeal No. 52 of 1932,
Decided on 26th April 1933, from order
of Stone, J., D/- 5th May 1932.

Contract Act (1872), S. 4—Insurance company at C—Policy taken at M through agent of company—Acceptance of proposal posted at C and assured informed by agent at M—Held, acceptance was made at M and that policy was effected at C—Insurance.

A person at M offered to take a policy through a local agent of an insurance company at C. The company posted the letter of acceptance at C and the assured was informed of it by the agent at M:

Held: that the proposal was accepted at C and that the policy was effected at C: 27 *Mad* 355; *Clarke Brothers v. Knowles*, (1918) 1 *K B D* 128, *Ref.* [P 765 C 2]

K. Venkataraghava Chari—for Appellant.

T. R. Vijiaraghava Chariar—for Respondent.

Beasley, C. J.—This is an appeal from a judgment of Stone, J. He held that an insurance policy effected with the National Insurance Co., Ltd., which has its Head Office at No. 7, Church Lane, Calcutta, on 7th July 1919 for Rs. 1,500, was effected in Madras. He has however stated no reasons in his judgment for so holding. The point to be considered by us here is, where was this policy of insurance effected? If it was effected in Madras, then a trust has been created in favour of the assured's wife and the policy money has to be paid to the Official Trustee of Madras; and that is by reason of S. 6, Married Women's Property Act. If, on the other hand, the policy was effected in Calcutta, it having been effected in 1919, that is to say before 1923, there is no trust, and letters of administration will have to be taken out by the widow of the assured for the purpose of obtaining the policy money. It is contended for the appellants that this policy was effected in Calcutta. A copy of the insurance policy has been put in and it is therein stated that:

"the assured has caused to be delivered at the Head Office of the company a form of proposal and declaration signed by him and dated 25th day of May 1919 which he has agreed shall be the basis of the contract of assurance between him and the company."

It is of course conceded on both sides that this policy of insurance was put through by means of the local agent in Madras of the insurance company; and this proposal was accepted by the insurance company by its directors in Calcutta. It is contended on behalf of the appellants that the contract between the assured and the company was made in Calcutta, that being the place where the proposal as it is described in the insurance policy was in fact received by the

company and the place where it was decided to accept the proposal and the place from which the acceptance was sent from by means of the post to Madras. It is argued that the proposal being received in Calcutta and being there accepted, the contract was made in Calcutta. Two cases have been referred to, one an English decision and another a decision of this High Court. The former is *Clarke Brothers v. Knowles* (1), a decision of the Divisional Court in England in respect of a matter arising in the county Court. It was there held that where a contract is made by offer and acceptance sent through the post between parties residing in different county Court districts, the posting of the offer is not part of the cause of action within the meaning of S. 74, County Courts Act, 1888. When the judgment is examined, it is clear that it was held that an offer made through the post is not made in the place where the offer is made but is made in the place where the offer is received. So that, applying that case, the offer here was made not in Madras but in Calcutta. The other case is *Kamisetti Subbiah v. Katha Venkataswami* (2) where it was held that under the Indian Contract Act where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted. The letter of acceptance in this case was posted in Calcutta.

It is argued however on behalf of the respondent that intervention of the Madras local agent makes all the difference and that the cases to which reference has been made are of no application here because those cases deal with the cases of parties who were directly corresponding with one another from different places, whereas in this case the offer, i.e., the proposal was given to the agent in Madras and by him sent to Calcutta and the acceptance of the offer by the company in Calcutta was communicated by the Madras agent to the assured in Madras. It is boldly argued that the agent in Madras is the company. That of course is far too sweeping a contention.

The agent in Madras is the agent merely for getting business for the insurance company and carrying out the

instructions of the insurance company as regards the medical examination and details of that description, and also in some cases he is the man who is authorized by the company to receive the premia in respect of policies of insurance and to give the company's receipts. But it is obvious—and there is no dispute about the matter—that the agent in Madras is not authorized to accept proposals. That he has no authority to do so. It is only the company, its head office by means of its directors, that has the authority to accept or reject proposals made by persons seeking to effect insurances. For the purpose of the proposal and the acceptance, in my opinion, the agent was merely a post office. It was his duty upon receiving the proposal signed by the assured merely to send it on to Calcutta there to be dealt with by the company and again when the proposal was accepted, it was his duty merely to communicate the acceptance of the proposal to the assured.

In my opinion this is a very clear case; and the policy of insurance, in my view, was clearly effected in Calcutta and not in Madras. That being so, this appeal must be allowed and the decree of the trial Court set aside. The effect of this decision is that the widow of the assured will be able to get the insurance money when she has taken out letters of administration and the money will not be paid to the Official Trustee of Madras or the Official Trustee of Bengal. The order will also be varied where it makes the policy money payable with interest at 6 per cent per annum from the date of death till date of payment. No order as to costs.

Bardswell, J.—I agree.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 765

Full Bench

BEASLEY, C. J. AND BARDSWELL
AND BURN, JJ.

V. M. Rathnavelu and another—Accused—Petitioners.

v.

K. S. Iyer—Complainant—Respondent.

Criminal Revn. Cases Nos. 15 and 16 of 1933 and Criminal Revn. Petns. Nos. 15 and 16 of 1933, Decided on 11th May 1933, from order of Chief Presidency Magistrate, Egmore (Madras), D/- 7th November 1932.

1. (1918) 1 K B D 123=87 L J K B 189=118 L T 253.

2. (1904) 27 Mad 355.

Criminal P. C. (1898), Ss. 403 and 531—Acquittal by Court wanting in territorial jurisdiction — Accused can plead *autrefois acquit* unless failure of justice is caused.

An accused person can plead *autrefois acquit* under S. 403, if the only defect in the jurisdiction of the Court which passed the order is a want of territorial jurisdiction, unless any failure of justice has occurred by reason of the trial having been held in the wrong Court: 30 *Mad* 94, *Rel on*; *A I R* 1928 *Bom* 530, *Diss from*. [P 766 C 1, 2]

K. S. Jayarama Ayyar and *G. Gopala-swami*—for Petitioners.

The Crown Prosecutor—for the Crown.

Burn, J.—Two persons were charged for cheating (S. 420, I. P. C.) in two cases and were tried by the Subdivisional Magistrate of Vellore. There was a dispute before the Magistrate on the question whether he had jurisdiction to try the case. The accused persons contended that he had not, and that the case ought to be tried in Madras. The complainant contended that he had, and the learned Subdivisional Magistrate held that he had jurisdiction, proceeded with the trial, and acquitted both the accused.

The complainant filed revision petitions in this Court against the orders of acquittal. Lakshmana Rao, J., dismissed the revision petitions, observing that the lower Court, i. e., the Subdivisional Magistrate, Vellore, "had clearly no jurisdiction to try the case," and that "all his remarks relating to the merits of the case must be regarded as mere obiter dicta." Then the complainant filed fresh complaints before the Chief Presidency Magistrate on the same facts. The Chief Presidency Magistrate dismissed the complaints on 17th December 1931 accepting the plea of the accused, that they had already been tried and acquitted, and that a petition to revise the orders of acquittal had been dismissed. Then the complainant came to this Court with revision petitions against the orders of the Chief Presidency Magistrate dismissing his complaints. Those cases (Criminal Revision Cases 461 and 462 of 1932) were laid by direction of Ramesam, J., before a Bench and were disposed of by Jackson and Mockett, JJ. The order was pronounced by Jackson, J., and is to this effect.

"An accused person can only plead *autrefois acquit* under S. 403, Criminal P. C., if the acquittal set up is by a Court of competent jurisdiction. A Court without territorial jurisdiction is not a Court of competent jurisdiction."

That is laid down in *Shankar Tulsi-ram v. Kundlik Anyaba* (1) and it is difficult to see how it could be held otherwise. No one is applying to have the order of acquittal set aside under S. 531, and there is no need to consider that section. Whether or no there was territorial jurisdiction is a matter that has not been decided after hearing both parties, and the Chief Presidency Magistrate can decide that fact. His order is set aside and he is directed to proceed.

Thereupon the Chief Presidency Magistrate appears to have taken some further evidence and decided that the Vellore Magistrate had no territorial jurisdiction. He therefore ordered the 3rd Presidency Magistrate to dispose of both the cases according to law. From these orders the present revision petitions have been brought.

It is clear that the attention of Jackson and Mockett, JJ., was not drawn to the case of *Emperor v. Doraiswami Mudali* (2), in which a Bench of this Court took a different view from that of the Bombay High Court in *Shankar Tulsi Ram v. Kundlik Anyaba* (1). S. 531, Criminal P. C., is strictly applicable to the facts of these cases. The only defect in the jurisdiction of the Vellore Subdivisional Magistrate, which is alleged, is a want of territorial jurisdiction. S. 531, Criminal P. C., says that no finding of a criminal Court shall be set aside merely because the trial was held in a wrong area. It follows that the judgments of acquittal passed by the Subdivisional Magistrate, Vellore, could not have been set aside on the ground of want of territorial jurisdiction, even by this Court (since there is no suggestion that any failure of justice has occurred by reason of the trial having been held in Vellore rather than in Madras). A fortiori it follows that those judgments cannot be ignored by the Presidency Magistrates of Madras who are not tribunals superior to the Subdivisional Magistrate, Vellore.

We therefore hold that the complaints to the learned Chief Presidency Magistrate in those cases were barred by S. 403, Criminal P. C. We set aside his order directing the 3rd Presidency Magistrate to dispose of them according to law, and we restore his order of 17th

1. *A I R* 1928 *Bom* 530=113 *IC* 76=53 *Bom* 69.
2. (1907) 30 *Mad* 94=4 *Cr L J* 500.

December 1931 dismissing both complaints.

P.R.S./K.S. *Order accordingly.*

A. I. R. 1933 Madras 767

SUNDARAM CHETTY AND WALSH, JJ.

A. T. Krishnamachari—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 142 of 1933 and Criminal Revn. Petn. No. 135 of 1933, Decided on 1st August 1933, from order of Sess. Judge, Bellary, D/. 30th January 1933

(a) Criminal P. C. (1898), S. 476 (b)—Complaint under S. 476—S. 476 is not exhaustive as to powers of appellate Court.

Section 476 (b) is not exhaustive as to the powers of the appellate Court in the case of a complaint made under S. 476. It has power of remand and also of summary dismissal in such cases: *Cr R C No. 1331 of 1930, Rel on.*

[P 767 C 2]

(b) Criminal P. C. (1898), Ss. 164 and 476—Statement by person made under S. 164 to one Magistrate found to be false—Trial of case by another Court in which different version is given by same person—Complaint by latter Court is proper in respect of false statement made to Magistrate.

A statement under S. 164 is one made in relation to a case which is subsequently tried on that matter, even though the Court which tried the case did not record the statement. Hence it is competent to the latter Court, on an application under S. 476 to make a complaint against the person in respect of a statement made by him to a Magistrate under S. 164: *AIR 1933 Mad 125 and Mad Cr R C No. 52 of 1932, Rel on.*

[P 768 C 1]

K. S. Jayarama Ayyar for *T. V. Venkatachariar*—for Petitioner.

A. Narasimha Iyer for *Public Prosecutor*—for the Crown.

Walsh, J.—This is a revision petition preferred against the order of the Sessions Judge of Bellary in Cr. M. A. No. 4 of 1933 refusing to direct the withdrawal of a complaint preferred by the Subdivisional Magistrate of Bellary against the petitioner. The facts which led to the complaint are briefly these: The petitioner was thrown out of a motor car on the night of 28th May 1932 and very severely injured. Another occupant of the car, Vakil Gundachari, was also injured and he never recovered consciousness and died. On the morning of the 29th the Sub-Magistrate of Bellary recorded a statement under S. 164 from the petitioner (Ex. K) wherein he stated that the driver of the car was Sandur Raja's driver, i. e., P. W. 5, and that the cause

of the accident was the collision of the car with a motor lorry. The inquiry by the police showed that the car was not driven by P. W. 5 but by one Chidambara Rao. This Chidambara Rao was afterwards tried and convicted. In his deposition before the Court the petitioner supported the police theory that Chidambara Rao had driven the car and that the accident was caused by the car being driven at an excessive rate which brought it on a gravel heap and caused it to upset. The accused then applied to the Subdivisional Magistrate under S. 476 to make a complaint against the petitioner for his false statement in Ex. K. A complaint was made and an appeal against it was dismissed. We are now asked to interfere in revision on two legal grounds and also on the merits of the case. The first legal ground which was taken at the time the petition was admitted was that the Sessions Judge had no power to dismiss the appeal summarily. This ground is not now pressed. The decision in Cr. R. C. No. 1331 of 1930 shows that the contention that S. 476 (b) is exhaustive as to the powers of the appellate Court in the case of a complaint made under S. 476 is incorrect, and that the appellate Court has power of remand and also of summary dismissal in such cases.

The second argument is that the statement Ex. K being one made under S. 164 to the Sub-Magistrate before the death of the pleader mentioned above, which death led to the accused being ultimately charged under S. 304-A, the offence of giving false evidence cannot be said to have been committed in or in relation to the proceedings before the Subdivisional Magistrate. The authority chiefly relied on is *Rami Reddi v. Public Prosecutor of Kurnool* (1), but it has to be noticed that this decision was under the old Code in which the words were "committed before it or brought to its notice in the course of a judicial proceeding." The meaning therefore of the words "in or in relation to a proceeding in that Court" was not and could not be considered in that case. Another point to be noticed is that the ground of the decision in that case was that the Sub-Magistrate was not subordinate to the Sessions Judge. We do not therefore

1. *AIR 1915 Mad 508=25 I C 524=15 Cr L J 612.*

think that the ruling can be applied to the present petition. Another case quoted as analogous is the Full Bench decision in *Registrar, High Court v. Kodangi* (2). There a certain man had sent a telegram to the police implicating four persons for a certain murder. The police charged only one of these persons on the ground that the charge against the others was deliberately false. The other persons were not brought to trial. The person who was brought to trial was convicted and the conviction confirmed on appeal. In disposing of the appeal in that case, Sir Owen Beasley, C. J., and one of us referred to a Full Bench the question as to whether a complaint against the informant to the police could be made under S. 476 with reference to his false complaint against the persons not tried.

The Full Bench held that the offence implicating the persons who were not tried could not be said to have been committed in relation to a proceeding of the Court which tried the case so as to enable it to lay a complaint under S. 476. We think this case is clearly distinguishable because the guilt or otherwise of the three accused who were not charged was not a matter before the Court and therefore the statement as to their guilt could not be held to be one in relation to the matter before the Court. No doubt in this case also P. W. 5 was not an accused before the Court, but from the very nature of the case it followed that if Chidambara Rao was guilty, P. W. 5, was not, and that the implication of him by the petitioner in Ex. K was false.

There is a recent decision of Burn, J., in *Maroma v. Emperor* (3), and also the decision of a Bench in *Ponnu-swami, In re* (4), in which it has been held that a statement under S. 164 is one made in relation to a case which is subsequently tried on that matter even though the Court which tried the case did not record the statement. We may note that the facts in *Ponnu-swami, In re* (4) are practically identical with those of the present case, and we are not prepared to dissent from the view taken in

2. AIR 1932 Mad 363=1932 Cr C 29=137 I C 312=33 Cr L J 479=55 Mad 611.

3. AIR 1933 Mad 125=1933 Cr C 157=140 I C 756=34 Cr L J 92.

4. Cr R C No. 52 of 1932, decided on 23th July 1932.

these cases, at any rate in a case like the present.

On the question of law one other point was urged before us, viz., that the appellate Court made an error in saying that the Sub-Magistrate made a note before recording the statement that the Sub-Assistant Surgeon had certified that the deponent was conscious. The person who made the note was the Sub-Inspector of Police. This is a trifling matter and the mistake could not have seriously influenced the Sessions Judge in his decision in dealing with the appeal. On the merits we consider that the Sessions Judge is correct in his view that the question whether the appellant was at the time of Ex. K still suffering from the mental shock of the accident and the effects of morphia which was given to him after the accident, and so should not be held responsible for what he then said is a matter for the Magistrate to decide at the trial of the case. It cannot even be said that we have before us on record anything like all the evidence which will or should be available to the trying Court to decide the matter. We think it would be premature to decide the question of fact in revision at this stage. On the finding on that question of fact largely depends the question whether it is in the public interest that an inquiry should be made. But *prima facie* Ex. K is a false statement and we are not prepared to say that an inquiry into such a *prima facie* false statement is not in the interest of public justice. In the result the petition fails and dismissed.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 768

CURGENVEN, J.

Karuppiah Pillai—Defendant—Petitioner.

v.

Ponnuchami Pillai—Plaintiff—Opposite Party.

Civil Revn. Petn. No. 654 of 1930, Decided on 4th August 1933, from decree of Sub-Judge, Sivaganga, D/- 2nd December 1929.

Madras Hereditary Village Offices Act (3 of 1895), S. 10—Outgoing karnam recommending person to act till minor heir attains majority on agreement by such person to pay pecuniary consideration—Agreement is

opposed to public policy and cannot be enforced—Contract Act (1872), S. 23.

An outgoing karnam recommended another to act in his place till the minor heir attained majority, after entering into an agreement with such person for a pecuniary consideration to be paid every month as long as he held the post :

Held : that the agreement was opposed to public policy and could not be enforced : 8 I C 745 and 33 Mad 530, *Ref.* [P 769 C 2]

G. Rajagopalan—for Petitioner.

C. S. Venkatachari — for Opposite Party.

Judgment.—The plaintiff held the office of Karnam and when he was granted leave the defendant was appointed to act for him. The plaintiff subsequently resigned his post in favour of his minor son, and upon his recommendation the defendant was appointed Karnam-gumasta during the minority. As consideration for making that recommendation, the plaintiff obtained from the defendant an agreement for the payment of a sum of Rs. 3 per mensem during the period 1st May 1926 to 24th June 1929. The Small Cause suit out of which this petition arises was to enforce that agreement, and the defence was set up that the consideration was unlawful, being opposed to public policy.

The learned Subordinate Judge has decreed the claim, disallowing the objection on the ground that the arrangement only amounted to a division of the emoluments between the Deputy and the Mirasiholder, i. e., the minor son. This argument does not convince me of the lawful nature of the agreement. The appointment of the defendant as Karnam was made under Sub-S. (5), S. 10, Madras Hereditary Village Offices Act (3 of 1895), which requires that :

“the Collector shall register the minor as the heir of the last holder and appoint some other person qualified under sub-S. (1) to discharge the duties of the office,”

until the minor attains his majority. The appointment is to a public office; it is made by the Collector, and if the Collector takes into consideration the recommendation or wishes of the outgoing incumbent, whether as such or as guardian of the minor—which under the Act he does not appear bound to do—it must only be upon the understanding that the advice is given in the interests of the office, i. e., of the public, and not for the personal profit of the adviser. I can see no essential difference between a case of this kind and any other case in which a recommendation is made to

an appointing authority, and it hardly bears discussion that the receipt of a pecuniary consideration for making such a recommendation is opposed to public policy.

My attention has been drawn to a somewhat similar case, *Nizam Mohaddin v. Mahammed Vufa Sahib* (1), decided by Saakaran Nair, J., relating to a Khatib, who is a Mahomedan priest officiating on certain occasions in a mosque. The mother of the minor nominated the defendant, and in consideration of such nomination, which was accepted by Government, the defendant executed the suit agreement. The judgment runs as follows :

“I do not think that the enforcement of this agreement is against the public policy. The defendant is really a deputy acting for the khatib, and not the khatib himself. The petition is dismissed with costs.”

It may be that the appointment of khatib in that case was not strictly comparable with the appointment of the defendant as Karnam, though the arrangement would seem to savour somewhat strongly of simony. The case in *Saminatha Aiyar v. Muthusami Pillai* (2), is of more assistance. It related to the succession to a Karnam's office, and Subramania Ayyar, J., said :

“It is clear to my mind that the money was promised in consideration of the permanent Karnam doing what lay in his power to secure the appointment permanently to the defendant. If this view is correct the agreement, unquestionably, was unlawful as shown by Illus. (f), S. 23, Contract Act.”

So here, I am clear that the agreement was unlawful for the same reason, and ought not to have been enforced. As the principle involved is a serious one I allow the petition, set aside the decree of the lower Court and dismiss the suit, with costs in both Courts.

Note.—Since the above judgment was written, the respondent's learned advocate has brought to my notice some provisions of Standing Order No. 148 of the Board of Revenue. Para. 9 runs as follows :

“Minor's family to be consulted. In selecting the deputy, regard should be had to the wishes of the minor's near relatives, and some one acceptable to them should be appointed if possible; but if the person selected by the minor's family is not qualified or is otherwise unsuitable, another may be appointed. A deputy once appointed should not be dismissed merely because the minor's family expresses a preference for some one else.”

1. (1911) 8 I C 745.

2. (1907) 30 Mad 530=17 M L J 252.

Paragraph 11, states that :

"Neither the minor nor his family has any claim on the deputy for maintenance."

I do not think that these instructions make an agreement such as is now in question any the more lawful. The acceptability of the deputy should depend only upon his personal qualities, and not upon his willingness to make a payment to the minor's family. I have no doubt that if the Collector had been aware of the agreement he would have taken exception to it and, at the least, made the petitioner's appointment contingent upon its cancellation.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 770

WALSH, J.

(*Thodukattil*) *Pativattath Katungi* — Plaintiff—Appellant.

v.

(*Mele Thodiyil Thazhathethel*) *Ittiraricha Nedungadi* and others - Defendants—Respondents.

Second Appeal No. 205 of 1929, Decided on 15th March 1933, against decree of Sub Judge, South Malabar, D/- 9th August 1928.

Civil P. C. (1908), S. 11—Decree wholly in favour of party—No issue decided against such party is res judicata in subsequent suit.

If a decree is wholly in favour of the defendant, no issue decided against him can operate as res judicata so as to bind him in a subsequent suit, for he cannot appeal from a finding on any such issue. Conversely, if a plaintiff's suit is decreed in its entirety, no issue decided against him can be res judicata in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour: *Case law discussed.* [P771 C 1]

S. Venkatachala Sastri — for Appellant.

K. P. Rama Krishna Ayyar—for Respondents.

Judgment — The plaintiff is the appellant in this second appeal. He filed a suit on a registered rental agreement executed by the defendants in favour of himself and of a deceased Karnavan. The defence put forward by defendant 1 was that the property belongs to the temple of which the plaintiff is one of the Uralans and unless all the Uralans are joined in the suit he is not liable to pay rent. The plaintiff had filed a previous suit, O. S. 683 of 1920, on the same rental agreement against the same defendants for a different period. This suit had been decreed in the plaintiff's

favour in spite of pleas of coercion and misrepresentation. Together with that suit was tried O. S. 338 of 1921 filed by the present defendants against the present plaintiff for a declaration that the plaintiff was not the only trustee but that there were two other persons also. In the common judgment the plaintiff was given a decree in his own right to recover the amount although the Court found on the issue that two other persons were also trustees of the temple. O. S. 338 was dismissed holding that plaintiffs were not entitled to any relief. Among the issues raised in the present suit, issue 6 is:

"Is defendant 1's plea barred by the rule of res judicata on account of the decree in O. S. 683 of 1920 of this Court?"

issue 7 is:

"Is defendant 1 estopped from raising the plea that the plaintiff has not the right to maintain this suit?"

and issue 9 is:

"Is the suit in its present form barred by the decision in O. S. 683 of 1920 of this Court as defendant 1 contends?"

On issue 7 the trial Court found that defendant 1's plea was not barred by res judicata; on issue 9, that the plaintiff's suit in its present form was barred by the decision in O. S. 683 of 1920; and on issue 6, that defendant 1 was not estopped from raising the plea that the plaintiff has not the right to maintain the suit. The suit was therefore dismissed and on appeal the dismissal was upheld. On issue 6 there is no specific finding by the lower appellate Court. The second appeal is preferred by the plaintiff on two grounds: (1) that the defendants are estopped from questioning the landholder's title until the yestore possession to him and (2) that the plaintiff's suit is not barred by res judicata but on the other hand, the defence is barred by res judicata. For the respondents it is argued that the finding in O. S. 683 of 1920 that there are two other Uralans is res judicata. I am of opinion that both the lower Courts are wrong on the matter of res judicata. The plaintiff's suit, O. S. 683 of 1920, was decreed in full. There was therefore nothing in the decree against which plaintiff could have appealed. The latest decision of this Court quoted is *Kumaraappa Chetti v. Muthurajaya Raghunathan* (1) decided by Venkatasubba

1. A I R 1932 Mad 207=137 I C 616=65 Mad 483.

Rao, J., and myself. Venkatasubba Rao, J., says in that judgment:

"The decree, far from being based on the finding as to ownership of the money, was made in 'spite of it.' In such a case no issue decided against the plaintiff can be res judicata. The law on the point may be thus stated: if the decree is wholly in favour of the defendant, no issue decided against him can operate as res judicata so as to bind him in a subsequent suit for he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's suit is decreed in its entirety no issue decided against him can be res judicata, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour: see Mulla's Civil Procedure Code, Commentaries on S. 11."

The first part of this rule is illustrated by *Run Bahadur Singh v. Lucho Koer* (2). The suit was brought by a Hindu against the widow of his deceased brother claiming his property by right of survivorship. The suit was dismissed upon a technical ground, but it was nevertheless found as a question of fact that the brothers were joint in estate. In this case, the widow wholly succeeded, although the finding was against her. The Judicial Committee held that the finding did not constitute res judicata against the widow. *Midnapore Zamindari Co. Ltd. v. Nares Narayan Roy* (3) recognises the same principle. In a suit against certain tenants, they pleaded (1) occupancy right, and (2) that the suit was premature. The High Court dismissed the suit on the ground that the suit was premature but gave a finding that the tenants had no occupancy right. Their Lordships held that their finding on the question of occupancy rights did not operate as res judicata against the tenants as the decree was wholly in their favour and they could not have appealed from that finding. "The second part of the rule" (it is with this we are concerned in the present case), is illustrated by (*Rango v. Mudiyeppa* (4). A alleging that he was the adopted son of X sued B to recover certain property granted to him by X under a deed. The Court found that A was not the adopted son of X, but that he was nevertheless entitled to the property under the deed and a decree was passed for A. A's suit was thus decreed in its entirety in spite of the finding against him on the question of

adoption. It was held that the finding did not operate as res judicata in a subsequent suit between A and B; for the decree having been in favour of A, A could not have appealed from the finding that was adverse to him.

Certain cases have been relied on by the learned advocate for the respondents. Some of them may be eliminated at once. *Obla Subbier v. Ramaswami Konar* (5) is a decision by a single Judge. There Jackson, J., held that the matter was not res judicata and his remarks as to what constitute res judicata are therefore obiter. Then there is a class of cases of which *Muthu Pillai v. Veda Vysa Chariar* (6) is an example where the party who had apparently no ground of appeal did actually appeal. It was held that the decision in such an appeal was res judicata. With such cases we are not concerned here. Then there is a class of cases where the defendant had a right of appeal as there was something in the decree against him: *Mota Holiappa v. Vithal Gopal Habbu* (7). Then there is another class of cases of which *Yusuf Sahib v. Durgi* (8) is an example. Where the defendant might have had himself impleaded as a plaintiff, in which case he would have had an appeal, a finding against him was held to be res judicata. The correctness of *Yusuf Sahib v. Durgi* (8) is doubted in a case which is otherwise strongly in favour of the respondents themselves, viz. *Muthaya Shetti v. Kanthappa Shetty* (9). It is not necessary to discuss the decisions of other Courts. As remarked in *Rama Krishna Naidu v. Krishnaswami Naidu* (10) at p. 650 (of 36 M. L. J.) (which is one of the cases strongly relied on by the learned advocate for the respondent),

"there are several Calcutta cases in which it is broadly laid down that no finding against the defendant is res judicata against him where the suit is finally dismissed unless that finding is incorporated in the decree as a declaration of rights and liabilities."

The learned Judge in *Rama Krishna Naidu v. Krishnaswami Naidu* (10) did not think it necessary to consider all

5. A I R 1927 Mad 643=103 I C 90.

6. A I R 1920 Mad 622=60 I C 397.

7. (1916) 40 Bom 662=36 I C 74.

8. (1907) 30 Mad 447=17 M L J 260.

9. A I R 1919 Mad 1097=45 I C 975.

10. A I R 1920 Mad 871=52 I C 34=36 M L J 641.

2. (1885) 11 Cal 301=12 I A 23=4 Sar 602 (P C).

3. A I R 1922 P C 241=64 I C 231=48 I A 49=48 Cal 450 (P C).

4. (1899) 23 Bom 296.

the Calcutta cases. Nor those of Bombay and Allahabad holding similar views and expressed his dissent from a number of such cases. He alludes to the Full Bench Calcutta decision in *Niamut Khan v. Phadu Buldeo* (11) and says it cannot be reconciled with the previous decisions of that Court. He points out that in subsequent cases that decision was held to have been overruled by the observations of the Privy Council in *Khater Mistri v. Sadruddi Khan* (12) and he himself thinks that it is a wrong view. The two decisions which are strongly relied on by the respondents are *Muthaya Shetti v. Kanthappa Shetti* (9) and *Rama Krishna Naidu v. Krishnaswami Naidu* (10). Both of these were decisions prior to the Privy Council decision in *Midnapore Zamindari Co., Ltd. v. Naresh Narayan Roy* (3) which Venkatasubba Rao, J., and myself followed in *Kumarappa Chetti v. Muthuvijaya Raghunatha* (1). For this reason they must be considered to have lost some of their authority. But even assuming that they are correct neither of them covers the present case.

In *Muthaya Shetti v. Kanthappa Shetti* (9) there was a suit for partition by a member of a family. The mortgagee was made a party. The plaintiff claimed the right to redeem his share on payment of his share of the mortgage amount. The mortgagee contended that the alienation in his favour was an absolute sale and not a mortgage. It was found that the alienation was a mortgage and not a sale but the suit was dismissed against the mortgagee on the ground that there could be no suit for redemption of a share in the mortgaged property. Subsequently, a suit for redemption was brought and the alienee again contended that the alienation was a sale and not a mortgage. It was held that the question whether the transaction was a sale or mortgage was res judicata by reason of the decision in the previous partition suit. At p. 485 four classes of cases are mentioned. The first are cases where there has been a decision on issues which are altogether unnecessary for the disposal of the case. There it is held that the decision is not res judicata. And it is said that *Rajah*

Ran Bahadur Singh v. Mt. Lachoo Koer (13) quoted above in Venkatasubba Rao, J.'s judgment in *Kumarappa v. Muthuvijaya Raghunatha* (1) belongs to this class of cases. It is the contention of the respondents that the decree which the plaintiff got in O. S. No. 683/20 was not based on the finding that there were two other Uralans, but was passed in spite of it. Therefore on the respondent's own showing *Muthaya Shetti v. Kanthappa Shetti* (9) is completely against them on this point. It is argued for the appellant that the learned Subordinate Judge is completely wrong when he says:

"But rightly or wrongly the lower Court passed a decree in favour of the plaintiff and there can be no doubt whatever that the decree was passed in his favour as one of the three Uralans of the plaintiff-mentioned temple. That is perfectly clear from para. 7 of the judgment in O. S. No. 683 of 1920."

I entirely agree with the contention. So far from its being perfectly clear that the decree has been passed in plaintiff's favour as one of the three Uralans it is unquestionably passed in the plaintiff's sole favour. In fact it is argued for the respondents before me that the Court took a wrong view of the law in passing it in his sole favour in the light of its finding that there were two other Uralans. The next class is where although the decision of an issue is unnecessary for the disposal of the case, still for some reason the Court embodies that decision in the decree itself. The present is not such a case. The third class relates to judgments which decide more than one issue but it is doubtful from those judgments on which of these issues the final conclusion was based. This also does not apply to the present case. In the fourth class, the decision upon the issue is necessary, but unfortunately the party against whom that decision is given could not appeal against it as the final decree is in his favour. In such a case, the learned Judge in *Muthaya Shetti v. Kanthappa Shetti* (9) says: "It seems to me that the decision on the issue would be res judicata." He goes on to say:

"The proper procedure where the defendant is affected by a decision on an issue which he has not the opportunity of contesting in appeal may be as suggested by Potheram, C. J., in *Jamaitunnissa v. Lulfunnissa* (14), that is to say, he

(11) (1831) 6 Cal 319 = 7 C L R 227 (F B).

(12) (1907) 34 Cal 922.

(13) (1885) 11 Cal 301 = 12 I A 23 = 4 Sar 602 (P C).

(14) (1885) 7 All 606 (F B).

can ask the Court which has given adverse decision on a material issue to embody it in the decree so that he may have a right of appeal against such a decision. But if he neglects the opportunity and the decision itself is necessary for the disposal of the case, there seems to be no escape from the bar of res judicata."

As I said above, these remarks are prior to the decision in *Midnapore Zamindari Co., Ltd. v. Naresk Narayan Roy* (3) and in any case it seems to me to be a totally different thing to say that the defendant can move to have an adverse finding inserted by amendment in a decree dismissing the suit against him in order that he may appeal against what might otherwise be res judicata, and to say that a plaintiff who has got a decree entirely in his favour should ask for it to be amended in such a manner as to prevent him from executing it merely to enable him to get this amendment set aside by preferring an appeal against the decree as amended. In the former case, if the defendant having got the decree amended succeeds in his appeal against the amended decree, he is better off than before, and if he loses he is in no worse position (if the principle of res judicata contended for is really correct). But to ask the plaintiff, who has got a decree entirely in his favour, to have it amended so that it will not be in his favour for no better object than that he may get this amendment set aside on appeal appears to me to be on its face absurd. If he fails on appeal he is in a far worse position than he was under the original decree. No case supporting such a view has been quoted. I now come to *Rama Krishna Naidu v. Krishnaswami Naidu* (10). Here again on the argument of the respondents themselves the decision is really against them. It was there held that where on a consideration of the whole evidence the Court decides certain issues against the defendant but dismisses the suit on another ground, the decision on those issues operates as res judicata in a subsequent suit between the same parties unless it is shown that the findings in the previous suit are wholly inconsistent with the decree or other findings therein. As I said above, it is the respondent's case that the decree in O. S. 633 of 1920 is entirely inconsistent with the finding that there are two other Uralans. Therefore, even if the decision in *Rama Krishna Naidu*

v. Krishnaswami Naidu (10) is followed it will not help the respondents.

One more case quoted by the learned Subordinate Judge may be noticed, *Venkateswarlu v. Lingayya* (15). In the first place it is a decision by a single Judge, Kumaraswami Sastri, J. (afterwards Sir Kumaraswami Sastri). The plaintiff who was the lessee of the suit lands from defendant 1 sued for the establishment of his title and for a declaration that the sale to defendant 2 by defendant 1's father was inoperative as they had become divided long prior to the insolvency of the father and the suit lands had fallen to the son's share. The suit was dismissed by both the lower Courts holding against the partition. On a second appeal being preferred by defendant 1 it was held that defendant 1 was competent to prefer the second appeal. The learned Judge there says:

"Where the point adversely decided to the defendant is directly and substantially in issue, and where in other proceedings the matter would be res judicata, I think it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground."

This is apparently a case like *Yusuf Sahib v. Durgi* (8) where defendant 1 could very well have asked to be impleaded as a plaintiff, his interest being identical with that of the plaintiff. If he had done so, he would have had an appeal against the decree dismissing the suit. That distinguishes it from the present case. Again the learned Judge says:

"In the present case it is clear that the question as to whether defendant 1 was divided or not from his father long before the insolvency of the father would be res judicata in subsequent proceedings between the Official Receiver and his assignee and defendant 1."

That is, the matter would be res judicata as between co-defendants. Now, it is perfectly clear that the decision that there are two other Uralans of the temple besides the plaintiff would not be binding on these two Uralans who are not parties to the suit, and I think the plaintiff was perfectly right in refusing to add them as parties in the present suit. The contention put forward being that the matter of there being two other Uralans besides himself was already res judicata by reason of the

decision in O. S. 683 of 1920 he could not on the defendants' case agitate this question again by bringing them on record. The sole result of bringing them on record would have been to admit the claim of the defendants which he was denying, viz. that there were two other Uralans of the temple and the plaintiff could not possibly be expected to stultify his own case in this fashion. It is obvious therefore that in this respect also the present case differs entirely from the case in *Venkateswarlu v. Lingayya* (15). Again the learned Judge in that case was largely influenced by the assumption that the matter would be res judicata in subsequent proceedings between the Official Receiver and his assignee and defendant 1. And so as regards the question whether defendant 1 was divided from his father long before the insolvency of the father, he thought that defendant 1 must be allowed to agitate the matter in appeal in spite of the fact that the suit has been dismissed. But if the correct law be, where the suit has been entirely dismissed nothing decided against the defendant is res judicata, the difficulty of not allowing him to appeal disappears.

In the result, I hold that the finding in O. S. No. 683 of 1920, that there were two other Uralans, is not res judicata in the present suit; on the other hand, I find that the defence of the respondents that they are not bound to pay rent to the plaintiff is barred by res judicata by reason of the decision in that suit. In the circumstances it is not necessary to discuss at length the question of estoppel arising under S. 116, Evidence Act. The learned District Munsif decides this in the defendants' favour by first finding that the existence of two other Uralans is res judicata and then stating that under the decision in *Chandu v. Kuttigil* (16), all the Uralans of the trust should be impleaded in the suit and that there can be no estoppel on a matter of law. If however as I hold, the fact that there are two other Uralans is not res judicata, then clearly the defendants are estopped under S. 116, Evidence Act, from denying the plaintiff's their lessors' title to the property until they surrender the land. In the result the appeal is allowed. The effect of holding that the decision in 16 A I R 1922 Mad 2=66 I C 396.

O. S. 683 of 1920 is not res judicata is to decide issues 2, 4, 6, 7 and 9 in the plaintiff's favour. The suit will be remanded for decision on the issues left untried, viz. issues 1, 3, 5 and 8. The costs will abide the result of the suit.
P.R.S./K.S. *Appeal allowed.*

* A. I. R. 1933 Madras 774

RAMESAM AND CORNISH, JJ.

Kandaswami Goundan and others—
Plaintiffs—Appellants.

v.

Venkatarama Goundan and others—
Defendants—Respondents.

Appeal No. 303 of 1926, Decided on 23rd March 1933, against decree of Sub-Judge, Chittoor.

(a) **Hindu Law—Partition—Partial partition—Suit for partial partition is maintainable as between members of joint family and alienee from member or members.**

Even though as between members of a joint Hindu family no suit for partial partition lies, such a suit is maintainable as between members of a joint Hindu family and alienee from a member or members. And where the alienee files such a suit, it is not necessary that he should be the second alienee from a member of the family: *Case law reviewed.* [P 777 C 1]

(b) **Hindu Law—Partition—Partial partition—Division in status effected among members of joint family—As between two alienees from members, suit for partial partition is competent.**

Where there is a division in status among the members of a joint Hindu family, though there ought to be as between members of the family only one suit for partition in respect of all items of property, still as between two alienees from members of the family a suit for partial partition is competent in respect of those items over which the contending parties are tenants in common: *A I R 1922 Mad 150 (FB), Ref.* [P 778 C 1]

Advocate-General and B. Somayya—
for Appellants.

*T. Kumaraswamiah and C. Padmanabha Ayyangar—*for Respondents.

Ramesam, J.—The facts out of which this appeal arises may be briefly stated: Defendants 1, 2 and 3 are brothers. Defendants 4 to 7 are the sons of one or other of these three brothers and their rights follow that of their fathers, and it is unnecessary to make any further reference to them. The father of defendants 1 to 3 died in May 1912. It is defendant 1's case that soon after, the brothers entered into an agreement to refer the disputes relating to their family properties to certain arbitrators. The arbitrators passed an award dated 30th November 1912, Ex. 1. Defendants 2 and 3 would not recognise the validity

of this award or submit to it on the ground that two of the arbitrators did not act. Defendant 1 thereupon filed an award in Court seeking to make it a rule of Court. This petition was filed as O. S. No. 112 of 1913 on the file of the Court of the District Munsif of Tirupattur. The plaint is Ex. O. The District Munsif dismissed the plaintiff's suit or, in other words, refused to make the award a rule of Court: vide Ex. O (1), dated 29th January 1914. Thereupon defendants 2 and 3 executed a sale deed of their two-thirds share of the family lands in Alasandapuram to the present plaintiff under Ex. A dated 27th November 1915.

In this sale deed they alleged that certain specific shares of the lands fell to their share, namely the southern and western two-thirds, conceding the remaining one-third to defendant 1. The consideration for this sale deed is that the plaintiff should discharge the whole of the debt due on a mortgage deed executed by the father of defendants 1 to 3. Thereupon the plaintiff offered the mortgage amount to the mortgagee, but the mortgagee refused to take it and he filed a suit on the mortgage deed to recover the mortgage amount by sale of the property. That suit was O. S. No. 579 of 1915 on the file of the District Munsif's Court of Tirupattur. Ex. B dated 8th December 1915 is the plaint. The present plaintiff by reason of his purchase under Ex. A was made defendant 8 in that case, defendants 1 to 7 in that case being the same as defendants 1 to 7 in this suit. Ultimately defendant 8 in that suit, the present plaintiff, paid off the mortgage amount. The present suit was filed by the plaintiff to recover the specific two-thirds of the Alasandapuram lands sold to him under Ex. A, but in the plaint he also prayed that in case the Court should find that there is no partition allotting the specific two-thirds to defendants 2 and 3, a general partition may be effected and two-thirds share of the suit lands be allotted to him. Meanwhile on 11th December 1916 defendant 1 sold the whole of the family lands in Alasandapuram to defendant 8 by a sale deed, Ex. 6, on the footing that all the lands belonged to him. By reason of this sale deed the purchaser under Ex. 6 is made defendant 8 in this case. It is now necessary to notice the pleas

of the various defendants. Defendant 1 pleaded that though the award was not filed by the Court it was "acted upon" by the parties. He adds:

"This defendant continued to enjoy the Alasandapuram properties in pursuance of the award and defendants 2 and 3 have been in possession of the properties attached to them in the award. That on account of misunderstandings defendants 2 and 3 raised objections to the award, but they never disturbed this defendant's possession."

This plea really amounts to this: it is true that defendants 2 and 3 originally objected to the award and did not recognise its validity, but they afterwards accepted it. Or if this interpretation is not possible it can only mean this: that as a matter of fact defendants 2 and 3 never disturbed defendant 1's possession of the Alasandapuram lands. There is no plea in para. 3 of the written statement that, apart from the refusal of the Court to file it, the award as a matter of fact is binding upon the parties and remains valid. Defendants 2 and 3 pleaded in para. 2 that the plaintiff sale deed was executed in order to compel defendant 1, their brother, to consent to give a share to these defendants in Alasandapuram village. They raised a similar plea in their written statement in O. S. No. 579 of 1915 showing that throughout they never accepted the right of defendant 1 wholly to the Alasandapuram lands.

Defendant 8 also pleaded in para. 10 of his written statement that the award was "acted upon" by the parties, and defendants 1 to 3 continued to be in possession of the properties as per terms of the award. Issue 1 in the case is whether a subsisting title was created in any and if so in what portion of the suit items by the conveyance, dated 27th November 1915, and whether the purchase money for the aforesaid sale moved from plaintiff. We do not see the particular significance of the word "subsisting" in this issue. The Subordinate Judge has not found that there was any fresh arrangement between the parties by which they agreed to accept the allotments made under the award in spite of the refusal of the Court to file it. There is a good deal of evidence on record to show that there could not be any such thing. Up to January 1915 we see that defendants 2 and 3 were resisting it. Afterwards they executed the sale deed, Ex. A, in November 1915 and they make no secret of their purpose in executing

the sale deed both in the written statement in O. S. No. 579 of 1915 and here. All this shows that there is no consensus between the brothers and the statement "acted upon" is merely an idle statement. It may be that defendant 1 managed to continue in possession of the whole of the Alasandapuram lands and was paying kist.

But this is an irrelevant circumstance. The plaintiff was as a matter of fact suing some of the tenants of the lands and getting decrees for his share of rent. That circumstance would not help him if as a matter of fact there was an arrangement prior to the plaintiff's sale deed by which the suit lands were wholly allotted to defendant 1. However there is no such evidence. The Subordinate Judge dismissed the suit on a reasoning which strikes us as very curious and which the learned advocate for the respondents expressly stated before us that he is unable to support. He says that it is the common case between the parties that they were divided in status; the dispute is only as to the details of the division. That is true. He also found that the specific division pleaded by the plaintiff is not true, and his finding is not questioned before us by the learned advocate for the appellant. Then he says at the end of para. 15:

"If it is not that they are divided on the lines of the award it may be asked what else there is to show in what manner the division has taken place."

In our opinion this sentence shows entirely a fallacious reasoning. It may be that the particular division set up by the plaintiff was found to be false by the Subordinate Judge and it is also true that the plaintiff-appellant does not argue in favour of that case before us. But it does not follow from that that the arrangement in the terms of the award is the only possible arrangement. It may be that there was really no arrangement between the parties, in which case the plaintiff is entitled to a partition and allotment of the two-thirds share of the suit lands and defendant 1 is entitled to one-third share. The Subordinate Judge's question "what else there is to show in what manner the division has taken place" is beside the point. What is necessary for the defendants to show before they can get the plaintiff's suit dismissed is that there was a division in some other manner. If any such

division is not forthcoming, the only conclusion is that there is no binding division between the parties. The Subordinate Judge is unable to see the possibility of this third alternative. We can only express our surprise that he is not able to see this alternative.

In para. 18 he says:

"My finding accordingly on issue 1 is there was no title created in plaintiff by the execution of Ex. A for the reason that in all probability the property did not belong to defendants 2 and 3 on its date."

The Subordinate Judge is simply speculating here. He does not refer to a single item of evidence which would show that the title of defendants 2 and 3 to two-thirds of the suit property, which prima facie they have got as members of the joint family has been lost. The award not having been recognized by the Court in 1914, and it not being pleaded in the case that the award is nevertheless binding on the parties and no other arrangement being found by the Court, the title of defendants 2 and 3 to an undivided two-thirds share has not been displaced though their title to a specific two-thirds is not established. In the face of such facts it surprises us to see the learned Subordinate Judge states that the properties did not belong to defendants 2 and 3 on the date of the sale deed. He does not make any reference to the documentary evidence between 1914 and 1916 which shows that defendants 2 and 3 continued their original adverse attitude towards their brother. It may be that in this case the brothers have combined for the purpose of defeating the plaintiff, a feature which is not uncommon in suits concerning properties of joint families. However the result is that we find that the plaintiff has not succeeded in showing his title to the specific portions of the suit lands but his title to an undivided two-thirds share in the suit lands remain.

The real contending defendant is not defendant 1 but defendant 8, a purchaser from him. In these circumstances the question arises, because it has been argued by the learned advocate for the respondent, whether the suit merely for a share of the Alasandapuram lands is maintainable. In view of the fact that the plaintiff has claimed an alternative relief for a general partition, the question is academic apart from the question

of proper court-fees payable by the plaintiff. But the point has been argued and we are of opinion that the suit for partition of merely Alasandapuram lands apart from a general partition is sustainable. We proceed to give reasons for this conclusion. Mr. Padmanabha Ayyangar contended that the suit for a share of the Alasandapuram lands is not maintainable because it is a suit for partial partition. Now cases establish two or three well-recognized principles. Firstly, as between members of a joint family no suit for partial partition lies. Secondly, a member or members of a joint family may sue an alienee from a member or members of the joint family for his or their share of the property alienated without suing for a general partition. In so doing they affirm the sale by the other member or members but the real basis of the rule is that as the rule against partial partition is a rule for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members, they can waive the benefit of it, and they can bring a suit to separate themselves from the undesirable stranger.

The remarks in *Iburaṃsa Rowthan v. Thiruvenkatasami Naick* (1), show that the rule is recognized on the ground that it has been acted upon in a series of cases, and it is too late to examine whether the foundation of the rule is sound or unsound. So it is unnecessary to analyse the reasons for the rule. It is enough to say that the rule exists as between members of a joint family and an alienee from a member or members. We have got the actual decision in *Iburaṃsa Rowthan v. Thiruvenkatasami Naick* (1), where the plaintiff is an alienee from one member and the defendant is an alienee from another member of the joint family. The suit was held to be maintainable. Mr. Padmanabha Ayyangar contends that that decision should be confined to cases where the plaintiff is the second alienee from a member and the defendant is the first alienee from a member of the family and that it cannot be utilized to hold that a suit by a first alienee against the second alienee is maintainable. We do not see any reason for upholding this distinction. In the facts of *Iburaṃsa Rowthan v. Thiru-*

venkatasami Naick (1) it happens that the plaintiff is the second alienee from a member. That is merely an accident. The principle is that where people who are fighting are merely two alienees, it is unnecessary to apply the main rule. The position of the respondent can easily be tested. If there are two simultaneous sale deeds on the same date, one by one member and another by another member, in favour of strangers, the question arises which is the person that can sue according to the rule as contended for by the respondent. The respondent concedes that in such a case both can sue, which only shows that there is no meaning in the rule as contended for by him.

Again in a case where there are two alienees, suppose the first alienor himself chooses to bring the suit either associating the alienee with him or by himself, it cannot be contended that the suit is not maintainable. The truth is that once you recognize the right of a member of a coparcenary to bring a suit against an alienee, the right of an alienee from a coparcener to sue another alienee immediately follows as a corollary and the distinction between first alienee and second alienee is entirely irrelevant. Another decision sought to be relied on by the learned advocate for the respondent is *Beevi Ammal v. Radhakrishna Ayyar* (2). That case does not bear upon the point in question as it discusses the question of equities in favour of the alienee in that case and proceeds so far as to say that the defendant alienee can insist on a general partition in a suit by the member. The third case relied on is *Sundara Ayyar v. Krishnamurthi Ayyar* (3). In that case a stranger who purchased a share of the properties of a joint family had several properties allotted to him in a suit for general partition but the defendant in the suit who was himself a purchaser had not been made a party to the earlier suit for general partition. The plaintiff had to sue him again in a second suit. The suit was confined to only one item and he reserved his right in respect of the other properties.

It was held that he must bring a general suit including all the items and cannot confine himself to one item. In

1. (1911) 34 Mad 269=7 I C 559 (F B).

2. AIR 1923 Mad 467=72 I C 81.

3. (1916) 35 I C 677.

our opinion that case has nothing to do with the matter under consideration. None of these cases supports the distinction sought to be drawn that the rule in *Iburaamsa Rowthan v. Thiruvengkatasami Naick* (1) should be confined to a second alienee and cannot be followed with reference to a first alienee from a member of the family. Apart from all this in this particular case there is no more joint family, it being conceded by all the parties that there is a division in status. Though in such a case, as between members of the family there ought to be one suit in respect of all items as held by Kumaraswami Sastri, J., in *Yerukola v. Yerukola* (4), still as between two strangers who are alienees from members of the family we do not see any reason why there could not be a suit for partition of those items in respect of which the contending parties to the suit are tenants in common. We think that the suit even in respect of the Alasandapuram lands is therefore maintainable.

In modification of the Subordinate Judge's decree we award a decree for partition of the two thirds share in the plaint lands. The plaintiff will be entitled to full costs in appeal and three-fourths costs in the lower Court. The plaintiff is entitled to profits for three years prior to suit and up to delivery of possession from defendants 8 to 11. These profits will be ascertained by the lower Court before passing a final decree.

P.R.S./K.S. *Order accordingly.*

4. AIR 1922 Mad 150=71 IC 177=45 Mad 648 (F B).

* A. I. R. 1933 Madras 778

WALSH, J.

Ramakrishna Chettiar and another—
Appellants.

v.

Jayarama Iyer and others — Respondents.

Second Appeal No. 535 of 1929, Decided on 10th May 1933, against decree of Dist. Judge, Nagapatam, in A. S. No. 211 of 1927.

* Limitation Act (1908), S. 14 — For applicability of S. 14 not only the cause of action should be the same but relief also must be the same.

For the applicability of S. 14, not only the cause of action should be the same, but the relief sought also should be the same. Hence where the same cause of action entitles a party

to several reliefs and he chooses to sue only for one of them, he cannot claim the benefit of S. 14 so far as limitation is concerned when he brings a suit for another relief: *A I R 1927 Mad 597; A I R 1923 Mad 347; A I R 1916 P C 96 and A I R 1933 Mad 197, Ref.* [P 779 C 1]

T. R. Venkatarama Sastriar, N. S. Srinivasa Ayyar and G. Jagadisa Ayyar — for Appellants.

K. Bhaysham, T. R. Srinivasan and V. C. Veeraraghavan — for Respondents.

Judgment.—The defendants are the appellants. The question is whether the suit is time-barred, having regard to S. 14, Lim. Act. The persons, Aiyaswami and Venkatachala Chetti were carrying on a grocery business jointly. Aiyaswami died leaving a widow, defendant 2. Venkatachala Chetti left a son Lakshminarayana and between this son and defendant 2 there was a partition suit, O. S. No. 37 of 1919 in the Mayavaram Sub-Court. Before it was launched a creditor of Venkatachala Chetti brought a suit, O. S. No. 397 of 1918, in the Tiruvarur District Munsif's Court, got a decree and in execution of it attached some of the goods in the grocery shop. The Amin who took charge of the attached properties left them in the hands of the plaintiff who executed a surety bond that he would be responsible for the value of the goods. The decree was satisfied between October and December 1919. In the partition suit between the widow, (defendant 2) and Lakshminarayana the grocery goods went to the widow under a compromise. She assigned them to a transferee, another Lakshminarayana. He sought to recover the goods from the plaintiff and filed a suit against him. The plaintiff as defendant 1 in that suit raised two defences: (1) that the plaintiff Lakshminarayana did not own the goods but was only a benami-dar; (2) that while he (defendant 1) was in possession of the goods the present defendants trespassed and took them away. In that suit the trial Court found the plaintiff Lakshminarayana was not entitled to the goods and dismissed the suit. The appellate Court found he was entitled and gave a decree against defendant 1. It may be noted that defendant 1 in that suit, the present plaintiff, got the present defendants impleaded as defendants 4 and 5. The alleged trespass by them was on the 22nd

or 23rd February 1920. The present suit was brought on 30th November 1925. It is admittedly out of time unless the time of the trial of the suit brought against the present plaintiff by Lakshminarayana is excluded. Both the lower Courts found that it should be excluded. I am, however, unable to agree with their view. Looking to the written statement of the plaintiff in that suit as defendant 1, it is perfectly clear that he claimed no relief as against defendants 4 and 5 in that suit (defendants 1 and 2 in the present suit). His main defence, as stated above, was that the properties did not belong to the plaintiff in that suit. Then he went on to para. 7 of the written statement to say: "If for any reason it is established that the plaintiff properties belong to the plaintiff and only Minakshi Ammal and Ramakrishna Chetti (defendants 4 and 5) removed the articles, having regard to the fact that the articles were entrusted to the plaintiff only for safe custody the plaintiff is entitled to relief only against these persons."

He then goes on in para. 8 to say: "The suit is bad for non-joinder of these parties," and he says therefore that they should have been made parties. He claims no relief against them. It is argued that S. 14, Lim. Act, says nothing about the relief being the same, but only the cause of action being the same. It would be an extraordinary proposition to hold that where the same cause of action entitles a party to several reliefs and he chooses to sue only for one of them he can subsequently bring a suit for another relief and, so far as limitation is concerned, claim the benefit of S. 14, Lim. Act. In a recent case quoted for the appellants *Narasimhacharyulu v. Appa Rao*, A. I. R. 1933 Mad. 197, Sundaram Chetty, J., says with reference to S. 14:

"Another aspect for consideration under that section is whether the previous proceeding was for the same relief although not founded on the same cause of action:"

See also 1932 M. W. N. 1317 where two items in regard to which a claim was not raised in the previous partition suit were held to be time-barred in the subsequent suit though both were partition suits, which is clear authority against the proposition that as long as the cause of action is the same the reliefs may be different. No authority has been quoted before me to show that the relief must not also be the same if S. 14, Lim. Act, is to apply. Then it is

argued for the respondents that the 6th additional issue in O. S. No. 194 of 1922 on the file of the District Munsif's Court, Tiruvarur, covers the plaintiff. That issue ran: "Whether the disputes among the defendants can be adjusted in this suit." This is very vague, and to see what the disputes were we must look to the written statement. As I said, the plaintiff never raised any point in the written statement that defendants 4 and 5 were liable to him. He simply stated that if anybody was liable to the plaintiff in that case it was defendants 4 and 5 and not himself. In fact, as stated by the trial Court in the present case it was found in that case that "no disputes arose between the defendants in that suit." The District Munsif's finding on that issue is "upon my findings of fact no disputes between the defendants in this suit arise." No doubt he goes on to say:

"But if there were such disputes it has not been shown why they could not be disposed in this suit itself."

The appellate Court in that suit said:

"It is unnecessary to express, and I do not express, any opinion as to the rights and objections, if any, as between the plaintiff and defendants 4 and 5 in the matter of the 'samans' in question in this suit. I am clear that defendant 1 has not made out any defence as against the plaintiff."

And in awarding costs he says:

"Defendants 1 to 3 must also pay the costs of defendants 4 and 5 who have been brought on record on their objection in both Courts."

No doubt there are cases in which a party may be entitled to the benefit of S. 14, Lim. Act, although he is a defendant, but in none of the cases relied upon by the lower Courts or before me for the respondent-defendants has it been held that where he has not asked for the relief in the other suit or proceedings he can take advantage of this section. In *Nrityamani Dassi v. Lakhan Chandra Sen* (1) relief was asked for, and not only that but the defendants got an effective decree in their favour in the first Court and certainly the time during which that decree was in force could be deducted under S. 14, Lim. Act: See also *Kunhikutti Ali v. Kunhammad* (2), where the relief was directly asked for. *Satyanarayana Brahmama v. Seethayya* (3) quoted for the

1. A I R 1916 P C 96=33 I C 452=43 Cal 660 (P C)

2. A I R 1923 Mad 347=73 I C 139.

3. A I R 1927 Mad 597=100 I C 776=50 Mad 417.

appellants is a very strong case to show that where the party could have filed a suit for the relief he asks during the pendency of another connected suit or proceedings, he cannot avail himself of S. 11, Lim. Act. In that suit the maker of a promissory-note sued the payee for a mere declaration that the note had no consideration and was obtained by fraud and undue influence without suing for an injunction to restrain the payee from filing a suit on the note. Held that this did not suspend the running of time for the suit on the note by the payee, that the principle of dependant judgments is no longer good law and no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. If an issue which was not actually raised could be held to arise by implication, so as to enable S. 14, Lim. Act, to be availed of in the subsequent suit, it would have been in a case of that sort, yet their Lordships say:

"There was nothing in the present case to prevent the filing of the suit on 5th September 1921. It may be that the District Munsif would have dismissed the suit following his finding in the earlier case on the question of consideration and undue influence. But, on appeal, it would have been reversed along with the other appeal and plaintiff would have got his decree. So long as there was no legal impediment to the filing of the suit earlier, no time can be excluded. Column 3, Art. 73, operated."

That is a very much stronger case than the present case. As stated by the learned Judges, it is almost certain that if in that matter a suit had been filed in the first Court it would have been dismissed by the first Court on account of its finding in the earlier suit. The question as to whether money was due on the note was obviously much more nearly raised by implication than the liability of defendants 4 and 5 to defendant 1 in the present matter, where it can only be argued that because the present plaintiff pleaded that not he but defendants 4 and 5 are liable, if any persons were, to the plaintiff in that suit, therefore he raised the question that they were liable to himself. In my opinion it is quite clear that the plaintiff's cause of action which arose on 22nd or 23rd February 1920 subsisted throughout the course of the suit brought against him, O. S. No. 194 of 1922, and that his right to recover from the present defendants

was not put in issue in that suit and the present suit is in my opinion clearly time-barred. It may be noted that even if for any reason it should be held that the plaintiff was entitled to deduct the period between the decree in the trial Court dated 26th November 1923 and that in the appellate Court dated 14th July 1925, about 20 months, the suit would still be out of time. In the result the appeal must be allowed with costs throughout and the suit dismissed.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 780

VENKATASUBBA RAO AND REILLY, JJ.

S. Ayyaswami Ayyar—Petitioner—Appellant.

v.

Sivakki Ammal—Opposite Party.

Appeal No. 481 of 1930, Decided on 18th October 1932, against order of Sub-Judge, Madura, D/- 1st March 1930.

Civil P. C. (1908), S. 145—Order passed by Court not under S. 145 but under general power against sureties—Surety has right of appeal from such order.

The Court can in certain cases to which S. 145 does not apply, under the general power, pass orders in regard to executing orders against sureties. And in such cases the surety has also a remedy by way of appeal from such order: AIR 1919 P C 55, Ref. [P 781 C 1, 2]

K. V. Sessa Ayyangar—for Appellant.

C. A. Seshagiri Sastri—for Opposite Party.

Order.—Mr. Seshagiri Sastri for the respondent takes an objection in limine that the present appeal is incompetent. The point to be decided is, whether an appeal lies against the order in question. The facts may be briefly stated:

One Chellammal executed a deed of mortgage in favour of Sivakkiammal, the respondent. In a suit (O. S. No. 13 of 1919 on the file of the Mayavaram Sub-Court) subsequently brought by Chellammal's husband, Ramachandra Ayyar, against Ayyaswami Ayyar, the appellant, Ramachandra Ayyar was appointed receiver. He was directed to furnish security, and Chellammal executed on 24th July 1917, a security bond in favour of the Court, creating a charge over the property already mortgaged to Sivakki. Some time later Chellammal executed another mortgage in favour of one Ramaswami Ayyangar. Sivakki then filed a suit on the foot of her mortgage (O. S. No. 239 of 1922 on the file of the

Munsif's Court, Madura). At that time she alleges she was not aware of the security bond executed in favour of the Mayavaram Sub-Court. Naturally while she impleaded Ramaswami Ayyangar as a party, she did not add as defendant any person claiming an interest under the security bond in question. Even if she was aware of the security bond, she would have had a difficulty in deciding as to whom she should add as a party, the charge having been created in favour of the Court. Sivakki in due course obtained a decree, brought the property to sale and on 1st February 1926 purchased it herself in Court auction and in October following, she was put in possession. Subsequently Ayyaswami Ayyar instituted proceedings in O. S. No. 13 of 1919 against the surety, Chellammal, obtained an order against her and got it transferred to the Madura Munsif's Court for execution. To those proceedings Sivakki was not a party. The order was executed, the charged property was brought to sale and Ayyaswami Ayyar himself purchased it in Court auction sometime after 30th July 1928. Then finding that the property was in the possession of Sivakki, he moved the Court, complaining of her obstruction, to remove her from the property, and the lower Court has made an order rejecting the application. The present appeal is from that order.

Mr. Seshagiri Sastri, for the respondent, contends that the order against the surety cannot be deemed to be one under S. 145, Civil P. C. The order was for the sale of Chellammal's immovable property, and the section applies only where a surety has made himself personally liable. If S. 145 does not apply, the learned counsel contends that Chellammal cannot be deemed to be a party to the suit (O. S. No. 13 of 1919) within the meaning of S. 47. It is true that to the proceeding in question S. 145 does not apply, and we must regard that the order against the surety was made, not under the terms of that section, but under the general power which the Judicial Committee has held the Courts possess in regard to executing orders made against the sureties: *Raghubar Singh v. Jai Indra Bahadur Singh* (1). But the very judgment of the Judicial

Committee shows that what was contemplated was an order in the suit itself (see p. 167) and the implication is that the surety was dealt with as if he was a party to the suit. S. 145, while it prescribes a remedy against the surety also provides for the surety's remedy by way of appeal. When their Lordships of the Judicial Committee held that there was power outside S. 145 to proceed against the surety, they could not have intended to deprive him of the remedy which he would have had, had the proceedings been taken under S. 145. Their Lordships point out that the surety was not a party to the suit at the stage of the fixation of mesne profits, that is to say, before the execution commenced. But having regard to their Lordships' decision and the policy underlying S. 145, we must hold that it was not intended that the surety's rights should in this respect be abridged.

The only other point bearing on the preliminary objection is, whether Sivakki is the representative in interest of Chellammal. Sivakki by reason of her purchase became the assignee of Chellammal's equity of redemption. This has not been seriously disputed. In the result, we must disallow the preliminary objection. The questions raised in the appeal itself are similar to those raised in C. M. S. A. No. 182 of 1931, which a Bench has suggested may be heard by three Judges. Subject to the orders of the Chief Justice, it appears to us convenient that this appeal should be heard by the same Bench of three Judges.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 781

CURGENVEN, J.

N. M. S. Sadasivier Krishnier and others—Plaintiffs—Petitioners.

T. S. Meenakshi Iyer and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 904 of 1930, Decided on 11th May 1933, from order of Sub-Judge, Madura, in S. C. S. No. 884 of 1929.

Stamp Act (1899), S. 36—Suit on promissory note—Attention of Judge brought when hearing of case was over and judgment was in preparation, to fact that note was not sufficiently stamped—Judge stating that he had not applied his mind to admissibility,

1. AIR 1919 P C 55=55 1 C 550=46 I A 228=42 All 158=22 O C 212 (P C).

considering such question and dismissing suit—Held dismissal was proper.

In a suit on a promissory note the defendant had admitted execution of the note and the hearing of the case had been closed, and judgment was in preparation when the Judge's attention was drawn to the fact that the note was insufficiently stamped. He then proceeded to consider, whether he had in fact admitted the document and, stating that he had not applied his mind, and answered the question in the negative and dismissed the suit as the note was inadmissible:

Held: that in view of the statement of the Court itself that no occasion had arisen for it to look at the document and that it had not in fact considered the question of its admissibility, the stage had not been reached at which that admissibility could not be questioned and that the suit was properly dismissed: *AIR 1929 Mad 522, Ref.* [P 782 C 2]

K. Venguswami Ayyar—for Petitioners.

T. L. Venkatarama Ayyar, K. V. Srinivasa Ayyar and P. N. Appu Swami Ayyar—for Opposite Parties.

Judgment.—The plaintiffs are the petitioners. The suit was brought on an insufficiently stamped promissory note which was for this reason rejected by the Subordinate Judge and the suit dismissed. The question is whether having regard to the provisions of S. 36, Stamp Act, the Subordinate Judge was right in rejecting the note; in other words, whether the note had not already been admitted in evidence. The circumstances are set out in the judgment of the lower Court. It appears that defendant 1 had admitted execution of the note, and the hearing of the case had been closed and judgment was in preparation when the Subordinate Judge's attention was drawn to the fact that the note was insufficiently stamped. He then proceeded to consider whether he had in fact admitted the document and answered the question in the negative. He was guided to this conclusion by a decision of this Court, *Venkanna v. Parasurama Byas* (1) where it has been held that a document cannot be deemed to have been admitted in evidence until the Judge has applied his mind to a consideration of its admissibility. In that case there occurred the circumstance that the endorsement required by O. 13, R. 4, Civil P. C., had not only been made but had been endorsed by the rubber stamp of the presiding officer.

In the present case the endorsement had been made by the clerk but had not been signed or initialled. All this is

1. *AIR 1929 Mad 522=120* 1 C 79=53 *Mad 137.*

quite unessential and we have to consider whether the Subordinate Judge had applied his mind. It is argued that the document must have been admitted before the stage came for writing the judgment. But although it may be wrong to commence a judgment before completing such matters as admitting documents, that is not to say that admission had actually taken place. It is difficult to resist the statement of the Court itself that no occasion had arisen for it to look at the document and that it had not in fact considered the question of its admissibility. In these circumstances I cannot differ from the view that the stage had not been reached at which that admissibility could not be questioned and I think therefore that the suit was properly dismissed. The revision petition is dismissed with costs, one set.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 782

PANDALAI, J.

Kothandarama Pillai and another—Appellants.

v.

Municipal Council, Trichinopoly and another—Respondents.

Second Appeal No. 315 of 1931, Decided on 3rd April 1933.

(a) **Madras District Municipalities Act (5 of 1920), S. 83 (a)**—Place where people are given only food and drink gratuitously but not allowed to rest during night time is not choultry.

A place where people are given food and drink gratuitously but are not allowed to rest during the night time is not a choultry within the meaning of S. 83-A. It is only a chatram.

[P 783 C 2]

(b) **Interpretation of Statutes**—Section must be read in the sense in which words in section are accepted by authority and not by unintentional use of such word.

Unintentional use of the words cannot be used to control the interpretation of the section which must be read in the sense in which the words are accepted by appropriate authority. [P 784 C 1]

(c) **Madras District Municipalities Act (5 of 1920), S. 83 (a)**—Only places which require that no income should be derived for exemption from tax are playgrounds—(Obiter).

Obiter.—The only places which require that no income should be derived therefrom in order to be entitled to exemption are the last-mentioned of series, namely playgrounds which are open to the public and from which no income is derived. [P 784 C 2]

K. P. Ramakrishna Ayyar—for Appellants.

P. Venkataramana Rao—for Respondents.

Judgment.—This is an appeal against the decision of the learned Subordinate Judge of Trichinopoly reversing a decision of the District Munsif and awarding to the respondent, the Municipality of Trichinopoly, a decree for Rs. 173 being arrears of property tax from the second half of the year 1924-25 to 1927-28 in respect of premises in the possession of the appellants. The defence was that the property was exempt from the property tax under S. 83 (a), Madras District Municipalities Act, being a choultry as mentioned there. The Municipality contended that the premises are not a choultry. The District Munsif accepted the defence but the learned Judge rejected it. Hence the appeal. S. 83, District Municipalities Act, says that the following buildings and lands shall be exempt from the property tax :

“(a) Places set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes and libraries and playgrounds which are open to the public and from which no income is derived.”

There are other clauses which it is not now material to refer to. Two points were discussed in the lower Court : (1) whether the premises are a choultry within the meaning of the section, and (2) if so whether it satisfies the condition which according to the respondent must be satisfied by all the kinds of buildings and lands mentioned in the clause, namely that no income shall be derived therefrom. The learned Judge has held that the place is not a choultry within the meaning of the section. He has so held on a consideration of Ex. 1, which is the deed by which the premises in question were dedicated to charity in 1888 by the owner, Kothandarama Pillai, and his wife, Manonmani Ammal. The question is whether that dedication by its express language or by what necessarily follows from it constitutes the premises a choultry. The deed of settlement as it is called (Ex. 1) enumerates in para. 4 the purposes for which the charity is founded and the properties dedicated. It begins by saying that the said building, the tank and the other appurtenances are to be known by the name of Tuesday *Thannir Pandal Dwadesi Kattalai Dharma Matam*. It goes on to say that on Tuesday every week Paradesis that come should be given food.

It continues: that every day from Thai to Avani each year kambu grain should be cooked and the said food should be kept in mud pots and allowed to ferment and be mixed with salt and that all who come between 7 a. m. and 6 p. m. without distinction of caste shall be given the food and the fermented water.

The deed further says that on every Dwadasi day, i. e., once a fortnight, Brahmins should be given food as funds permit. The tank is to be used by all castes among the Hindus except the Pallas and Pariahs for bathing and drinking, and the flowers that are to be got by the maintenance of a flower garden and the leaves of the holy Bilvam and Thoolasi are to be used for worship by Brahmins, Saivas etc. The paragraph winds up by saying that the above building and the appurtenances have been built for these purposes. The question is whether the building and lands appurtenant thereto dedicated to charity of the above description are a choultry within the meaning of that word in the District Municipalities Act. It would be observed that all the purposes mentioned are the giving of food and drink freely. Paradesis, literally people of other places which means those who have no fixed abode and go from place to place having given up any lucrative occupation (it is to be presumed in search of a higher life), are to be fed every Tuesday. All who come, without distinction of caste, are to be given kambu food and the fermented water of the food throughout the six months, Thai to Avani, and Brahmins are to be fed on the Dwadasi day i. e., once a fortnight. The essential idea running through the foundation is that of free gift of food and drink. The premises are intended for being used to carry out this purpose. The respondent's contention, which the learned Judge accepted is that a place intended for free feeding, however charitable it might be, is not a choultry but a chatram. In Wilson's Glossary, p. 108, it is stated that the word chavadi becomes choultry when corrupted and that choultry means a public lodging place, a shelter for travellers. In the same book at p. 104, the word chatram which is the vernacular corruption of the Sanskrit Sathram is explained as a place where refreshment is given "gratuitously", especially to Brahmins. The same distinction bet-

ween a resting place for travellers and a place where refreshment is given is also mentioned in Maclean's Manual where at p. 160 choultry is stated to be a corruption of the word chavadi and is explained as a hall used by travellers as a resting place and also intended as a place for the transaction of public business as in the expression village chavadi. And at p. 188 chatram is explained as a corruption of the Sanskrit Sathram and as a house where pilgrims and travelling members of the higher caste are entertained and fed gratuitously for a day or two and as charitable foundations for the lodging and entertainment of a certain number of guests for a specified time.

This distinction between the two words is confirmed by popular use, although it is not uncommon when language is loosely used for the two words to be indiscriminately used to describe the same premises. The appellant's advocate has thus drawn my attention to *Venkatachala Pillai v. Taluk Board, Saidapet* (1) where at p. 381 the institution then in question which was undoubtedly a feeding place is described as a choultry. But this is more or less inaccurate because unintentional use of the words cannot, I think, be used to control the interpretation of the section which must be read in the sense in which the words are accepted by appropriate authority. That being so, I am unable to say that the learned Judge's decision is not justified. There is no provision as far as I can see in the deed of foundation for any provision for a resting place for anyone. It is natural that those who come to take their food may have to wait some time before it is given and afterwards may linger before they go away. But that will not convert the foundation into one intended as a shelter for travellers and in my opinion the trustees would be justified in requiring that those who come to receive their food should not stay in the premises and take shelter there. It is noteworthy that the whole feeding contemplated in the deed is to take place during the daytime-Dwadasi feeding of Brahmins is always, in the morning. The poor feeding is expressly required to be over by 6 p. m. and at night the building is to be kept lit but not for the reception of any travellers.

1. (1911) 31 Mad 375=10 I C 301.

That being so, the only conclusion I can come to it is that although the premises are undoubtedly a charity they do not fall within the category of charities which are exempted by the District Municipalities Act, viz., choultries. It may be that in particular cases the same place is intended to be used both as a choultry and as a chatram. Where such is the case, such premises would undoubtedly to the extent to which they are choultries come within the exception to S. 83 (a). But that is not the case here. I think the decision on this point of the learned Judge was right.

In this view the contention of the respondent whether even if the place is a choultry it should not also satisfy the condition of no income being derived therefrom does not arise. As the matter has been argued however I may indicate my view that as I read Cl. (a), S. 83, the only places which require that no income should be derived therefrom in order to be entitled to exemption are the last mentioned of series, namely playgrounds, which are open to the public and from which no income is derived. On this point I have been referred to a decision of Madhavan Nair, J., in *Municipal Council, Trichinopoly v. Venkatarama Iyer* (2) in which the learned Judge took a slightly different view and held that the requirement of no income being derived is applicable to libraries also the immediately preceding word. I think that on a proper reading of the clause the words which go together are "buildings used for educational purposes and libraries," i. e., buildings used for educational purposes, buildings used for libraries. These occur before playgrounds and are separated therefrom by the word "and" which shows that the qualifying clause of playgrounds is not to be taken over and attached to the previous places but only to playgrounds. This reading explains and gives effect to all the words of the clause including the "and" before libraries and the "and" after it. The appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

2. AIR 1931 Mad 55=129 I C 225=54 Mad 495.

* A. I. R. 1933 Madras 785

PANDALAI, J.

Vempati Mangamma—Appellant.

v.

Dyta Narayanappa—Respondent.

Appeal No. 207 of 1930, Decided on 9th May 1933, against appellate order of Sub-Judge, Bapatla, D/- 31st December 1929.

* Limitation Act (1908), Art. 181—Decree declared unexecutable by execution Court—Order set aside on appeal—Fresh period of limitation runs from date of latter order.

Where a decree is declared unexecutable before the execution is otherwise barred, and that decision is reversed later and the decree is thereby rendered executable, the subsequent application for execution should be regarded as one falling under Art. 181 and fresh period of limitation runs from the date when the decree is rendered executable: *Case law reviewed*. [P 787 C 2]

Ch. Raghava Rao—for Appellant.*B. Somayya*—for Respondent.

Judgment.—The question is whether the appellant's (decree-holder's) execution petition dated 9th June 1928 is barred by limitation. He obtained his decree for money on 20th April 1922. The judgment-debtor (respondent) on 3rd May 1924 put in a petition stating that he had discharged the debt and to enter up satisfaction which was ordered on 23rd December 1924. Thus the decree was declared incapable of execution as it was discharged about five months before the expiry of the first period of three years from the date of the decree. The decree-holder appealed from this decision and the appellate Court on 26th February 1926 reversed it and held that the decree was unsatisfied. The decree-holder's first execution petition was the one dated 9th June 1928 which both the lower Courts have held to be barred by limitation under Art. 182, Lim. Act. It is clear that if the starting point is calculated from the date mentioned in Art. 182 (1) and if that date is taken as 20th April 1922 without giving any effect to the fact that though that was the original date when the decree was passed, the decree as such ceased to have legal effect between the parties or to be executable as such on 23rd December 1924 when it was declared satisfied and was restored to force and executability only on 26th February 1926, the petition would be barred. The appellant's argument is that those facts cannot be ignored and that a new starting point must be calculated from 26th

February 1926 when the decree was restored to file and invokes the principle of *Peer Ammal v. Nallauswami Pillai* (1) for dating the date of the decree from the time when having been declared unexecutable that declaration was itself set aside on appeal. Alternatively he argues that by reason of those facts, a fresh right to apply has arisen and the application must be taken as falling within Art. 181. Both these are merely different means of arriving at the same result that a fresh right to execute the decree arose on 26th February 1926. On the other hand the respondent urges that there is no such fresh right and that the only right is to execute the decree of 20th April 1922 within any of the periods mentioned in Col. 3, Art. 182. The decision depends on acceptance of either of these arguments.

As the Privy Council observed in *Nagendra Nath Dey v. Suresh Chandra Dey* (2), the only course open to the Court is to give effect to the words of the statute. But in so doing the Privy Council themselves and the Courts in India have by interpretation understood the applicability of Art. 182 as a whole or the words in the third column of that and other articles in such a way in particular situations and classes of cases as to avoid obvious injustice and inconvenience to which the opposite interpretation would lead. The theory of continuation or revival of execution petitions dismissed for statistical purposes and without any fault of the decree-holder but because there was some collateral proceeding which made execution practically impossible is one of the methods by which injustice is avoided in some cases. That theory is of no use in this case because the decree-holder had not put in any execution application before the present one. As to this theory limited in the above way Viscount Cave remarked drily during the argument in *Rameshwar Singh v. Homeswar Singh* (3), that you must make a hopeless application or this principle will not apply. If for instance this decree-holder had in the five months left to him between 23rd December 1924 and 20th April 1925 filed an application for

1. AIR 1931 Mad 149=130 I C 738=54 Mad 455.

2. A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1 (P C).

3. A I R 1921 P C 31=59 I C 636=48 I A 17 (P C).

execution it would certainly have been dismissed as the District Munsif had held on 23rd December 1924 that the decree was satisfied. Such dismissal was however necessary for this principle to be of avail. But it would keep the decree alive.

Similarly the decree-holder's opposition if by counter-affidavit, to the judgment-debtor's petition to enter up satisfaction might have been regarded as a step-in-aid of execution. But according to the relevant authorities this requires that there should have been a previous execution petition of which the opposition was a step in aid. Therefore this method of loosening the bonds of a decree-holder whose legs are tied by circumstances beyond his control while trying to keep up with the time which is always running against him is also not available in this case. The Privy Council in the case before them in *Rameshwar Singh v. Homeshwar Singh* (3) therefore adopted the much more direct and simple doctrine that the language of Art. 182 (1) prescribing three years from the date of a decree or order read with its context refers only to an order or decree made in such a form as to render it capable in the circumstances of being enforced. They put it in another way by saying that when as in that case the application for execution could not have been made till the judgment-debtor had come into possession of the property, Art. 181 may be called in aid and the period is three years from the time when the right to apply accrues. If that principle could be used in the case of a decree which though not initially unexecutable becomes such by a decision in the same execution which is binding between the parties and which unexecutability is removed only on appellate decision in the same proceedings, it would not seem an unwarrantable extension to hold that "the date of the decree" in Art. 182 (1) is really and in common sense when the bar to its executability was removed by the appellate decision; or alternatively that the petition filed after such removal is one governed by Art. 181 when the right to apply to execute again accrues.

It is now decided, *Nagendra Nath v. Suresh Chandra* (2), that if there is an appeal against any portion of the decree by whichever party, "the date of the

decree" for purposes of execution in favour of the parties who did not appeal and in respect of matters on which there was no appeal is the date of appellate decree. This is based by the Privy Council on the words of Art. 182 (2): "where there has been an appeal" being unqualified by reference to parties or subject matter. Similarly if the whole Art. 182 is to be read in its context as applicable to decrees which are in the circumstances legally capable of execution, I fail to understand why in a case where after a decree is passed it is judicially held by an order binding on both parties in the same proceedings incapable of execution, a right to execute it should not be deemed to arise on that decision being reversed. Execution proceedings are for many purposes a continuation of the suit and there seems to be no violence to any language employed in the Limitation Act in holding as above.

I am aware of the principle that once a period of limitation has begun to run against a particular right to sue, appeal, or apply, there is no suspension of that period except as provided by the Limitation Act itself. At the same time the principle that a former right of suit or application may lapse and that a fresh right to sue or apply for the same relief giving rise to a fresh period of limitation may arise from circumstances has been recognized in decisions binding on me. In the case of suits, *Muthuverappa Chetty v. Adaikappa Chetty* (4), and the cases therein referred to, establish this. The Full Bench decision in *Muthukorakkat Chetti v. Madar Ammal* (5) is an instance of the same kind in execution proceedings. This decision and the Privy Council cases on which it is based were considered in *Peer Ammal v. Nallauswami* (1) in respect of appeals. In the last case the words "the date of the decree" in the third column of Art. 156, Lim. Act, were in conformity with the Full Bench decision, understood as the date on which the remedy (appeal) becomes available to the party. The recent Full Bench decision in *Sundaramma v. Abdul Khaddar* (6), was relied on for the respondent. In that

4. AIR 1920 Mad 668=59 I C 472=49 Mad 845.

5. A I R 1920 Mad 1=54 I C 66=49 Mad 185 (F B).

6. A I R 1933 Mad 418=143 I O 1=56 Mad 490 (F B).

case after a mortgage decree was passed and pending execution it was held in another suit instituted by a stranger to the mortgage in the first Court that the mortgaged property did not belong to the mortgagor but to the stranger and it was held that the period during which this decision stood till it was set aside by the appellate Court could not be deducted from the period of limitation for execution of the mortgage decree. That decision is based on the principle that the bar of limitation for a decree cannot be postponed or avoided in the absence of a direct order of stay or some provision for suspension in the Limitation Act on any equity based on an implied order or collateral litigation which would render the proceedings futile. This was also the principle of *Ammathayi Ammal v. Sivarama Pillai* (7), a case on very similar facts referred to and distinguished in *Peer Ammal v. Nallauswami Pillai* (1) (at pp. 459 and 460 of 54 Mad.).

In this case the decision of the District Munsif rendering the decree unexecutable was passed in the same proceedings and not in collateral litigation at the instance of third parties and it seems to me that the grounds explained in *Peer Ammal v. Nallauswami* (1) are applicable here. The difference no doubt is that that was a case of an appeal from a lower Court's decree which had been set aside and afterwards restored, whereas this is a case of an application for execution of a decree which had been imperilled and rendered ineffective but later restored to force and executability by the order of the execution Court. But the principle is the same that you cannot either appeal from or enforce by execution a decree so long as it is declared by the competent Court to be ineffective but must wait till the higher Court has restored the decree and its force and effect. To adapt the language employed here it seems unreasonable to suppose that the right to execute this decree under Art. 182 became barred in the circumstances because the period of three years is to be reckoned from the original date of the decree though within that period the decree was declared unexecutable, and though by the time that decision was set aside more than three years had elapsed from that date. Such a construction of Art. 182 could not have

been contemplated by the legislature. Therefore it becomes necessary on the principle of *Rameshwar Singh v. Homeswar Singh* (3), either to interpret the words "the date of the decree" in that article as implying the condition that the decree should be legally executable during the whole of the three years' period; or in the alternative in case where the decree is declared unexecutable before the execution is otherwise barred and that decision is reversed later and the decree is thereby rendered executable, to regard the subsequent application as one falling under Art. 181. For these reasons the decision of the lower Court is reversed and the execution petition remitted to the first Court for execution in accordance with law. The appellant will have his costs throughout.

P.R.S./K.S.

Appeal allowed.

A. I. R. 1933 Madras 787

SUNDARAM CHETTY AND WALSH, JJ.

Lakshmanan Chettiar and others—Petitioners—Appellants.

v.

R. M. C. T. C. T. Chidambaram Chettiar and others—Respondents.

Appeal No. 202 of 1930, Decided on 27th July 1933, against order of Sub-Judge, Devakottah, D/- 1st November 1929.

Court-fees Act (1870), S. 11 — Plaintiff asked to pay additional court-fee in suit for partnership accounts—No mention in final decree as to from which of the defendants such court-fee was to be realized—Executing Court has jurisdiction to pass any order regarding it and to collect it as costs relating to execution.

In a suit for partnership accounts, plaintiff was given a decree for an amount over and above what he had claimed, and he was asked to pay the court-fee on the additional amount before executing the decree. The final decree did not mention as to from which of the defendants this additional amount of court-fee was to be realized. In execution of the decree, plaintiff sought to recover this amount. It was contended that, as the final decree did not mention about that liability, that amount was to be borne by the plaintiff himself and that the executing Court had no jurisdiction to decide as to by whom this liability was to be borne :

Held : that any direction for the payment of the additional court-fee for the excess sum decreed if given in the final decree, should be deemed to be a mere surplusage ; that under S. 11 a duty was cast on the executing Court to collect the deficit court-fee, when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint ; that the costs so incurred by the additional court-fee may well nigh be deemed to be costs relating to execution and therefore the executing

Court had jurisdiction to pass any order regarding it and that under the rule that costs should follow the event, the defendants were liable to pay it : 30 Mad 32, Ref. [P 789 C 1]

P. M. Patanjali Sastri — for Appellant.

V. Ramaswami Ayyar — for Respondent.

Sundaram Chetty, J.—The appellants are the legal representatives of the deceased decree-holder. The decree in this case arises out of a suit for dissolution of a partnership and for accounts and other incidental reliefs. In the final decree that was passed in this suit, a decree was given in favour of the plaintiff for a sum of Rs. 4,284-12-11 against defendants 1 to 3 in excess of the amount claimed in the plaint for which court-fee was already paid. According to the provisions of S. 11, Court-fees Act, the decree for the excess amount shall not be executed until the additional court-fee is actually paid. This is a mandatory provision which the executing Court is to carry out when the decree-holder applies for the recovery of such excess amount by way of execution of the decree. In the final decree that was passed in this suit there is a direction that

"on payment of the additional court-fee the plaintiff do recover the sum of Rs. 4,234-12-11, the excess amount decreed."

The legal representatives of the deceased decree-holder when applying for execution in order to recover this excess amount paid the additional court-fee of Rs. 359-11-0 before seeking to execute the decree for that amount. The question arising for consideration is whether in a case of this kind it is competent to the executing Court to determine whether the excess court-fee so paid is recoverable or not from defendants 1 to 3. It is urged strenuously on behalf of the respondents that in the absence of a specific direction in the final decree as to which, if any, of the defendants, are liable to pay this excess court-fee, the executing Court is not competent to give any direction as to the recovery of this amount as costs of execution or costs incidental or relating to execution. In the first place, we have the authority of the decision of this High Court in *Perianan Chetty v. Nagappa Mudaliar* (1), wherein the learned Judges have stated that any direction for the pay-

ment of the additional court-fee for the excess sum decreed if given in the final decree, should be deemed to be a mere surplusage. It is clear from the opinion expressed in this decision that in view of the mandatory provision of S. 11, Court fees Act, no such direction need be given at all in the final decree. We are in agreement with that view having regard to the express provision in the aforesaid section of the Court-fees Act, which casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint. That being so, no argument can be reasonably based on the supposed omission in the final decree as to the ultimate liability for the payment of this excess court-fee. This is not therefore a case in which we can hold that there is an express or implied direction in the decree itself that the plaintiffs should alone bear the costs of the additional court-fee without any right to recover the sum from the defendants.

Then, the next question arising for consideration is whether the executing Court which directs the payment of the additional court-fee under S. 11, Court-fees Act, is not also competent to determine whether this amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which this extra court-fee was paid. It is argued by Mr. Ramaswami Ayyar for the respondents that unless this sum can be taken to be strictly costs of execution the executing Court is not competent to pass any order for the recovery of the additional court-fee from the defendants. There is no doubt that costs subsequently incurred by the decree-holder for the purpose of executing the decree have to be provided for in the order of the executing Court. Such costs will be tacked on to the decree amount and made recoverable by the very same process of execution. The additional court-fee, the payment of which is made the condition precedent for the recovery of the excess amount by execution of the decree, can very well be deemed to be so intimately connected with the costs of execution as to warrant us to infer that it is within the competence of the executing Court to

give any reasonable direction regarding it. Though this additional court-fee may in one sense be deemed to be part of the stamp duty to be paid on the plaint itself, still the payment of that sum in the course of execution of the decree which is necessitated by S. 11, Court-fees Act, could be the payment of costs necessary for realizing the fruits of the decree by execution.

The costs so incurred by the decree-holder by reason of the payment of the additional court-fee may well nigh be deemed to be costs relating to execution and therefore the executing Court has jurisdiction to pass any order regarding it. In the present case, nothing has been shown to us to justify the non-observance of the usual rule that costs should follow the event. There is no reason why the decree holder should lose the costs incurred by him by way of paying the additional court fee, when the defendants who are bound to pay that sum have necessitated his resorting to the executing Court for the recovery of the sum. We find ourselves unable to agree with the view of the learned Subordinate Judge and hold that the petitioners are entitled to recover this sum of Rs. 359-11-0 from defendants 1 to 3 in the course of execution proceedings. The order of the lower Court on the aforesaid point is set aside and the execution petition will be remanded for disposal according to law in the light of the above observations. The appellants' costs in this appeal will be paid by respondent 3.

P.R.S./K.S.

*Petition remanded.***A. I. R. 1933 Madras 789**

PANDALAI, J.

Muhammad Sahoob Levvai Sayabu—Appellant.

v.

Mayamad Ammal—Respondent.

Appeal No. 57 of 1930, Decided on 9th May 1933, from order of Sub-Judge, Dindigul, D/- 20th September 1929.

(a) Partition—Court has jurisdiction to award other sharers their share if they want it.

The Court in a plaintiff's suit for partition has undoubtedly jurisdiction to award the other sharers their shares if they want to avail themselves of such a decision. [P 790 C 1]

(b) Limitation Act (1908), Art. 182, Expl. 1—Final decree in partition suit award-

ing several plots to several sharers—Whether application for delivery of one plot can save application for another plot from limitation: *Quaere*.

Quaere.—Whether in a final decree for partition merely awarding several plots to several sharers, an application for one plot cannot save from limitation the application for another plot: *A I R* 1922 *Mad* 327 and 456 and *A I R* 1931 *Cal* 531, *Ref*. [P 790 C 1, 2]

(c) Limitation Act (1908), Art. 182, Expl. 1—Declaration of joint character of certain items of property in partition suit—Decree is joint decree and application by one for delivery of his share can save application by another from limitation.

Where in a suit for partition all the sharers are awarded their shares, but certain property is declared to be joint, as the same decree cannot be both joint and several, the whole decree must be understood as joint, to the benefit of which all the sharers are entitled. Hence an application by one for delivery of his share can save the application of another from limitation: *A I R* 1932 *Cal* 869, *Rel on* [P 791 C 1]

S. R. Muthuswami Ayyar—for Appellant.

B. Sitarama Rao—for Respondent.

Judgment.—This is an appeal by defendant 1, against defendant 2 in a suit for partition brought by the plaintiff who is not a party to this appeal. The parties are Mahomedans and partition was decreed: to plaintiff 3/16ths, to defendant 1 (appellant) 10/16ths, and defendant 2 (respondent) 3/16ths. The preliminary decree was passed on 2nd October 1924 declaring these shares and directing a commissioner to make a partition by metes and bounds of the properties among the parties according to their shares. The commissioner did so and the final decree was passed on 14th November 1924 providing inter alia

“that the several properties mentioned in Sch. 2 hereto be assigned to and they are hereby vested in the several parties under whose names the said properties are respectively set out absolutely, for and in full satisfaction of their respective shares and interests”

in the suit property. According to the plan prepared by the commissioner the plaintiff was entitled to the plot B, defendant 1 to plot C and defendant 2 to plot A. On 6th January 1926 the plaintiff applied for and obtained delivery of his share. On 12th October 1928 defendant 2 applied in execution for delivery of the plot A. Appellant-defendant 1 opposed the application. His grounds were, as stated by the learned Subordinate Judge in the lower appellate Court, (1) that there is no executable decree passed in favour of defendant 2 which is capable of being

worked out in execution; (2) that the lower Court had no jurisdiction to pass a decree in favour of defendant respondent 2 because the subject-matter of the suit related only to partition and separate possession of the plaintiff's share alone; and (3) that, in any case, defendant 2's application is time-barred as the decree in question cannot be said to be a joint decree within the meaning of Expl. (1), Art. 182, Lim. Act. The learned Judge rejected all these objections. They have been urged before me again.

As to the first objection, whether there is or is not an executable decree in favour of defendant-respondent 2, the words of the decree which I have already set out are conclusive. They mean that the plot A set out under the name of the respondent was assigned to and vested in the respondent in full satisfaction of his share in the joint property. The only object of such a provision is that the party to whom the plot is assigned may be able to get it if he satisfies the other conditions for getting it, which include usually, if the party is not the plaintiff, the payment of court-fees. This point fails. The second objection is also equally futile. The Court in a plaintiff's suit for partition has undoubtedly jurisdiction to award the other sharers their shares if they want to avail themselves of such a decision. In any case the appellant's objection to the decree cannot be heard in execution and this is sufficient to dispose of it. The learned advocate here for the appellant tried to raise another objection under this heading, namely that the decree is invalid, because it does not bear the proper revenue stamp as an instrument of partition under the Stamp Act. I asked him whether he could show me from the judgments of the Courts below that those Courts had dealt with or were invited to deal with it. He has not shown me anywhere that this objection was raised at any previous stage of this proceeding and I therefore decline to allow that objection to be taken here.

The last and the main objection is that based on limitation and it depends upon the question whether with regard to a decree in a partition suit such as the present, the plaintiff's application for delivery of his share can be utilised

by another party like the present respondent as the starting point for limitation. This can be done only upon the footing that the decree comes within the latter part of Expl. (1) to Art. 182, Lim. Act, namely that it is a joint decree. The lower Courts dealt with this upon the authority of *Ramaswami Ayyangar v. Narayana Ayyangar* (1) and *Vasuvada Muthu Sastry v. Vittal Shastri* (2), both of which cases upheld the familiar doctrine that a decree in a partition suit is one which is passed in favour of the sharers therein and that it is open to them all to take advantage of it; in other words, that such decrees are joint decrees falling within the description in Art. 182, Expl. 1. But it is objected here that those were decisions upon partition decrees passed under the old Civil Procedure Code when there was only one decree, namely what is now called the preliminary decree, and all subsequent proceedings were proceedings in execution of it. It is therefore urged that where under the new procedure the executable decree is the final decree referred to in O. 26, R. 14, which awards to each sharer his particular plot or plots, such a decree does not come within the doctrine of those cases as it is a several decree.

It is argued that this decree was therefore a several decree and in such a case the plaintiff's application cannot afford the starting point of limitation for the respondent's petition. This view has been accepted in *Ramanath Ray v. Harendra Kumar Ray* (3), by a Bench of that Court which held that in execution of final decrees under the new procedure which allot to the several sharers their respective plots, there is no element of jointness to enable them to be brought under joint decrees. This view was upheld by another Bench of that Court in *Manmohan Gope v. Madhusudan Gope* (4) although in that particular case the Court held that that particular decree was a joint decree because although there were allotments of several plots to the several sharers there was also a portion of the decree which awarded another plot jointly to them all, namely a way to be used by them all,

1. A I R 1922 Mad 327=65 I C 990.

2. A I R 1922 Mad 456=70 I C 296.

3. A I R 1931 Cal 531=131 I C 860=59 Cal 1102.

4. A I R 1932 Cal 869=139 I C 736.

and it was held that the same decree cannot be both joint and several and therefore the whole decree must be understood as joint.

There appears to be no authority in our Court, or in any other Court for that matter, on this point. If the point really arose for decision I should have, for the reason stated, preferred to send it to a Bench, but the truth is that the point argued does not really arise because on the language of the decree now sought to be executed it is very like the decree in *Monmohan Gope v. Madusudan Gope* (4) where, although there were parts of the decree which were several, there was also the part which was joint. The final decree in this case as printed at p. 4 of the paper was drawn up according to the directions contained in O. 26, R. 14, and the forms printed for use in the lower Courts: See Civil Rules of Practice, Vol. 1, Part 2, Ch. 3, R. 13 and Form No. 6 at p. 291 of Vol. 2. It refers in para. 1 to the fact that the report of the commissioner had been received and confirmed. Para. 2 then says that "it is declared that the property for division consists of the particulars set out in Sch. 1, hereto" and para. 3 says "it is decreed as follows: that the several properties mentioned in Sch. 2 hereto be assigned to" etc. etc., as set out in the earlier part of the judgment. Now it seems to me, whatever may be the argument based upon other final decrees which do not contain the declaration given in para. 2 and whatever may be the argument as regards the question whether in a final decree merely awarding several plots to several sharers an application for one plot cannot save from limitation the application for another plot, no such question can arise on this particular decree because as held in *Monmohan Gope v. Madusudan Gope* (4) a decree cannot be both joint and several at the same time and to the extent that there is a declaration of a joint character of the property mentioned in Sch. 1, the decree is undoubtedly one to the benefit of which all the sharers are entitled. That being so, the objection has no substance in it.

The order of the lower appellate Court is confirmed and the appeal is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 791

PANDALAI, J.

Potnuru Swamy Babu—Plaintiff—Appellant.

v.

Union Board, Narasannapet—Defendant—Respondent.

Second Appeal No. 108 of 1929, Decided on 4th April 1933, against decree of Dist. Judge, Ganjam, in A. S. No. 205 of 1927.

(a) Interpretation of Statutes — Statutes which are frequently repealed, re-enacted or amended should not be construed by reference to language of similar legislation elsewhere.

Indian statutes like the Madras Local Boards Act which are from time to time wholly repealed or re-enacted or extensively amended should not be construed by the language of those which they replaced or of similar legislation elsewhere in India or England, on an assumption, that no change in the law was intended and thereby declining to give effect to the words: *A I R 1930 P C. 120 ; 23 Cal 563 and A I R 1928 P C 2, Ref.* [P 793 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 225—Suit for refund of house-tax illegally collected with interest thereon falls within scope of S. 225.

A suit for refund of house-tax illegally collected with interest thereon is a suit for compensation in money with interest thereon and falls exactly within the scope of S. 225: *Case law reviewed.* [P 794 C 1, 2]

(c) Madras Local Boards Act (14 of 1920), S. 225—Inquiry as to historical origin of contract of suits for money had and received and reference to jurisdiction of Indian Courts are irrelevant to construction of S. 225.

Inquiry into the historical origin, in actual or imputed contract, of suits for money had and received and reference to the jurisdiction of Indian Court being alike extended to equitable as to legal claims irrespective of their historical origin are irrelevant to the construction of S. 225. [P 794 C 2]

C. Sambasiva Rao—for Appellant.

Judgment.—The appellant sued the respondent, the Union Board of Narasannapet, for refund of Rs. 118-8-0 and interest thereon being the amount of house-tax for 1924-25 illegally collected from him on 1st May 1925. The suit was brought on 6th May 1926. To the defences on the merits it is needless to refer as it has been held by both the Courts below and is no longer questioned that the levy was illegal as an essential notice was not published. The only point for decision is whether the suit was barred by limitation being brought more than six months after the date of the cause of action as provided by S. 225, Local Boards Act, 1920, as it

stood before the amendment of 1930. The learned District Judge has held the suit barred and the plaintiff appeals. The appellant mainly relies on *Lakshmanan Chetti v. Union Board, Devakottai* (1), where Madhavan Nair, J., held in February 1931 that the above section is applicable only to suits for compensation and damages; and also that a suit for a declaration that a Union Board is not entitled to levy profession tax and for recovery of the tax illegally collected is not a suit for compensation, or damages and does not require notice under the section. Although this decision was not on limitation but on notice, the reasoning would equally apply to limitation under the section.

As against this there is the decision of the late Chief Justice and Madhavan Nair, J., in *Municipal Council, Dindigul v. Bombay Co.* (2) in April 1928 where in holding that a suit for company's tax illegally levied by the Dindigul Municipality is not governed by the six months' period prescribed by S. 350, District Municipalities Act (5 of 1920) corresponding to S. 225, Local Boards Act 14 of 1920, both learned Judges expressly founded themselves on the words "suit for damages or compensation" in S. 350 of the former Act but for which the decision would have been otherwise. The Chief Justice observed that he was quite prepared to concede that if an action for money had and received sounds either in tort or implied contract in this country, it would be within the words of S. 350, Act 5 of 1920, and that the plaintiff company would be time-barred; because either form of such an action would obviously be a suit for damages or compensation within the meaning of the section. He added that he was prepared to think that if the draftsman had not added the qualification "for damages or compensation," in that case the arrears claimed could not be recovered. Madhavan Nair, J., discussing the effect to be given to the words "suit for damages or compensation" in S. 350 said that the corresponding S. 261 (1), of the old District Municipalities Act (4 of 1864) corresponding to S. 156, Local Boards Act (5 of 1884), used the words "no action shall be brought" thus bringing within its scope

all descriptions of actions as under the English law. He added that in view of the express language "suit for damages or compensation" used in the Indian enactment it was no use discussing whether the suit before them sounded in contract or tort. It thus seems by parity of reasoning that according to the then view of both learned Judges in *Municipal Council, Dindigul v. Bombay Co.* (2) the language of S. 225, Local Boards Act, 1920, which is similar in generality of application to all suits to S. 156, Local Boards Act, 1884, and in that respect differs from the language of S. 350, District Municipalities Act of 1920, is not to be confined to suits for compensation and damages and that this limit was placed in S. 350, District Municipalities Act, 1920, only on account of the express words above mentioned. But in the later case *Lakshmanan Chetti v. Union Board, Devakottai* (1), Madhavan Nair, J., held that even without any words in the section which limit S. 225 to suits for compensation and damages, it is to be limited as if these words were there and understood as in the earlier case.

For this he relied on earlier decisions on the corresponding provisions of the Local Boards Act and District Municipalities Act of 1884, *Ameer Sahib v. Venkatarama* (3), *President Taluk Board, Sivaganga v. Narayana* (4), *Srinivasa v. Ratnasabhapathi* (5) and *Govinda Pillai v. Taluk Board, Kumbakonam* (6). Having so admitted the section by words which are not found there, and which were considered the deciding factor in *Municipal Council, Dindigul v. Bombay Co.* (2), he thereupon applied the Local Boards Act, the doctrine enunciated in that case, with respect to District Municipalities that in India a suit for money had and received is not one for compensation or damages but for an equitable remedy binding on the conscience of the defendant 'ex aquo et bono' and therefore is not governed by S. 225, Local Boards Act. In C. R. P. No. 1147 of 1928, in August 1932, Sundaram Chetty, J., followed *Lakshmanan Chetti v. Union Board Devakottai* (1) and held that a suit for recovery of profession tax illegally levied is not governed by the

1. A I R 1931 Mad 520=132 I C 113.

2. A I R 1929 Mad 409=120 I C 867 =52 Mad 207.

3. (1893) 16 Mad 296.

4. (1893) 16 Mad 317.

5. (1893) 16 Mad 474=3 M L J 124.

6. (1909) 32 Mad 371=4 I C 32.

six months' limitation provided in S. 225, Local Boards Act. Both because the earlier case is a decision of a Bench and because the reliance on the difference in language emphasized therein appears to me to be more in accord with rules of statutory construction, I prefer to follow it. The Privy Council have condemned on more than one occasion the practice of construing Indian statutes like the Madras Local Boards Act, which are from time to time wholly repealed or re-enacted or extensively amended by the language of those which they replaced or of similar legislation elsewhere in India or England on an assumption that no change in the law was intended and thereby declining to give effect to the words. *H. M. Edwards v. Attorney-General of Canada* (7), *Narendranath Sircar v. Kamalabasini* (8) and *Ramarandi Kuer v. Kalawati Kuer* (9). I shall now refer to the cases.

In *Ameer Sahib v. Venkataramana* (3) the suit was to recover land on which a local authority (Panchayat of a Union) had wrongfully trespassed and erected a latrine. The question of limitation arose on S. 156, Local Boards Act 5 of 1884, which prescribed six months for actions brought for anything done or purporting to be done under that Act. All that was decided was that it was not the intention of the legislature to allow local bodies to appropriate the lands of private individuals otherwise than under the Land Acquisition Act or curtail the rights of such individuals by cutting down the period provided by the general law of limitation for suits for land. It was held that the section only applied to suits for compensation claimed for wrongful acts committed under colour of the Act. With the greatest respect to the learned Judges (Madhavan Nair and Sundaram Chetty, JJ.) this decision is not in any way an authority in support of the proposition that a suit for recovery of profession tax wrongfully levied under colour of the Local Boards Act is not governed by the S. 156 then under consideration. On the contrary the reference to *Chunder Sikhur Bandopadhyaya v. Obboy*

Charan Bagchi (10), *Joharmal v. Municipality of Ahmednagar* (11) and the *Municipal Committee of Moradabad v. Chatri Singh* (12), would show that all that was decided following those cases was that suits for land are not within the section. I have little doubt, if it had arisen for decision, the Court would have held that a suit like the present one is within the section.

Similarly the suit in *President, Taluk Board Sivaganga v. Narayana* (4) was for an injunction against a Taluk Board and a Union to restrain them from interfering with a wall which they threatened to demolish unless the plaintiff removed it. The question was whether notice of suit as required by S. 156, Local Boards Act, was necessary and it was held that the section applied only to suits for compensation and for damages (i. e., to money claims in respect of acts already done); and that the principle of the provision for notice is to allow public bodies time for tender of amends to avoid litigation and that it did not apply to suits for declaration of title to immovable property and for an injunction to restrain future acts interfering with such property.

This principle was again affirmed in the Full Bench decision in *Givinda Pillai v. Taluk Board Kumbakonam* (6) which was decided after S. 156 was amended by Act 6 of 1900 and it was held that a suit for injunction against interference with plaintiff's enjoyment of his land is not within S. 156 and that neither the notice nor the period of limitation prescribed by that section applied to such suits. The decision relied with approval is *Rangachariar v. Municipal Council of Kumbakonam* (13), a case under corresponding S. 261, District Municipalities Act 1884 and quoted with approval the language of Subramanier, J., at p. 545, that :

"Suits referred to in Cl. (1), S. 261, are by its very terms those which related to acts done or purporting to be done, "whereas, a claim for an injunction is with reference to what is apprehended will be done in the future."

There is as little in this decision to support the proposition in *Lakshmanan Chetti v. Union Board, Devakotai* (1) as there is in the two decisions pre-

7. A I R 1930 P C 120=126 I C 88 (P C).

8. (1896) 23 Cal 563=23 I A 18=6 Sar 663 (P C).

9. A I R 1923 P C 2=107 I C 14=55 I A 18=7 Pat 221 (P C).

10. (1881) 6 Cal 8 (F B).

11. (1881) 6 Bom 580.

12. (1876) 1 All 269.

13. (1916) 29 Mad 539=16 M L J 532.

viously cited. The last case relied on is *Srinivasa v. Ratnasabhapat* (5) a decision under S. 261, District Municipalities Act 1884. There the Municipality of Negapatam purporting to act under a contract made with its lighting contractor forfeited a deposit made by him for the due performance of the contract on the allegation of default. It was held that the contract was not one for which any special provision was made in the District Municipalities Act and could not be placed in a different category to a contract made with any private individual. The principle was again affirmed that the cases contemplated in S. 261 are suits for compensation and damages for acts done or purporting to be done under colour of the Act and not suits governed by the general law of contract. Therefore the suit was governed by the ordinary law of limitation for compensation for breach of contract. With the greatest respect, this is the same principle which runs through similar legislation in England and India and is referred to by the Chief Justice in *Govinda Pillai v. Taluk Board, Kumbakonam* (6) (at p. 374) and lends no support to the view in *Lakshmanan Chetti v. Union Board, Devakottai* (1) that where, as in this case, powers given to a local body to impose taxation are illegally exercised under colour of the Act governing that local body, a suit for the return of the sum wrongfully levied is not one in the words of S. 225 of the present Local Boards Act: "on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act."

The reference in some of the cases to suits for compensation and damages as the proper scope of the sections considered is to draw the distinction between money claims arising out of acts already done under colour of the Act on the one hand and suits for land or for injunction for threatened injury or for things done dehors the special powers given by the Act on the other. The distinction was not between compensation and damages on the one hand and money had and received on the other.

* The present is not a suit for land, nor for an injunction against threatened injury, nor for breach of contract, or other wrong dehors the Local Boards Act in which the Local Board occupies the same position as any other party,

but it is for compensation in money with interest thereon for money exacted from the plaintiff by a Local Board by a purported exercise of powers given by the Local Boards Act, but in excess of them because done without observing the necessary formalities prescribed for the exercise of those powers. The case falls exactly within the scope of S. 225. I am unable to see anything in the decided cases or in the language of the section as contrasted with that of the corresponding S. 350, District Municipalities Act, considered in *Municipal Council, Dindigul v. Bombay Co.* (2), which would justify the exemption of such a case from the operation of the section. In my humble opinion and with the utmost respect, I think that inquiry into the historical origin in actual or imputed contracts, of suits for money had and received and reference to the jurisdiction of Indian Courts being alike extended to equitable as to legal claims irrespective of their historical origin are irrelevant to the construction of the section in question and I think that to exclude such suits as the present from its operation would be to defeat the object with which it is framed and to protect Local Boards from long periods of limitation for money claims arising from irregular exercise of their powers and to give them a chance of tendering amends before a suit is brought. The decision appealed from is right and the appeal is dismissed.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 794

LAKSHMANA RAO, J.

K. Raman—Petitioner.

v.

A. Parvathi and others — Opposite Parties.

Criminal Revn. No. 213 of 1933 and Criminal Revn. Petn. No. 203 of 1933, Decided on 4th August 1933, against order of Joint Magistrate, Tellicherry, 20th December 1932.

Malabar Law—Marriage is not legal institution—Offspring is entitled to maintenance against father only if and when mother's tavazhi or tarwad is unable to maintain them.

The law of Malabar does not recognize marriage as a legal institution, the relation being, in truth, not marriage, but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. And the offspring of such a con-

nexion would be entitled to an order for maintenance against the father, only if and when the mother's tavazhi or tarwad is unable to maintain them : *AIR* 1917 *Mad* 276 and *AIR* 1924 *Mad* 549, *Rel on.* [P 795 C 1]

M. C. Sridharan—for Petitioner.

A. Narasimha Ayyar for Public Prosecutor—for the Crown.

Order.—The order for maintenance in favour of respondent 1 is obviously illegal as independently of any legislative enactment, the law of Malabar does not recognize marriage as a legal institution, the relation being in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases, and as pointed out in *Chantan v. C. Mathu* (1) and *In re Bharatha Iyer* (2), the offspring of such a connexion would be entitled to an order for maintenance against the father only if and when the mother's tavazhi or tarwad is unable to maintain them. The lower Court does not find, nor was it specifically alleged in the petition, that the tavazhi or tarwad is unable to maintain the children and the order for maintenance cannot be upheld. The revision petition is therefore allowed and the order for maintenance is set aside.

P.R.S./K.S.

Revision allowed.

1. *AIR* 1917 *Mad* 276=32 *I C* 144 =17 *Cr L J* 16=39 *Mad* 957.
2. *AIR* 1924 *Mad* 549=77 *I C* 418 =25 *Cr L J* 370.

A. I. R. 1933 Madras 795

BEASLEY, C. J. AND BARDSWELL, J.

Official Assignee, Madras and another—Appellants.

v.

Sampath Naidu—Respondent.

Original Second Appeal No. 19 of 1932, Decided on 4th May 1933, against judgment of Sundaram Chetty, J., D/- 21st August 1931.

(a) *Deed*—Substance and not merely form or colour of transaction should be looked into.

In construing a document, what has to be looked to is the substance of the transaction, and not merely the form or colour of it.

[P 796 C 1]

(b) *Interpretation of Statutes*—Illustration should not be taken as part of statute under every circumstance—But they should not be lightly disregarded.

Under every circumstance an illustration must not be taken as part of the statute, but a Court should not lightly disregard the illustration, merely because they do not seem to be in accord with generally accepted ideas as to the law in

other places : *AIR* 1927 *Mad* 99, *Foll* ; *AIR* 1918 *P C* 249 and *AIR* 1916 *P C* 242, *Expl.*

[P 797 C 2]

(c) *Transfer of Property Act* (1882), S. 6 (a) and S. 43 — Illustration—Illustration to S. 43 is repugnant to S. 6 (a)—Alienation of spes successionis is not validated by S. 43, even if prohibition against alienation is subsequently removed.

The illustration to S. 43 is repugnant to the provisions of S. 6 (a). Hence S. 43 cannot be applied to make valid an alienation which at the time of its being made was prohibited by statute, like spes successionis, even if the prohibition against alienation is subsequently removed : *Case law referred.* [P 797 C 1]

T. Krishnaswami Ayyar and C. Venugopalachari—for Appellants.

T. R. Srinivasa Ayyangar — for Respondent.

Bardswell, J.—The suit under appeal is one for a declaration that two mortgage deeds, executed on 18th March 1914 and 17th November 1920 respectively in favour respectively of the predecessors of defendants 1 and 2, as well as a decree obtained thereon, are void and inoperative in law to the extent to which these defendants seek to exercise their rights over the suit property. The plaintiff has been granted a decree as prayed for and the defendants are appealing.

The suit properties belonged originally to G. S. Venkatakrishnama Chetti who had three daughters. These daughters succeeded to his estate on his death, and the last of them died in October 1926. On her death B. Venkatakrishnama Chetti, the son of another of the three sisters, succeeded to the estate. The suit mortgages were executed by this B. Venkatakrishnama Chetty when he had only a spes successionis. After the death of Narasammal, the last survivor of the three sisters, he sold the suit properties on 6th December 1926 to Ananda Mohan Chetty by whom they were mortgaged on 21st January 1927 to the plaintiff. As to the validity of the plaintiff's mortgage deed (Ex. A) there is no question.

The learned trial Judge, Sundaram Chetty, J., has held that the mortgages to defendants 1 and 2 cannot be deemed to have become valid, even by an application of S. 43, T. P. Act, to them, as they were made in contravention of S. 6 (a) of that Act which runs thus :

“The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any

other mere possibility of a like nature, cannot be transferred."

There can be no doubt but that at the time of execution of the two mortgage deeds in question, Exs. 3 and 2, their executant B. Venkatakrishnama Chetti had nothing to mortgage except his right as a presumptive reversioner and that he was perfectly aware that such was the position. It was urged by the learned advocate for the appellants that what is recited as being conveyed in each of these two documents is not a spes successionis but a present interest in the property but, as has been remarked by the learned trial Judge, the fact that the documents contain these untrue recitals cannot affect the situation. What has to be looked to is the substance of the transaction and not merely the form or colour of it. The learned trial Judge has in this connexion quoted pertinent remarks from Maxwell on the Interpretation of Statutes (Edn. 6, pp. 207—209) and has also referred to what was said in *Sri Jagannada Raju v. Sri Rajah Prasada Rao* (1) (at p. 560) that :

"It would be defeating the provisions of the Transfer of Property Act to hold that, though such hopes or expectations cannot be transferred in the present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer, not the expectations but the fruits of the expectations by saying that what he has purported to do may be described in a different language from that which the legislature has chosen to apply to it for the purpose of condemning it. When the legislature refuses the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed."

It is unnecessary to add anything to what has been said in this connexion by the learned trial Judge. The appellants lay emphasis on two main points, that there is in their favour a decision of this Court in *Alamanaya Kunigari Nabi Sab v. Papaiah* (2) and that the illustration to S. 43, T. P. Act, also supports them. Sundaram Chetty, J., has found himself unable to follow the decision in *Alamanaya Kunigari Nabi Sab v. Papaiah* (2) as he finds it opposed to the Full Bench decision in *Sannamma v. Radhabhai* (3) as well as to the Privy Council decision in *Annada Mohan Roy v. Gour*

Mohan Mullick (4). With reference to the illustration he has contented himself with reiterating that what has to be looked to is not the mere form but the substance of the transaction. The leading judgment in *Alamanaya Kunigari Nabi Sab v. Papaiah* (2) is, curiously enough, that of the same learned Judge, Tyabji, J., as, in the course of the same month delivered the judgment already quoted from in *Jagannada Raju v. Sri Rajah Prasad Rao* (1). In *Alamanaya Kunigari Nabi Sab v. Papaiah* (2) Tyabji, J., has drawn a distinction between purporting to

"transfer the chance of an heir apparent, and erroneously representing that he (the transferor) is authorized to transfer certain immovable property."

Reason has however already been given for holding that such a distinction cannot be drawn, at any rate when the erroneous description is deliberately made with knowledge of its falsity. To quote again from the judgment of the learned trial Judge if such a distinction were allowed :

"the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition."

With regard to the importance to be attached to the illustration to S. 43, the remarks of the Privy Council in *Mahomed Syedol Ariffin v. Yeoh Ooi Gaik* (5) have been cited. In that case their Lordships have said with regard to the illustrations in the Evidence Ordinance that is in force in the Straits Settlements:

"It is the duty of a Court of law to accept—if that can be done—the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas forcibly derived from another system of jurisprudence as to the law with which they or the sections deal. But it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. The great usefulness of the illustrations which have, although not part of the sections, been expressly furnished by the legislation as helpful in the working and application of the statute should not be thus impaired."

These remarks have been considered by my Lord the Chief Justice as Beasley, J., in *Ramalinga Mudaliar v. Muthuswami Ayyar* (6) when he has also

1. (1916) 39 Mad 554=29 I C 241.

2. (1915) 29 I C 439.

3. AIR 1918 Mad 123=41 Mad 418=43 I C 925 (F B).

4. AIR 1923 P C 189=50 I A 239=50 Cal 929=74 I C 499 (P C).

5. AIR 1916 P C 242=48 I A 256=39 I C 401 (P C).

6. AIR 1927 Mad 99=50 Mad 94=99 I C 609 (F B).

referred to a remark of the Privy Council in *Balla Mul v. Ahad Shah* (7) :

"Four illustrations are given. They are to be taken as part of the statute."

He has thus expressed himself :

"I do not take either judgment to mean that under every circumstance an illustration must be taken as part of the statute. All that, in my view, is meant is that a Court should not lightly disregard the illustration, merely because they do not seem to be in accord with generally accepted ideas as to the law in other places."

This view I would with respect adopt. In the present instance, too, it is to be observed that not only is the illustration to S. 43 repugnant to the provisions of S. 6 (a) of the same Act, but that also the question of what value is to be given to the illustration hardly arises, as there is a plain authority from the Privy Council that the law is not as stated in the illustration. This is to be found in *Annada Mohan Roy v. Gour Mohan Mullick* (4) in which it was held, in agreement with a decision of the High Court of Calcutta, that a contract by a Hindu to sell immovable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him is void, and that S. 6 (a), T. P. Act, which forbids the transfer of expectancies, would be futile if a contract of such a character was enforceable. In their decision their Lordships quoted with approval the remarks of Tyabji, J., in *Jagannada Raju v. Sri Rajah Prasada Rao* (1).

The Full Bench decision of this Court to which Sundaram Chetti, J., has referred in his judgment under appeal is that in *Sannamma v. Radhabhayi* (3). The decision of the Full Bench was that S. 43, T. P. Act, could not be applied to make valid an alienation which at the time of its being made was prohibited by statute, even if the prohibition against alienation was subsequently removed. There is quoted in support of the contentions of the appellants the decision of a Bench of this Court in *Muthuswami Pillai v. Sandama Velan* (8), but in that case S. 6-A was not considered. Nor was it considered in the decision of the High Court of Allahabad that is reported in *Eshaq Lal v. Dulla* (9). The decision under appeal is thus clearly in accor-

dance with authority. The appeal is therefore dismissed with costs in the ratio of the two decree amounts under the mortgages.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 797

VENKATASUBBA RAO, J.

(Nakur) Mira Rowther—Plaintiff—Appellant.

v.

Muhammad Ismail and others—Defendants—Respondents.

Second Appeal No. 821 of 1929, Decided on 24th July 1933, against decree of Sub-Judge, Mayavaram.

Civil P. C. (1908), O. 21, R. 16—Application by assignee to be recognized as decree-holder and for transmission of decree for execution is petition for execution.

An application by an assignee to recognize him as assignee of the decree-holder and for transmission of the decree from the Small Cause side to the original side for execution is a petition for execution.

[P 797 C 2]

R. Somasundaram Aiyar—for Appellant.

T. S. Venkatesa Aiyar—for Respondents.

Judgment.—The finding of the lower appellate Court that no fraud has been made out is a finding of fact, and no grounds have been shown why I should interfere with it in second appeal. Mr. R. Somasundaram Ayyar for the appellant however raises another point. The Court allowed execution on the application of 4th November 1919, and the learned counsel's argument is, that before ordering execution, the Judge should have directed notice to issue under O. 21, R. 22, Civil P. C. It is contended that for want of such notice, the order allowing execution is invalid and that the proceedings that followed thereupon are void and of no effect. The soundness of this contention depends upon whether the previous application dated 12th September 1919 was a petition for execution or not. The learned counsel's argument is that it was not such a petition. I cannot agree with this. That was an application by defendant 1 for his being recognised as assignee decree-holder and for transmission of the decree from the Small Cause side, to the original side of the Court. Under the plain terms of O. 21, R. 16 this is clearly a petition for execution. A transferee decree-holder must not only ask for his being brought on the record but must in the same petition

7. AIR 1918 P C 249=124 P R 1918=48 I C 1 (P C).

8. AIR 1927 Mad 649=101 I C 619.

9. AIR 1930 All 115=122 I C 177.

apply for the execution of the decree. In this case defendant 1 applied to the Small Cause Court by which the decree was passed, for his being recognised as well as for the decree being transmitted for execution. The petition must therefore be held to be an execution petition, and the Court to which the petition was presented, made an order recognising the assignment after notice to the judgment-debtor. The application of 4th November 1919 was made within one year from the date of the order of the Small Cause Court recognising the transfer. The proviso to O. 21, R. 22, says that no notice shall be necessary

"if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution."

I am quoting the words of the proviso. On these facts there is no substance in the appellant's contention that notice should have been ordered before the petition of 4th November 1919 was granted. The second appeal fails and is dismissed with costs.

P.R.S./K S. *Appeal dismissed.*

A. I. R. 1933 Madras 798

BEASLEY, C. J. AND BARDSWELL, J.

Kaliappa Goundan and another—
(Prisoners—Accused)—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 6 and 179 of 1933, Decided on 3rd May 1933, against order of Sess. Judge, Coimbatore.

Penal Code (1860), Ss. 201 and 302—Accused placing deceased while unconscious on railway line, and death caused—Some evidence regarding marks of struggling and strangulation but death not caused by strangulation—No evidence that accused believed deceased to be dead before placing on railway line nor evidence to show that it was done to screen, already committed murder—Held accused was guilty of murder.

Accused with a deliberate intention to murder the deceased decoyed her. There was some evidence regarding struggling and marks of strangulation, but this however was not the cause of death. When the deceased was in the unconscious state, the accused dragged her and placed her on the railway line and by the passing of a train, the deceased was killed. There was no evidence to show that the accused knew or believed that the deceased was dead before the body was placed on the railway line nor to show that the accused did so in order to screen the murder:

Held: that the intention of the accused throughout was to kill the deceased, that the intention with which the accused struggled with deceased could not be separated from the inten-

tion with which they put her body across the line, that the two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the accused must be treated as being only one transaction, the transaction being to kill the deceased, and that the most favourable inference that could possibly be drawn in favour of the accused was that they acted with a reckless indifference and ignorance as to whether the deceased was alive or dead, and that accused were guilty of murder: *Case law referred.*

[(P 804 C 1)]

K. W. Rama Rao—for Accused.

Public Prosecutor—for the Crown.

Beasley, C. J.—The two appellants were charged in the Sessions Court of Coimbatore with having murdered a woman named Muthayee, the wife of appellant 1, on 16th September of last year and also with having caused evidence of the said offence to disappear by placing her body on the railway line with the intention of screening themselves from legal punishment. They were thus charged, firstly, under S. 302, I. P. C. and secondly, under S. 201, I. P. C. The learned Sessions Judge convicted them of the offence of attempt at murder under S. 307, I. P. C., under the first count and sentenced them to transportation for life. The appellants appeal against that conviction. The Public Prosecutor has presented a memorandum of criminal appeal against that order of the learned Sessions Judge on the following grounds, namely, that the appellants ought to have been convicted of murder and that the learned Sessions Judge, having found in para. 18 of his judgment that there was no doubt that the appellants intended to kill their victim, was wrong in convicting them only of an offence under S. 307, I. P. C. It was in consequence of observations which fell from us when the appellants' appeal first came before us that the Public Prosecutor presented his criminal appeal.

The prosecution case was that appellant 1 who is a cart driver and appellant 2 a cooly are related to each other and that the two appellants decoyed appellant 1's wife, Muthayee, under pretence of taking her to see a sick relation of appellant 1 at Koneripatti, strangled her on the way and put her dead body on the railway line between Somanur and Vanjipalayam so that the train might run over it and obliterate all traces of their crime. There is the evidence of P. Ws. 4 and 5, the former

the mother of the deceased, and the latter her father, that appellant 1 had been married for about 15 years and that he was addicted to drink and used to ill-treat the deceased causing her often to seek refuge in their house. At about noon on the day of the occurrence the deceased took her two children to her parents, left them at their house and went away with appellant 1 saying that she was going on a visit to Koneripatti where a relation of appellant 1 lay ill. She never reached Koneripatti and her body was discovered across the railway line between Somanur and Vanjipalayam stations. Her head had been severed from her body and lay at some distance away. It is clear that her head was cut off by a passing train and that this train was the Blue Mountain Express. The deceased woman was last seen in company with the appellants at about 5.30 p. m. by P. W. 9 on a country road along the southern side of the railway line. On this road he met Muthayee and the two appellants.

He asked them where they were going and they replied that they were going to Pollachi. Previously to this the deceased is shown to have been in the company of the appellants on a shuttle train which left Erode at 2.15 p. m. and arrived at Vanjipalayam at about 4 p. m. Then there is evidence that at Vanjipalayam the deceased was in the company of the appellants in a petty shop belonging to P. W. 8. A little later the two appellants drank toddy at a toddy-shop half a mile away. At about 7.30 p. m. P. Ws. 10 and 11 arrived by train at Somanur railway station. Together they started eastwards along the railway line to go to their villages. Having gone about a mile they saw two persons getting down from the railway track on its southern side. At this time P. W. 11 saw something black lying across the rails and drew his companions attention to it. Immediately afterwards the Blue Mountains Express came past them and they found that what had appeared to them to be something black lying across the line was the dead body of a woman subsequently identified to be Muthayee. The body was naked and headless, the head being discovered about 60 feet away. A woman's cloth lay south of the line. They then ran after the two persons whom they had

previously seen and those two persons began to run. P. Ws. 12 and 13 also pursued them and they were eventually caught at a level crossing by P. Ws. 14 and 15. These two men were the appellants. They are said to have been tipsy at the time. An examination was made of the site and the land near by and marks of a struggle were discovered by Sub-Inspector at D and D-1 on the plan where also was found M. O. 1, a thali string. This place is on the country road $9\frac{1}{2}$ feet below the line to the south and there were marks of something having been dragged towards the railway line. The prosecution case therefore was that the appellants intended to murder the deceased and that they decoyed her away to this spot and strangled her and then put her body across the railway line so that it could be run over by a passing train and thus the traces of strangulation on the deceased's body would be obliterated and death appear to be the result either of suicide or accident.

On the question of the murder of Muthayee by strangulation, in support there was evidence of P. W. 1, the Sub-Assistant Surgeon in charge of the Local Fund Dispensary at Palladam who conducted the post mortem examination and in Ex. G, the post mortem certificate, expressed it as his opinion that the death of the deceased was due to asphyxia. That being the medical opinion as to the cause of death, the prosecution case was death by strangulation and not by decapitation. There were of course no actual eye-witnesses to the crime and therefore as regards the cause of death the prosecution had to proceed on theory although prima facie the evidence of witnesses other than P. W. 1 would establish the case of murder by decapitation on the railway line. Having regard to the fact that the deceased woman's head was cut off at the neck, it seems to me that all objective signs of strangulation on that part of the woman's body if there had been any, would have been obliterated by the decapitation. A different view of the cause of death was taken by Lieutenant Colonel Fraser, I. M. S., who was examined as a Court witness as from the evidence of P. W. 2, it appeared that the death of the woman had probably been caused by decapitation—at least that

witness's evidence appeared to the learned Sessions Judge to suggest that Lieutenant Colonel Fraser stated as his definite view that the case that the deceased was first strangled to death and then decapitated by the train was inconsistent with the appearances described in Ex. G-1. The learned Sessions Judge came to the conclusion that it could be safely taken that the deceased woman was alive when she was run over by the Blue Mountain Express and therefore that the prosecution case that she had already been killed was incorrect.

The defence story that the deceased woman was killed by accident, namely, in rushing across from one side of the line to the other in front of the passing train cannot possibly be accepted and was rightly rejected by the learned Sessions Judge. It is opposed to the evidence of P. Ws. 10 and 11. It does not fit in with the marks of a struggle near the road nor with the discovery of the deceased's thali on that spot, nor with the fact that the deceased's clothing had been removed before she got across the line. The defence story however, does show that the two accused and the deceased woman were together at that spot and the accused have no explanation as to how the deceased's body got across the rails.

Turning to the medical evidence, it may be that P. W. 1's opinion expressed in the post mortem certificate was correct and that the deceased was strangled. If that is so, of course the accused were guilty of murder, but, having regard to Lieutenant-Colonel Fraser's evidence which has been accepted by the learned Sessions Judge, the deceased did not die of strangulation but as a result of decapitation on the line. Accepting that position, what offence has been committed by the appellants? The learned Sessions Judge thinks that the appellants intended to murder the deceased and tried to do so by strangling her, that they did not succeed in killing her although they thought that they had done so and that, believing that she was already dead, they put her body across the line in order to hide the traces of the crime which they thought they had committed. It is perfectly clear that the appellants did intend to kill the deceased and that it was in pursuance of a deliberately planned

transaction that she was taken to the spot where the marks of a struggle were; and it is beyond question, of course, that the deceased died as a result of the appellants' act. If, as the prosecution first thought, she was strangled by the appellants, then it was that act of the appellants which caused her death. If the case accepted by the learned Sessions Judge is correct, it was the act of the appellants in putting her body on the line which caused her death. The question before us is whether, on the case accepted in the Sessions Court the appellants can escape a conviction on the murder charge. In this High Court the view has been taken by at least two Criminal Benches of which I was a member of both, that, if persons intend to cause the death of another or others and do an act in furtherance of that intention, which act does not in fact cause the death of that person or the other persons, and, in the belief that the act has caused death, those persons do another act, for example, for the purpose of hiding the traces of their crime, and such act results in death, the offenders cannot be convicted of murder but of some lesser offence. This view has been taken in consequence of a Full Bench decision of this High Court, namely, *Palani Goundan v. Emperor* (1).

There an accused struck his wife a blow on her head with a plough-share which, though not shown to be a blow likely to cause death, did in fact render her unconscious, and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, the accused hanged her on a beam by a rope and thereby caused her death by strangulation; and it was held by the Full Bench that the accused was not guilty of either murder or culpable homicide not amounting to murder. In view of this decision, in the two Criminal Bench cases referred to, no argument was addressed to the Bench that the offence was murder although in one of these cases my learned brother and I agreed with counsel for the appellant who had been convicted in the Sessions Court of murder that the offence of murder had not in the circumstances of that case been committed because an unconscious person believed to be dead

1 A I R 1920 Mad 862=51 I C 164=20 Cr L J 404=42 Mad 547 (F B)

through the act of the appellant was killed by the appellant's act in endeavouring to screen his offence. When the present case first came before us, it appeared to us to be necessary to consider whether in all such cases it is right to hold that the offenders are guilty of a lesser offence than murder particularly so as it also appeared to us that *Palani Goundan v. Emperor* (1), was distinguishable certainly from the present case.

In that case it was not shown that the blow on the deceased's head with a plough-share was likely to cause death though it certainly rendered her unconscious and in the end, after the Full Bench decision, when the case came before the Division Bench, it resulted in the conviction of the appellant of grievous hurt under S. 326, I. P. C., only. It must be observed also that of the two referring Judges, Napier, J., was of the opinion that even on the facts of that case the accused was guilty of murder. In the course of his judgment he makes one observation at p. 552 with which I entirely agree and it is:

"Apart from the actual offence of concealing a murder, it is the grossest violation of natural rights to stab, shoot or hang a person without absolute knowledge that that person is dead unless of course it is done innocently, and I see no reason why the offender should not suffer the consequences of his act."

He then refers to *Gour Gobindo Thakoor* (2). There one Gour Gobind struck the deceased a blow which knocked him down and then he and others without inquiry as to whether he was dead or not, in haste hung him up to a tree so as to make it appear that he committed suicide. The accused were all convicted of hurt, but the High Court quashed the proceedings and directed the accused to be re-tried on charges of murder, culpable homicide not amounting to murder and hurt. Seton-Kerr, J. says:

"If however the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the trees, would be clearly liable to a charge of culpable homicide amounting to murder, for, without having ascertained that he was actually dead, and under the impression that he was only stunned, they must have done the act with the intention of causing death or bodily injury likely to cause death, and without the exceptions provided by the law, or they might have been committed for culpable homicide not amounting to murder."

2. (1866) 6 W R 55 Cr.

The next case to which reference is made by Napier, J., is *Queen Empress v. Khandu* (3). In that case it was found that the accused struck the deceased three blows on the head with a stick with the intention of killing him. The accused, believing him to be dead, set fire to the hut in which he was lying with a view to remove all evidence of the crime. The medical evidence showed that the blows were not likely to cause death and did not cause death and that death was really caused by injuries from burning. The Bombay High Court was of the opinion that the offence committed was attempt to murder and not murder. In this view the Judges were not unanimous. Parsons, J., took the view that the whole transaction, the blow and the burning, must be treated as one and that therefore the original intention to cause death applied to the act of burning which did cause death. With this view Napier, J., agreed—and for reasons which I will presently state I do also—and expressed the opinion that *Queen Empress v. Khandu* (3), was wrongly decided. Another case referred to in the judgment of Napier, J., is *Emperor v. Dalu Sardar* (4). There the accused assaulted his wife by kicking her below the naval. She fell down and became unconscious. In order to create an appearance that the woman had committed suicide, he took up the unconscious body and, thinking it to be a dead body, hung it by a rope. The post mortem examination showed that death was due to hanging. The Court held that as the accused thought it to be a dead body he could not have intended to kill her; if he thought that the woman was already dead, the offence was not murder. Sadasiva Ayyar, J., the other referring Judge, considers the latter case correctly decided and is of the opinion that the intention in S. 299, I. P. C., "to cause such bodily injury as is likely to cause death" cannot mean anything except "bodily injury" to a living human body. When the case came before the Full Bench, the Public Prosecutor did not contend that the facts as found by the referring Judges constituted the offence of murder or even culpable homicide. The Full

3. (1891) 15 Bom 194.

4. A I R 1915 Cal 221=26 I C 157=15 Cr L J 709.

Bench however gave an opinion upon the matter and Wallis, C.J., in his judgment says:

"The conclusion is irresistible that the intention of the accused must be judged not in the light of the actual circumstances, but in the light of what he supposed to be the circumstances. It follows that a man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction as in *Queen-Empress v. Khandu Valad Bhavani* (3), or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in *Gour Gobind's* case (2). The facts as found here eliminate both these possibilities, and are practically the same as found in *Emperor v. Dalu Sardar* (4)."

It is clear therefore that the Full Bench distinguish the two former cases from the case which was before them and seem to indicate an opinion that in these cases the offence committed might have been murder. In my opinion, we are therefore free to consider the present case, which is, in my opinion, as near a case as could be found to the *Queen-Empress v. Khandu* (3) as not being covered by the decision in *Palani Goundan v. Emperor* (1). Accordingly I will refer again to *Queen-Empress v. Khandu* (3). In that case the accused confessed to having struck his father-in-law, the deceased, three blows with a stick, one on the back and one on each ear. The injured man immediately fell down on the ground and the accused said that he died. The accused then set fire to the hut. It was found that the deceased man died from the burns received and that the blows struck by the accused were not likely to cause death and did not do so. Birdwood, J., and Sergeant, C. J., to whom the case was referred owing to a difference of opinion between Birdwood and Parsons, JJ., held that as the accused had not intended to cause the death of the deceased by setting fire to the shed but had only done so after he thought that the deceased was dead, the act of setting fire to the shed by which death was caused was not done with such intent or knowledge as is contemplated in S. 299, I.P.C. Parsons, J., took a different view. On p. 200 he says:

"It is true that the accused says that, immediately after he dealt the three blows, his father-in-law died and fell down on the ground, but he does not say that he in any way satisfied himself

that he was actually dead or even that he thought that he was dead; still less does he say that his intention in setting fire to the hut was to conceal his crime. He does not say what his intention was. This being so, I think the presumption of law is that in all that he did he was actuated throughout by one and the same intention. There is no evidence or proof of any change therein. There is then the intention of the accused to cause death and there are two acts committed by him which together have caused death—acts so closely following upon and so intimately connected with each other that they cannot be separated and assigned the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. In my opinion, the accused in committing those acts is guilty of murder."

In my view, Parsons, J., was right. If the intention is to kill and a killing results, the accused succeed in doing that which they intended to do and if the acts follow closely upon one another and are intimately connected with one another such as they were in the Bombay case, then in my opinion the offence of murder has been committed. Similarly when the facts suggest that the accused acted with a reckless indifference and ignorance as to whether the body he handled was alive or dead, it is only right also to say that in the present case, unlike the other cases referred to, there is no evidence of what the acts of the appellants were at the place where there were marks of a struggle beyond the fact that it is likely that a struggle took place there. In all the other cases the act which the accused thought had caused the death of the murdered person was proved either by the accused's own statement or by the evidence of eye-witnesses. Here it has not been shown that the appellants thought that the deceased woman was dead when they put her body across the rails. It is not the appellants' case that they thought so, and the Court is merely asked to infer that they did so because there were marks of a struggle and signs of an attempt, at strangulation, both of which are quite consistent also with the alternative that the appellants merely intended to make the woman unconscious in order to make it easy for them to put her body on the line, or another alternative that they did not know or care whether she was dead or not and put her body across the line.

There is also another alternative which presents itself, namely, that the

woman's body was put across the line in order to finish her off. When the Court has facts before it such as in this case that the appellants deliberately put the woman's body across the line and that she was killed by a passing train, then it certainly seems to me that very much stronger facts are required than there are at present in this case to prove the case which has been accepted in the Sessions Court. In the absence of such proof, I will go so far as to say that no proof of that case is to be found and it was not the case put forward by the appellants. Even assuming the case to be as accepted by the learned Sessions Judge, I am strongly of the opinion that the offence committed was murder. In support of my view in addition to the view expressed by Parsons, J., in *Queen-Empress v. Khandu Valad Bhavani* (3), there is a decision of the Allahabad High Court, namely, *Emperor v. Khubi* (5). There the accused, a full grown man, beat his child wife, an invalid and weak girl, so recklessly with a lathi that he thought he had killed her. He then threw her down a dry well 33 feet deep, an act which, if she was not already dead, must inevitably have killed her. He was convicted in the Sessions Court under S. 304, I. P. C., and it was held however by Walsh and Ryves, JJ., in the High Court that the accused was probably guilty of an offence under S. 302, I. P. C. Walsh, J., in the course of his judgment expresses the opinion that the difference of opinion in *Queen-Empress v. Khandu* (3) between Parsons, J., and the majority of the Bench, was a difference of fact and not of law. Later on he states:

"His subsequent conduct indicates that he felt no surprise and showed no remorse. Instead of going to his friends or her friends or anybody in authority to explain this accident, which he had brought about, if it was an accident though in my opinion he must be taken within the meaning of the Code to have known quite well that what he was doing was likely to cause her death, he surreptitiously by night carried what he thought was her dead body and threw it down a well leaving it there presumably in the hope of covering up the traces of injury, I am by no means satisfied with the inference drawn by the learned Judge which I think is too merciful and too improbable that he really thought that she was dead. I think he must have known when he was carrying the body that she was still alive, but in either case in the peculiar circumstances of his conduct, it seems to me to make no difference. He either beat her till she was dead or he

beat her until her chances of recovery were slight and finished her off by throwing her down a dry well 33 feet deep. If I had tried him, he would have been convicted under S. 302, I. P. C., and sentenced to death."

And later :

"To sum up my reasons, it is this : that one common intention of inflicting such injuries upon her as he must have known to be likely to cause her death is present throughout the case from the beginning to the end, and if this is the case I agree with Parsons, J., in his view of the facts in the Bombay case."

Ryves, J., agrees with Walsh, J. There is also a decision of the Lahore High Court, viz., *Emperor v. Gajjan Singh* (6). There the accused struck the deceased two or three times on the head and when the latter fell down unconscious threw him face downwards into a pool containing a few inches of water, removed the contents of his pockets and covered the body with the branches of a tree. Later on the accused carried the body of the deceased in a dhoti and threw it into a canal. The Sessions Judge held that the offence of murder had not been made out and convicted the accused under Ss. 325 and 379, I. P. C. On appeal it was held that the action being continuous and it being impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object and he was therefore guilty of murder. The learned Judges in that case in dealing with the act proved to have been committed by the accused observed that

"the one thing that can be said with positive certainty is that, after he had lain face downwards in the pool of water for some hours, and before he was removed to the canal, Bagawandas was dead. There is another difference between this case and the facts of the two authorities relied upon : *Queen-Empress v. Khandu Valad Bhavani* (3) and *In re Palani Goundan* (1), and that is that there was no definite break in the events of the first two chapters. The incidents ran into each other and the action was continuous. The accused struck Bagawandas and, as soon as he fell, he removed him and put him into the pool and, after taking what money there was on him, covered him with the branches of the *ak* bush. The action being continuous etc."

To sum up this case (1) an intention to kill Muthayee was clearly proved; (2) that it was in pursuance of a deliberate plan; (3) that the appellants placed

6. AIR 1931 Lah 27=1931 Cr C 91=130 I C 321=32 Cr L J 483.

Muthayee's body across the railway line; (4) that it was that act which caused her death; (5) the appellants have not put forward the case that they believed Muthayee to be dead when they put her body across the line; (6) the marks of a struggle and the body being dragged and discovery of the woman's thali at that spot prove nothing more than a struggle and (7) there is some slight medical evidence re. marks of strangulation. This however was not the cause of Muthayee's death. The conclusions I arrive at from the before mentioned facts are that the appellants had a struggle with the deceased woman during which her thali fell off or was removed, that an attempt may have been made to strangle her, that she was immediately dragged either in an unconscious or semi-conscious condition on to the railway line and placed in front of the train, the intention throughout being to kill Muthayee, that the intention with which the accused struggled with Muthayee cannot be separated from the intention with which they put her body across the line, that the two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the appellants must be treated as being only one transaction, the transaction being to kill Muthayee, and that the most favourable inference that could possibly be drawn in favour of the appellants is that they acted with a reckless indifference and ignorance as to whether Muthayee was alive or dead. Even this inference, in my view, is not such a reasonable one as the former but it is the most favourable one which could be drawn.

All this leads me to one conclusion only, namely that the appellants were guilty of the offence of murder. They have been acquitted on that charge in the Sessions Court. The question is whether we should interfere with that acquittal. I am clearly of the opinion that we should do so firstly because the learned Judge's view of the legal position is incorrect and secondly because I can see nothing which could reasonably justify the learned Sessions Judge in drawing the inference that the appellants thought that Muthayee was dead when they placed her body on the railway line. It seems to me to be a pure guess and nothing more. There is evidence that

the appellants were tipsy when they were arrested. They cannot have been so drunk as not to know what they were doing because they dragged Muthayee on to the line, put her body across the line in such a way that her neck lay across the rails and then ran away. The probability is, as the evidence shows, that they took some drink before the occurrence in order to screw themselves up to the necessary pitch for the performance of the murder. In my opinion, the acquittal of the appellants on the charge of murder must be set aside and the appellants must be convicted of the offence of murder. As regards the sentence, the murder was a deliberately planned one and a very cruel one. There are no mitigating circumstances whatever and no reason for not inflicting the ordinary sentence which the law requires, that is to say, the sentence of death.

Bardswell, J.—I agree. The sentence of the Court is that the two accused be hanged by the neck until they are dead.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 804

BEASLEY, C. J. AND BARDSWELL, J.

Punnamchand Chatraban (Firm) —
Petitioner.

v.

Vijjapu Satyanandam — Opposite
Party.

Civil Revn. Petn. Nos. 1335 to 1338 of 1928, Decided on 16th February 1933, against order of Dist. Judge, East Godavery, D/- 28th February 1928.

Civil P. C. (1908), S. 73 and O. 21, Rr. 72 and 84—Decree-holder allowed to bid and set off amount of bid—Set off should be deemed to be made as soon as sale is made and other decree-holders cannot claim rateable distribution in the amount of bid.

When a decree-holder has been given permission to bid and set off, and when the amount of the successful bid is less than the decree amount the whole of the set off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised co instante the sale is made, and S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale however soon after its conclusion their applications may be made: *A I R 1931 Mad 103, Foll.*; *A I R 1920 Mad 731, Dist.*; *A I R 1931 Bom 252 and 32 Bom 379, Ref.* [P. 805 C 2]

G. Lakshmanna and G. Chandrasekhara Sastri—for Petitioner.

P. Satyanarayana Rao for V. Govindarajachari—for Opposite Party.

Bardswell, J. — The respondent to these appeals obtained a decree in O. S. No. 67 of 1920 on the file of the Subordinate Court of Vizagapatam. The decree was transmitted to the District Court of East Godavari for execution. The respondent filed an execution petition, 45 of 25, in that Court and was given permission, on an application on that behalf, to bid at the auction sale and to set off the amount of his bid, if successful, against the amount due to him under his decree. The actual expression in the order was not "set off" but "credit," but it is perfectly clear and is not disputed that the effect of the order was to give permission to set off. The sale began on 7th January 1927 and was concluded on 12th January 1927 on which date the property was knocked down to the respondent. There has been no objection to the sale on any ground. On the evening on which the sale was concluded, but just after its conclusion, the appellants in these appeals, each of whom held a decree against the same judgment-debtor, filed petitions, asking for rateable distribution. The learned District Judge of East Godavari has dismissed the petitions holding that they had not been put in, as S. 73, Civil P. C., requires that such petitions should be, before the receipt of the assets, which they asked to be distributed, by the Court that held them. In his view, in that the respondent had been given permission to set off, the sale proceeds must have been deemed to have been paid into Court by the respondent purchaser and immediately repaid to him towards satisfaction of his decree. The appellants therefore could not have the benefit of S. 73, as their applications were not made to the Court before it had received the assets. They appeal against this decision.

In *Arunachalam Chetti v. Somasundaram Chetty* (1), a view was taken by Seshagiri Ayyar, J., sitting as a single Judge that is favourable to the appellants. A decree-holder had obtained permission to bid and set off and was the successful bidder at a sale which was

1. A I R 1920 Mad 731=59 I C 86.

held and concluded on 28th August 1918. On the following day another decree-holder applied for rateable distribution. The learned Judge pointed out that under O. 21, R. 72 permission to bid and set off is given subject to the rights of decree-holders under S. 73, and, as there was nothing to show that permission in that case was of a different character, he allowed the petition for rateable distribution. This decision however has been considered by Ramesam, J., when also sitting as a single Judge, in *Ramaraju v. Lakshmiah* (2), and he held it to be wrong. In his view when a decree holder has been given permission to bid and set off and when, as in the case now under notice, the amount of the successful bid is less than the decree amount, the whole of the set off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised eo instante the sale is made. This view must, in my opinion, and with respect, be taken as the correct one. Ordinarily under R. 84, O. 21, the successful bidder has to pay a deposit of 25 per cent of his bid immediately on his being declared to be the purchaser, but, if the purchaser is the decree-holder and is entitled to set off the purchase money under R. 72, then the Court may dispense with the requirements of the rule. Normally there will be such dispensation, in which case, as soon as such decree-holder is declared the purchaser, the set off must be taken as having been made, and S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale however soon after its conclusion their applications may be made.

Mr. Lakshman's main point for the appellants is that leave to set off cannot legally be given before the sale has been held and concluded, and he quotes in his support, an opinion to that effect by Broomfield, J., in *Navaja Bhandu v. Totaram Govind*, A. I. R. 1931 Bom. 252. That opinion however was obiter and was not necessary for the decision of the case which was then before the Bench of which that learned Judge was a member. It is certainly not the view taken by Ramesam, J., in the case above cited, and it is also contrary to the view indicated by another Bench of the Bom.

2. A I R 1931 Mad 103=130 I C 458.

bay High Court in *Hazarimal v. Nandev* (3). There with reference to S. 294 of the previous Code, to which the present O. 21, R. 72 corresponds, Sir Lawrence Jenkins, C. J., remarked:

"that section is perfectly clear. The first paragraph of that section requires the permission of the Court to enable the decree-holder to bid for the property. If he gets that permission and gets it without qualification then the amount due on the mortgage may if he so desires be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off."

If there can be a refusal in advance to allow set off, it would appear that it is equally permissible for set off to be allowed in advance. And that permission to set off may be granted at the same time as the permission to bid seems clear from the terms of S. 84, by which the decree-holder purchaser may be dispensed from the immediate payment of the purchase money that would have otherwise to be made. There could be no dispensation from immediate deposit unless the permission to set off had been obtained prior to the sale. In my opinion the orders under appeals are correct. These appeals must therefore be dismissed with costs (one set). Pleader's fee Rs. 50.

P.R.S./K S.

Appeals dismissed.

3. (1908) 32 Bom 379.

A. I. R. 1933 Madras 806

SUNDARAM CHETTY, J.

Kannusami Chetti—Defendant — Appellant.

v.

M. Rabiath Ammal and another — Plaintiffs—Respondents.

Second Appeal No. 3 of 1930 and Civil Misc. Petn. No. 2553 of 1930, Decided on 11th October 1932, against decree of Sub.Judge, Madura.

(a) Civil P. C. (1908), O. 41, R. 33—Power under O. 41, R. 33 can be exercised in favour of party not on record in appeal—Exercise of such power is discretionary with Court and depends on peculiar circumstances of each case.

The power vested in the appellate Court under R. 33, can be exercised in favour of a party not on the record in the appeal, but certainly not against a person not actually a party on record. Those powers are very wide and can be exercised in a proper case, even in favour of a respondent who has neither appealed nor filed a memoran-

dum of cross-objections. But the exercise of such extraordinary powers is a matter of discretion with the appellate Court which must depend upon the peculiar circumstances of each case: *A I R 1930 Mad 801 (F B), Rel on; A I R 1914 Cal 722, Ref.* [P 808 C 1]

(b) Civil P. C. (1908), O. 41, R. 20 and 33—Appellate Court has jurisdiction to add a person as party respondent for purpose of exercising power under O. 41, R. 33.

The appellate Court has jurisdiction under R. 20 to add a person as a party respondent for the purpose of exercising the powers vested in it under R. 33, though no appeal or memorandum of cross-objection has been filed: *Case law referred.* [P 809 C 2]

(c) Civil P. C. (1908), S. 107, O. 1, R. 10 and O. 41, R. 20 — O. 41, R. 20, does not exhaust appellate Court's power to add parties.

Order 41, R. 20 does not exhaust the appellate Court's power to add parties. Even if R. 30 does not apply, the Court has power to do so under O. 1, R. 10 read with S. 107: *A I R 1920 Mad 120, Rel on.* [P 810 C 1]

(d) Execution — Sale — Title of bona fide stranger auction-purchaser cannot be attacked by party to suit in which decree is passed.

The title of a bona fide auction-purchaser who is not a party to the suit in which the decree is passed, cannot be attacked by a party to the suit: *Case law referred.* [P 811 C 1]

(e) Civil P. C. (1908), O. 32, R. 3—Assignment by mother of mortgage in favour of both minor daughter and herself — Suit on such mortgage — Merely by fact of such assignment, interest of mother is not adverse to that of minor daughter so as to disqualify her from being appointed as guardian — Minor.

A mother assigned a mortgage which was in favour of herself and her daughter; and in a suit on the mortgage which was decreed, the mother was appointed guardian of the minor:

Held: that the mere fact that the mother was the executant of the assignment deed in question would not be enough to hold that the interest of the mother was really adverse to the minor, so as to disqualify from being appointed as guardian: *A I R 1929 Mad 213 (F B), Rel on.* [P 812 C 1]

(f) Mahomedan Law — Guardianship — Mother is neither natural nor legal guardian of minor daughter — Transfer by mother as de facto guardian of minor's interest in immovable property is void.

Under Mahomedan law, the mother is neither the natural nor the legal guardian of her minor daughter. The mother even as a de facto guardian has no power to convey to another her minor daughter's interest in immovable property, which the transferee could enforce against the minor. Such a transfer is unauthorised and void: *A I R 1918 P C 11, Foll.* [P 813 C 2]

(g) Limitation Act (1908), Art. 62 — Assignment by Mahomedan mother of mortgage in favour of minor daughter and herself — Assignment void as regards interest of minor

daughter — Realization of full mortgage amount by assignee—Suit by minor daughter against assignee for her share of amount is maintainable—Trusts Act (1882), S. 90.

A mortgage which was in favour of both a minor daughter and her mother who were Mahomedans was assigned by the mother. The assignment was void as regards the interest of the daughter. The assignee, who was aware of the voidability of the assignment, so far as the minor's right under it was concerned, realized the mortgage amount and the daughter sued for her share of the amount:

Held : that the suit was maintainable as the action could be described as one for money had and received within Art. 62, Limitation Act, and also on the principle mentioned in S. 90, Trusts Act : *Case law referred.* [P 814 C 2]

H. Civil P.C. (1908), S. 11—Decision as a result of gross negligence of guardian does not operate as res judicata as against minor—Minor.

If the decree passed in a prior suit is the result of gross negligence on the part of a guardian of the minor, it will not operate as res judicata so as to bar the later suit by the minor: *A I R 1925 Mad 204; A I R 1931 Mad 641 and A I R 1922 Mad 273, Rel on.* [P 816 C 1]

K. Rajah Ayyar, V. Rama Swami Ayyar and K. S. Rajagopalachari—for Appellant.

S. Varadachariar for K. S. Champasaka Iyengar and A. V. Narayana Swami Ayyar—for Respondents.

Order.—C. M. P. No. 2553 of 1930.—This second appeal was filed by defendant 7 impleading the plaintiff alone as the respondent. The suit was filed by the plaintiff for the recovery of a certain amount by the sale of the hypothecated properties, and if, for any reason, the Court should hold that the plaintiff cannot proceed against the hypotheca, she prays that defendants 8 to 10 should be held liable to pay the suit amount jointly and severally.

The facts of the case are briefly these: The plaintiff's father Mahomed Rowther became entitled at a family partition to the mortgage debt due under the original of Ex. B dated 17th December 1902 and executed by one S. N. Mahomed Rowther. The plaintiff was a young girl of two years when her father died. In 1911 defendant 8 who is the plaintiff's mother, thought of re-marriage and fraudulently assigned the aforesaid mortgage bond on behalf of herself and the minor plaintiff in favour of defendant 9 under Ex. G-1. Defendant 9 in his turn assigned it in favour of defendant 10. The aforesaid assignment by defendant 8 is void and ineffectual so far as the plaintiff's share in the mortgage debt is

concerned. On the strength of the aforesaid assignment, defendant 10 filed O. S. No. 99 of 1913 on the file of the Additional District Munsif's Court of Madura impleading the present plaintiff and also defendants 8 and 9 as parties thereto. The plaintiff was then a minor and was not properly represented and the decree in that suit cannot therefore affect her interests. She has therefore filed the present suit for two kinds of relief in the alternative. The first Court dismissed the plaintiff's suit as against all the defendants except defendant 8. On appeal by the plaintiff, the lower appellate Court gave a decree in plaintiff's favour for the amount found due to her as against the hypotheca, in the hands of defendant 7, dismissing the claim against defendant 10. As against that decree, defendant 7 has filed this second appeal impleading the plaintiff alone as respondent. During the pendency of this appeal, an application was made by the plaintiff (respondent) to add defendant 10 also as a co-respondent in the appeal. It is C. M. P. 2553 of 1930.

The reasons for impleading defendant 10 as a party respondent in this appeal are stated in the affidavit filed in support of that petition. On 7th August 1930, the Master passed an order directing defendant 10 to be made a party to the appeal. That order was passed without previous notice to defendant 10. It is now urged by defendant 10, that under the appellate side rules the Master had no jurisdiction to direct the addition of a party as a co-respondent and therefore that order is ultra vires. It appears that such an order is not within the competence of the Master to pass, and accordingly I allowed that petition to be treated as not disposed of in the eye of the law and heard arguments on both sides at great length for the purpose of determining whether defendant 10 can be added as a co-respondent in the circumstances of this case.

Two contentions have been put forward on behalf of defendant 10 to persuade the Court to dismiss this petition. One is that under R. 20, O. 41, Civil P.C., which alone gives the power to an appellate Court to add a party as respondent, defendant 10 cannot be added as he cannot be deemed to be interested in the result of the appeal. The second is,

the Court's discretion under R. 33, O. 41, Civil P. C., should not be exercised in favour of the plaintiff (respondent) by interfering with the dismissal of her suit as against defendant 10 by the Courts below, regardless of the fact that defendant 10 has acquired a valuable right on account of the omission on the part of the plaintiff to file either an appeal or a memorandum of objections within the period of limitation.

There is, no doubt, that the power vested in the appellate Court under R. 33 can be exercised in favour of a party not on the record in the appeal, but certainly not against a person not actually a party on record. The scope of the powers given to an appellate Court by R. 33 has been fully considered and decided by a Full Bench of our High Court in the case reported in *Subramania Chettiar v. Sinnammal* (1). It was held that those powers are very wide and can be exercised in a proper case even in favour of a respondent who has neither appealed nor filed a memorandum of cross-objections. But it is recognized that the exercise of such extraordinary powers is a matter of discretion with the appellate Court which must depend upon the peculiar circumstances of each case. The illustration to R. 33 which indicates the type of a case covered by the section is as follows :

"A claims a sum of money as due to him from X or Y and in a suit against both, obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y."

The view taken by the Calcutta High Court in the decisions reported in *Gangadhar v. Banatashi* (2) and *Abjal Majhi v. Ipu Bepari* (3) is, that though the rule is widely expressed, ordinarily the exercise of the power conferred thereby should be limited to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. This is exactly a case covered by the illustration. But in the Full Bench decision of this

High Court referred to above, it has been held that the appellate Court has jurisdiction to interfere in a proper case and pass any decree and make any order which ought to have been passed or made in the suit and that the view taken in the aforesaid Calcutta decisions would be a limitation of the Court's powers which is not warranted by reason of the very wide terms of the rule. But in the present case it is unnecessary to go further than the limits placed by the Calcutta High Court in the said two decisions, because this case is exactly covered by the illustration to R. 33. The plaintiff seeks to recover the suit amount by the sale of the hypotheca in the first instance. That is the primary relief claimed by her. If that relief is denied to her, then she asks for a decree against defendant 10 who sued on the mortgage and recovered the full amount. She cannot and does not ask for accumulative relief against the hypotheca and defendant 10.

A decree for the recovery of the money by sale of the hypotheca precludes her from asking for a personal decree against defendant 10. In the present appeal, defendant 7, who stands in the shoes of the auction-purchaser in execution of the mortgage decree obtained by defendant 10, attacks the correctness of the decree against the hypotheca and wants the plaintiff's suit to be dismissed as against the hypotheca. If in this appeal the decree against the hypotheca is set aside, then the question of further interference with the decree of the lower appellate Court dismissing the claim against defendant 10 arises for consideration and in order to do complete justice to the parties in exercise of the powers under R. 33, a decree may be passed in favour of the plaintiff-respondent as against defendant 10, though the plaintiff-respondent has not filed any appeal or memo of cross-objections. Relying on the Privy Council decision in *Chockkalingam Chetty v. Seethai Achi* (4), and the decisions in *Ma Thaw May v. Mahomed Esoof* (5), *Saktiprasanna Bhattacharya v. Naliniranjan Bhattacharya* (6) and *Rukia v. Mewapal* (7),

1. A I R 1930 Mad 801=127 I C 624 = 53 Mad 881 (F B).

2. (1915) AIR 1914 Cal 722=24 I C 208.

3. (1916) 32 I C 494.

4. AIR 1927 P C 252=107 I C 287=6 Rang 29 (PC).

5. AIR 1932 Rang 16=135 I C 645=9 Rang 624,

6. AIR 1931 Cal 738=133 I C 177=58 Cal 923.

7. AIR 1928 All 746=111 I C 751=51 All 63.

the learned advocate for defendant 10 strenuously contended that the Court should not exercise its discretion to add defendant 10 as a party respondent for the purpose of passing a decree in pursuance of the powers given to it under R. 33.

In *Chockkalingam Chetty v. Seethai Achi* (4) and *Ma Thaw May v. Mahomed Esoof* (5) the main ground for refusing to add a person as a party respondent to the appeal is the fact that that person has acquired a valuable right under that decree, inasmuch as an appeal against him was then barred by limitation. In those cases the person sought to be added as a party was a necessary party to the appeal, in the sense that the appeal could not proceed in the absence of that person, and as the appellant could have very well filed an appeal against that person also in time, it was thought that he should not be deprived of a valuable right acquired by him, by means of a discretionary power vested in the appellate Court. As I have already pointed out, the facts of the present case are quite different. In the face of the lower appellate Court's decree granting relief to the plaintiff against the hypotheca, she cannot file an appeal against the dismissal of her claim against defendant 10. She cannot therefore be blamed for not filing an appeal against that portion of the decree dismissing the suit against defendant 10, or for not filing a memorandum of objections for the same relief, so long as the decree against the hypotheca given to her is not set aside.

In case the decree against the hypotheca cannot be upheld, this is eminently a fit case for the exercise of the powers of the appellate Court under R. 33, in order to see whether she can at least be given a decree against defendant 10 or not. The view taken in *Saktiprasanna Bhattacharya v. Naliniranjana Bhattacharya* (6) is not quite in accordance with the decision of a Division Bench of this High Court reported in *Ponnuswami Asari v. Palaniandi Mudali* (8). The somewhat narrow view taken by the Calcutta High Court as to the scope of R. 23, O. 41, Civil P. C., has not been adopted by our High Court in the Full Bench decision in *Munuswami Mudali*

v. Abbu Reddi (9). According to this Full Bench decision, it is open to a respondent under R. 22 to file a memo of cross-objection against any other respondent, whether the appellant was interested in it or not. In *Ponnuswami Asari v. Palaniandi Mudali* (8) the learned Judges held that the appellate Court has jurisdiction under O. 41, R. 20, to add a person as a co-respondent, in order to enable the respondent already on record in the appeal to file a memo of cross-objections against him. They treat the person sought to be added as one interested in the result of the appeal within the meaning of R. 20, because the expression "the appeal" should be understood in the broad sense so as to include all the proceedings in the appellate Court whether those involved in the disposal of the appeal proper or also those involved by the memo of objections. If the appellate Court has jurisdiction under R. 20 to add a person as a co-respondent in order to sustain the memo of cross-objections to be filed against him, according to the decision in *Ponnuswami Asari v. Palaniandi Mudali* (8) there is no difficulty in holding that the appellate Court has jurisdiction under R. 20 to add a person as a party respondent for the purpose of exercising the powers vested in it under R. 33, though no appeal or memo of cross-objections has been filed.

In the present case, if defendant was originally made a respondent in the appeal itself, there can be no question that under R. 33 the dismissal of the suit as against him can be interfered with by the appellate Court if the decree against the hypotheca has to be set aside.

The relief that could be obtained against him by way of cross-appeal may be obtained under R. 33, even without filing the memo of objections. That being so, the principle of the decision in *Ponnuswami Asari v. Palaniandi Mudali* (8) can well nigh be extended to the present case also. The decision in *Saktiprasanna Bhattacharya v. Naliniranjana* (6) proceeds on the narrow view of the scope of R. 22 of O. 41, Civil P. C., adopted by the Calcutta High Court in some of its decisions. That is why it was held that a memo of cross-objections filed against one who was not already a party respondent was liable to

rejection. It may be reasonably urged that defendant 10 in this case is one interested in the result of the appeal, because the relief which the plaintiff (respondent) may ask the Court to give her as against defendant 10 in exercise of the powers under R. 33, is one contingent on the result of the appeal. Even if R. 20 is deemed to be strictly not applicable to the present case, the appellate Court has power to add parties under O. 1, R. 10, Civil P. C., read with S. 107. In *Ponnusami Asari v. Palaniandi Mudali* (8) this view has been expressed by Krishnan, J., who points out that R. 20 does not exhaust the appellate Court's power to add parties.

The decision of the Patna High Court of Sir Dawson-Miller, C. J., and Foster, J., reported in *Padarath Mahton v. Hitan Singh* (10), deals with a case exactly on all fours with the present case. Following the decision in *Girish Chunder Lahiri v. Sasi Sekharaswar Roy* (11), Miller, C. J., observes that in a case of this description the ordinary rules of limitation relating to appeals ought not to apply, where in the course of an appeal the Court finds that in order to do justice between the parties it is necessary to bring one of them who was a party to the suit upon the record in the appeal. It has further held that the Court in second appeal has power under R. 20 to bring parties upon the record in order to carry out the powers granted to the Court under R. 33 of O. 41. The principle of this decision is in consonance with the view taken by this High Court in *Ponnusami Asari v. Palaniandi Mudali* (8). I am clearly of opinion that there are adequate grounds for exercising the powers given under R. 33 in the present case, and on the authority of the two decisions above mentioned, defendant 10 could be added as a party respondent now under R. 20, O. 41, Civil P. C. This may be done even under O. 1, R. 10 read with S. 107 Civil P. C. I accordingly direct the addition of defendant 10 as respondent 2 in this appeal. The appeal will be heard on the merits.

Judgment.—The facts of this appeal have been set forth in the order passed on C. M. P. 2553 of 1930 in this appeal which will form part of this judg-

ment. The plaintiff and her mother (defendant 8) may be taken to be co-heirs of the late Mahomed Rowther and have inherited his estate which they held as tenants in common. The lower appellate Court has rightly held that the assignment of the mortgage bond Ex. B in favour of defendant 9 whose assignee is defendant 10 is void as against the plaintiff's interest in that mortgage bond, as her mother who effected the assignment on behalf of herself and the minor plaintiff was not the plaintiff's legal guardian according to Mahomedan law. On the strength of that assignment, defendant 10 sued on the mortgage bond in O. S. No. 99 of 1913 on the file of the Additional District Munsif's Court, Madura, impleading the present plaintiff (who was then a minor) as one of the defendants and obtained a decree. In execution of that decree he brought the mortgaged properties to sale. Defendant 6 was a bona fide purchaser of those properties in Court auction from whom defendant 7 subsequently purchased it under Ex. 10. In passing the decree in the present suit in favour of the plaintiff for her share of the mortgage amount against the hypotheca, the learned Subordinate Judge appears to have entirely overlooked the principles of law governing the title acquired by a bona fide Court auction purchaser. This serious omission has led to a wrong decree being passed.

It is contended on behalf of the appellant that when a decree for sale of the hypotheca was passed in favour of the present defendant 10 in the former suit to which the present plaintiff and her mother were also parties, and when the Court had jurisdiction to sell the hypotheca in execution of the decree, the title acquired by a bona fide auction purchaser (who is a third party) cannot be impeached by the present plaintiff, and she is debarred from claiming any relief against the hypotheca in the hands of defendant 7. The ground on which the present plaintiff attacks the former decree is, that inasmuch as her mother was not competent to assign her interest in the mortgage bond to defendant 10, the decree passed in his favour for the whole of the mortgage amount is not binding on her and therefore she must be given once again a decree for her share of the amount against the hypo-

10. A I R 1924 Pat 773 = 82 I C 600.

11 (1903) 33 Cal 320.

theca. That a bona fide auction purchaser is immune from such attacks by those who were actually parties to the suit in which the decree against the hypotheca was passed, has been held in a series of decisions not only of the Privy Council, but also of the High Courts.

In *Zainulabdin Khan v. Muhammad Asghar Ali Khan* (12), their Lordships of the Privy Council have recognised the distinction between the cases of bona fide purchasers in Court auction who are no parties to the decree and the cases of the decree-holders themselves being the Court auction purchasers. It was held that a sale which had taken place in execution of a decree in force at the time could not afterwards be set aside as against a bona fide purchaser not a party to the decree, because on further proceedings that decree was subsequently reversed by an appellate Court. In another case, the Privy Council held that where property was sold in execution of a valid decree and purchased bona fide by a third party, the existence of a cross decree for a higher amount in favour of the judgment-debtor would not support a suit by the latter against the purchaser to set aside the sale: vide *Rewa Mahton v. Ramkishen Singh* (13). At p. 25 their Lordships observe as follows :

"To hold that a purchaser at a sale in execution is bound to enquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues."

This principle has been applied and followed in the decision of the Allahabad High Court reported in *Kaunsilla v. Chander Sen* (14). In another case, *Malkarjun v. Narahari* (15), where the sale in execution of a mortgage decree was effected after service of notice upon a person who was not the legal representative of the judgment-debtor's estate but who was erroneously treated by the executing Court as such representative, the judicial sale was held by the Privy Council not to be a nullity, though the

irregularity was a material one. The purchase in that case was by a third party and it was held that the Court had jurisdiction to sell. The observation at p. 347 is important, namely :

"their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do."

In a Full Bench decision of the Bombay High Court reported in *Shivlal v. Shambu Prasad* (16) the sale in execution of a mortgage decree in favour of a third party was upheld, even though that decree was subsequently varied in appeal by deciding that the mortgage was not enforceable against the minors and their property. That the title of a bona fide auction purchaser who is not a party to the suit cannot be impugned on such grounds is also laid down by the Lahore High Court in *Indar Sain v. Prabhu Lal* (17). The same view has been held by our High Court in the decision reported in *Rhodes v. Padmanabha Chettiar* (18). It is only where the Court has no jurisdiction to sell, for instance, the property of persons who were not parties to the suit, the decree and the sale would be void and the auction purchaser would not be protected from the claim of such persons. If it is found that a minor, though his name was on the record, was still not represented at all, it would be a case of his being no party to that proceeding: vide the observations of the Privy Council in *Kharajmal v. Daim* (19).

The ratio decidendi of all these cases is in favour of the appellant's contention and the present plaintiff cannot attack the validity of the sale in Court auction in execution of the former decree, by simply showing that the assignment of the mortgage bond by her mother (defendant 8) on the strength of which the previous suit was filed by the present defendant 10 is not valid, so far as her share in the mortgage money is concerned. The purchaser in Court auction was not bound to inquire into the correctness of the former decree and was

12. (1888) 10 All 166=15 I A 12=5 Sar 129 (PC).

13. (1937) 14 Cal 18=13 I A 106=4 Sar 746 (P C).

14. (1900) 22 All 377=(1900) A W N 123.

15. (1901) 25 Bom 337=27 I A 216=7 Sar 739 (P C).

16. (1905) 29 Bom 435=7 Bom L R 5:5.

17. AIR 1922 Lah 277=3 Lah 88=66 I C 4.

18. AIR 1915 Mad 150=26 I C 369.

19. (1905) 32 Cal 296=32 I A 23 (P C).

justified in believing that the Court has done what it ought to do.

It is however contended on behalf of the plaintiff (respondent) that inasmuch as her mother was appointed as guardian ad litem for her in that suit, it must be taken that the interest of the guardian were adverse to her and therefore she was not properly represented in that suit. O. 32, R. 3, Civil P. C., shows that a person whose interest is adverse to that of the minor should not be appointed as guardian. The mere fact that her mother was the executant of the assignment deed in question would not be enough to hold, as a pure question of law, that the interests of the mother were really adverse to her in that suit. It has been so held by a Full Bench of this High Court in *Venkateswara Rao v. Lakshmanaswami* (20). The learned Judges have held that

"there is nothing either in the Civil Procedure Code or in any of the authorities, to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed."

In view of this pronouncement by a Full Bench of this Court, I think it unnecessary to refer to the earlier decisions of this Court as regards this question. *Kuppuswami Ayyangar v. Kamalammal* (21) and *Sellappa Goundan v. Masa Naicken* (22). In this case, Ex. 6 shows that a written statement was actually filed in the former suit on behalf of the plaintiff's mother and the plaintiff (who were defendants 6 and 7 respectively). The District Munsif says that that written statement is not available. It would appear from Ex. P-2 that one of the contentions of defendants 1 to 4 in that suit was about the validity of the assignment of the mortgage bond by the plaintiff's mother. But that question was not tried and decided as the defendants failed to appear at the time of the trial. Despite the fact that the plaintiff's mother was the executant of the assignment deed, it was open to her to plead in that case that the assignment was invalid so far as the minor's share in the mortgage bond was concerned. She might have set up that plea in the written statement filed. But in the absence of that written statement, we cannot be certain about it.

20. AIR 1929 Mad 213=52 Mad 275=115 I C 801 (F B).

21. AIR 1920 Mad 645=43 Mad 842=59 I C 662.

22. AIR 1924 Mad 297=47 Mad 79=76 I C 1018.

In the circumstances of this case and upon the evidence on record, it is not possible to hold that as a matter of fact the interests of the plaintiff's mother were really adverse to those of the plaintiff in the former suit. So far as the auction purchaser was concerned, he would be perfectly justified in believing that the Court would have considered this question of adverse interest when it chose to appoint the mother as the guardian for the plaintiff and that the appointment was made in a regular and proper way. In the absence of clear proof, I am not prepared to hold that the interests of the plaintiff's guardian in the former suit were really adverse to her and therefore she was not represented at all in that suit. That being so, the principle laid down in a uniform course of decisions as regards the title of the auction purchaser (third party) must apply to the present case, because the plaintiff should be taken to have been a party to the former suit and as such she is precluded from disputing the validity of the Court auction sale in favour of a third party in execution of that decree. That decree, if at all, is only voidable at her instance, and she has not chosen to ask for the setting aside of that decree in her present plaint. For all the foregoing reasons, I hold that the plaintiff cannot be given a decree against the hypotheca in the hands of defendant 7.

Now, the question arises whether the plaintiff can at least be given the alternative remedy sought for against defendant 10, who has been added as defendant 2, for the reasons already mentioned in the order passed in this appeal on 27th September 1932. In the circumstances of this case, which have been already adverted to, I have no hesitation in stating that this is eminently a fit case for the exercise of the discretionary power vested in the appellate Court under O. 41, R. 33, Civil P. C. If the plaintiff's share of the mortgage debt legitimately due to her cannot be recovered from the hypotheca in the hands of a bona fide auction purchaser, is she not also entitled to any decree against defendant 10, who realized the mortgage debt including her share, by filing a suit on the mortgage bond and obtaining a decree thereon by virtue of the assignment deed, Ex. G-1.

which was executed during the minority of the plaintiff by her mother Rahimat Ammal on behalf of herself and as the guardian of the plaintiff? The illustration to R. 33, O. 41, Civil P. C., exactly covers the present case.

The next point for consideration is, whether the plaintiff has a cause of action against defendant 10 for claiming a refund of her share of the mortgage debt which he had collected and realized in the execution of the decree obtained in O. S. No. 99 of 1913 on the file of the Additional District Munsif's Court, Madurai. The plaintiff and her mother Rahimat Ammal (the present defendant 8) were entitled to the mortgage debt due under Ex. B as co-owners, they having inherited the property from the deceased Mahomed Rowther as his co-heirs under Mahomedan law. This mortgage debt was one of the properties assigned by defendant 8 under Ex. G-1 on 2nd March 1911 in favour of the present defendant 9 expressly reciting that she executed this deed of assignment on her own behalf and also as the guardian of the minor plaintiff. Defendant 10 is a subsequent assignee of the same rights from defendant 9 under Ex. L. Specific mention of the assignment deed, Ex. G-1, is made in Ex. L, and there is no doubt whatever that defendant 10, when he got Ex. L was perfectly aware of the fact of the execution of Ex. G-1 by Rahimat Ammal on her own behalf and on behalf of her minor daughter. He admits in his evidence as D. W. 5, that at the time of the execution of Ex. L in his favour the originals of Exs. B and G-1 were handed over to him. Even in his plaint in the former suit, (vide Ex. O) he has referred to the above facts in para. 7. It is thus perfectly clear that the present defendant 10 was fully conscious of the fact of the execution of the original assignment deed (Ex. G-1) by Rahimat Ammal and her minor daughter when he got the assignment Ex. L from defendant 9. There is no scope for contending that when he took the assignment Ex. L, he was under the belief that the mortgage debt in question was assigned by Rahimat Ammal (defendant 8) alone as the sole owner thereof.

A mortgage debt creates an interest in immovable property. Under Maho-

medan law, the mother is neither the natural nor the legal guardian of her minor daughter. As held by the Privy Council in the decision in *Inambandi v. Mustadi* (23), the mother even as a de facto guardian has no power to convey to another her minor daughter's interest in immovable property which the transferee could enforce against the minor. Such a transfer is unauthorized and void. As observed by the lower appellate Court in para. 14 of its judgment, the transfer under Ex. G-1 is not proved to have been made either for the benefit or for any legal necessity of the minor. It must be held that the assignment is void and not binding on the minor to the extent of her share in the mortgage debt.

What then is the position of law as between the plaintiff and defendant 10? Under the assignment deed, Ex. G-1, what was conveyed was the interest of both the co-heirs. So far as the interest of the minor plaintiff (one of the co-heirs) is concerned, that transfer is void and ineffectual. On the strength of that void assignment defendant 10 has recovered the plaintiff's share of the mortgage money which justly belongs to her. Can the plaintiff get relief on the footing that this is an action for money had and received by defendant 10 for the plaintiff's use? (Vide, Art. 62, Limitation Act). To maintain an action of this kind, it is not absolutely necessary to show the existence of a privity of contract between the plaintiff and defendant 10. This is not a case of express agency. Is defendant 10 an utter stranger to whom the law would impute no sort of obligation to refund the money to the plaintiff? Would the law impute a sort of agency by fiction to defendant 10 to give effect to the principles of justice and equity? Is this case covered by S. 90, Trusts Act, which deals with the obligation of a co-owner gaining unfair advantage over another co-owner by availing of his position as such? In short, can we predicate some kind of privity of a legally recognized nature so as to entitle the plaintiff to claim refund of her share of the mortgage debt unlawfully collected by defendant 10? Strenuous arguments have been advanced on both sides with

much ability. If the facts of this case are clearly understood, the application of law does not create much difficulty.

The principle of law has been well stated in the case in *Mahomed Wahib v. Mahomed Ameer* (24). In that case the suit was by one of the cosharers for the recovery of his share of the money due under two deeds of mortgage which was collected by the other cosharer. The general principle applicable to an action for money had and received by the defendant to the plaintiff's use as laid down in Blackstone's Commentaries was applied in that case. In referring to Art. 62, Limitation Act, Mookerji, J., observes at p. 533 that the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it the receipt by the defendant to the use of the plaintiff. It is further observed that this form of action would be maintainable in cases in which the defendant at the time of the receipt, in fact or by presumption or fiction of law, receives the money to the use of the plaintiff. The learned Judges have also held in that case that in order to maintain an action of this kind it is not necessary to show that at the time of receipt the defendant really intended to receive it to the plaintiff's use. These principles have been adopted fully in the decision of our High Court reported in *Baiznath Lala v. Ramadoss* (25). That was a suit brought by one decree-holder against another for the refund of an amount which the latter is alleged to have received by way of rateable distribution, while that sum was in fact due to the former. The learned Judges applied Art. 62, Limitation Act, to such a suit, treating it as an action for money had and received by the defendant for the plaintiff's use.

In that case, there was certainly no privity of contract nor was there any agency express or implied. It is not easy to bring that case under the category of some privity of a legal recognizable nature. But what seems to me on a careful perusal of that decision is, that they regarded the action as maintainable because the defendant has re-

24. (1905) 32 Cal 527=1 C L J 167.

25. (1916) 39 Mad 62=26 I C 219.

ceived money which in justice and equity belonged to the plaintiff in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. The decision of another Division Bench of this High Court reported in *Sankunni v. Govinda* (26) is in conformity with the principles laid down in *Mahomed Wahib v. Mahomed Ameer* (24). In the present case, having regard to the facts mentioned above, defendant 10 by reason of the assignment under Exs. G-1 and L really stepped into the shoes of Rahimat Ammal, one of the co-owners of the mortgage debt. The assignment of the other co-owner's share (the plaintiff's share) being void and ineffectual, defendant 10 must be deemed in the eye of the law to have become a cosharer with the plaintiff in respect of the mortgage debt. That was his real position when he realized the whole of the mortgage debt in execution of the decree in O. S. No. 99 of 1913. That being so, his liability to the other co-owner certainly arises under S. 90, Trusts Act, and in no case was it decided that an action for money had and received by the defendant for the plaintiff's use would not be maintainable if the fiduciary relationship could come under S. 90, Trusts Act. This is one aspect of the present case. In the other aspect, this would be a case of defendant 10 realizing the plaintiff's share of the mortgage debt on the strength of a void assignment in his favour made by the plaintiff's mother as her guardian. In an exactly similar case, the action for the recovery of money has been held to be one for money had and received within the meaning of Art. 62, Limitation Act: Vide, *Shanmuga Pillai v. Minor Govindaswami* (27). This decision is a clear authority for the maintainability of the action against defendant 10 in the second aspect.

On the side of respondent 2 (defendant 10) reliance was placed on the decision in *Ramaswami Naidu v. Muthuswami Pillai* (28), as an authority for showing that the plaintiff has no cause of action against defendant 10. There

26. A I R 1914 Mad 572=14 I C 254=37 Mad 381.

27. (1907) 30 Mad 459=17 M L J 452.

28. A I R 1919 Mad 957=48 I C 756=41 Mad 923.

is an elaborate discussion of the English and Indian case law in that decision. However the previous decision of a Division Bench of this High Court in *Baiznath Lala v. Ramadoss* (25) was not noticed in it. The rule laid down in Blackstone's Commentaries seems to have been regarded as too wide, and general stress was laid on the confinement of that principle to some privacy of a legally recognizable nature or to other particular kinds of cases held by judicial decisions to be properly actions for money had and received. But as I have held that the principle of S. 90, Trusts Act, is applicable to the present case, the action of the plaintiff against defendant 10 for refund of the money would be maintainable, even according to the decision in *Ramaswami Naidu v. Muthuswami Pillai* (28). But as Mr. Varadachari, the learned counsel for the plaintiff, has pointed out in his careful argument, the facts of the case in *Ramaswami Naidu v. Muthuswami Pillai* (28) are clearly distinguishable from the facts of the present case. In that case, defendant 1, the purchaser at the auction held by the Official Receiver, bona fide believed that the debts put up for sale in auction belonged exclusively to Rajappa Mudali. The debts were not put up for sale as those belonging to Rajappa Mudali and his other partners and therefore the purchaser was under the bona fide belief that he was purchasing the debts which exclusively belonged to Rajappa. That is why Sadasiva Ayyar, J., has observed at p. 938 (of 41 *Mad.*) as follows :

"A co-sharer may by a stretch of language be treated as standing in a position of confidence towards his co-sharers, but a person who ignorantly purchases from a co-sharer the whole of the claim of all co-sharers cannot be said to be in such a position. I therefore agree that the plaintiff has no cause of action against defendant 1."

But in the present case, it is perfectly clear that defendant 10 was aware of the fact of assignment of the mortgage debt by two co-sharers and he did not take the assignment under the belief that the mortgage debt belonged only to the plaintiff's mother. After a careful reading of the decision in *Ramaswami Naidu v. Muthuswami Pillai* (28), I find it extremely difficult to bring the present case within the scope of the facts on which that decision was based.

The Courts below are in error in holding that the decision in *Ramaswami Naidu v. Muthuswami Pillai* (28) governs the present case. In my opinion, the case is clearly distinguishable. On the authority of the other decisions referred to above, I hold that the plaintiff has a cause of action against defendant 10 for the refund of her share of the mortgage money, which defendant 10 had collected on the principle of money had and received. There remains the question of res judicata. It is contended on behalf of defendant 20, that the plaintiff's claim as against him is barred by res judicata by reason of the decision in O. S. No 99 of 1918. Ex. L is the copy of the judgment in that suit. The present plaintiff was defendant 7 in that suit, represented by her mother and guardian, defendant 6. Though a written statement was filed by defendants 6 and 7 in that suit, it seems that they did not appear on the date of the hearing. What is now urged on behalf of defendant 10 is that the present plea as regards the invalidity of the assignment under Ex. G-1 to the extent of the plaintiff's share, might and ought to have been made a ground of defence in that suit, and therefore that decision operates as res judicata in the present suit. As I have already pointed out, it was certainly open to the plaintiff's mother (defendant 6 therein), to have pleaded on behalf of the minor plaintiff that the assignment of the mortgage debt was invalid and not binding on the minor to the extent of her share.

The omission to raise such a plea by the guardian or the omission to support that contention by adducing the necessary evidence, would be an act of gross negligence on the part of the guardian. We find that defendant 6 put in no appearance in the former suit during its trial and practically allowed the Court to proceed to decide that suit ex parte. Such conduct on the part of the guardian is undoubtedly gross negligence. The decision in *Dada Sahib v. Gajraj Singh* (29), is a direct authority for holding that the decision in O. S. No. 99 of 1913 would not operate against the plaintiff as res judicata in the present suit. The same principle has been laid down by Madhavan Nair, J., in a recent decision reported in *Sutramania Iyer v. Vaithi-* 29. A I R 1925 Mad 204=85 IC 258.

linga Pandara Sannadhi (30). If the decree passed in a prior suit is the result of gross negligence on the part of a guardian of the minor, it will not operate as *res judicata* so as to bar the later suit by the minor: vide also *Punnayyah v. Viranna* (31). It is contended on behalf of respondent 2, that the omission to set up the plea that the assignment deed Ex. G-1 was void to the extent of the minor plaintiff's share, would not amount to gross negligence on the part of the guardian, because such an assignment was not understood to be void according to the then state of the law and it was only in *Imambandi v. Mustadi* (23), the Privy Council clearly laid down that the transfer by one who is not a legal guardian under Mahomedan law would be void and ineffectual. As it is found in the present suit, even treating the assignment as one made by a *de facto* guardian, neither benefit nor necessity is shown to exist so as to bind the minor and the guardian must have pleaded the invalidity of the assignment on this ground at least. Gross negligence on the part of the guardian having been shown beyond the pale of doubt, the former decision would not operate as *res judicata* in the present suit.

Let me next consider the question of *res judicata* in some other aspects. Following the decision in *Rukhmini v. Dhondo Mahadu* (32) and other cases, the lower appellate Court held that the question whether the plaintiff alone in O. S. No. 99 of 1913 was entitled to the amount of the mortgage money or whether the minor defendant 7 was also entitled to a portion of it, did not necessarily arise for determination in that suit. That was because the dispute between the plaintiff and defendant 7 in that suit was not one in which the mortgagor defendants were interested. It may however be contended that though the mortgagors in that suit had no concern with this dispute, still defendant 7 having been made a party to that suit should have set up her interest in a portion of the mortgage debt, as a ground of attack against the claim of the plaintiff therein to the entire mortgage money: vide the decision in *Sethurama Iyer v.*

Ramachandra Aiyar (33). But as I have held that the omission to set up such a plea was due to the gross negligence of the guardian, there is no *res judicata* as against the present plaintiff.

The alternative remedy sought for by the plaintiff as against defendant 10 must therefore be given in this suit. Out of the amount realized by defendant 10 in execution of the decree in O. S. No. 99 of 1913 (after deducting the costs incurred by him in connexion with that suit) he should refund to the plaintiff her 119/216th share of the balance. The mortgaged property was sold in Court auction for Rs. 1,960 on 1st November 1915 and the sale was confirmed on 2nd December 1915. The extract from the suit register (Ex. U) shows that the present defendant 10 drew by cheque a sum of Rs. 1,902-13-0 on 7th December 1915. Deducting the costs of suit and execution therefrom, the plaintiff should get 119/216th share of the balance of Rupees 903. As this sum was utilized by defendant 10 and withheld from the plaintiff to whom it was legitimately due, it is but equitable that defendant 10 should repay the same with interest at 6 per cent per annum from 7th December 1915 till the date of this suit, viz. Rs. 577. In the result, the second appeal is allowed, and the decree passed by the lower appellate Court against the mortgaged properties is set aside, and a decree is passed in plaintiff's favour for the recovery of Rs. 1,480 from defendant 10, with simple interest thereon at 6 per cent per annum from this date. The plaintiff (respondent 1) should pay defendant 7's (appellant's) costs in this Court and in the lower appellate Court. Respondent 2 will pay respondent 1, her costs in this second appeal. As regards the plaintiff and defendant 10 there will be no order as to costs payable by one to the other, in the Courts below, and the lower appellate Court's decree directing the plaintiff to pay defendant 10's costs is set aside.

P.R.S./K.S.

Order accordingly.

33. (1917) 38 I C 184.

30. A I R 1931 Mad 641=133 I C 207.

31. A I R 1922 Mad 273 = 70 I C 668 = 45 Mad 425.

32. (1912) 36 Bom 207=14 I C 466.

* A. I. R. 1933 Madras 817

WALSH, J.

(Kanuparthi) Hanumantha Rao—Appellant.

v.

(Kottapalli) Venkatakrishnayya and others—Respondents.

Appeal No. 127 of 1929, Decided on 31st March 1933.

* (a) Hindu Law—Debts—Decree obtained against father for surety debts incurred under obligations undertaken that judgment-debtor will file insolvency petition—Sons are bound to pay—Even if sons are exonerated under decree, they are liable for such debt under pious obligation, unless debt is illegal or immoral.

A surety debt which is not either immoral or illegal is one which the sons are bound to pay, unless it is one for honesty or appearance and hence an obligation undertaken by the father that the judgment-debtor would file an insolvency petition, being outside any of the four undertakings enumerated in the texts is binding on the sons. And where a decree has been passed against the father on such a surety bond, even if the sons have been exonerated from the decree, they will still be liable to pay the debts if they are not illegal or immoral: 39 Cal 862, 23 Bom 454 and A I R 1929 Mad 898, Ref; A I R 1928 Mad 657 (FB), Rel. on. [P 820 C 2]

* (b) Civil P. C. (1908), S. 55 (4)—Surety bond executed under S. 55 (4)—But surety not binding himself to do anything in case of default—He may plead that he incurred no liability under the bond—But if decree is passed against him he cannot raise this defence in execution proceedings.

There is no doubt that suretyship for a judgment-debtor in its very nature involves payment of some money due under the decree. But where under a surety bond executed under S. 55 (4) the surety does not bind himself to do anything in case of default, the document thus executed is not a bond at all, inasmuch as the essence of a bond is that in case of default the surety undertakes to pay some money or do something else. And in the proceedings started against the surety on such a bond he might put forward a sound defence that he incurred no liability at all under the bond. But if the surety does not put forward this defence and a decree is passed against him which decree is confirmed in appeal he or the persons claiming under him cannot raise such a defence in the execution proceedings and contend that the whole bond is a nullity. [P 818 C 1,2]

(c) Hindu Law—Debts—All decree debts passed against father are not ipso facto binding on sons.

All decree debts passed against a Hindu father are not ipso facto binding on the sons under the doctrine of pious obligation, but only such as would not fall under the exceptions recognized by the Hindu law. [P 818 C 2]

K. Kameswara Rao—for Appellant.

K. Bhimasankaram—for Respondents.

Judgment.—The appellant got a decree on 1st March 1917 which was modified in appeal on 8th November 1917. The

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decree was against three defendants. Appellant applied for the arrest of defendants 1 & 5 in that suit. Defendant 1 was arrested and brought before the Court. He said he was going to file an insolvency petition and on this one Kothapalli Venkata Subbayya, the father of the present respondents, executed a surety bond on 23rd April 1919 which was accepted by the Court. Defendant 1 in that suit was released from arrest. No insolvency petition was filed by the judgment debtor within the time allowed, one month. The appellant filed E. P. No. 656 of 1919 against the surety on 29th July 1919 and the surety produced the judgment-debtor in Court and that execution petition was dismissed. Later the decree-holder filed E. P. No. 20 of 1920 on 3rd January 1920 against the surety. The latter contended that the bond was only for the appearance of the judgment-debtor and that he was not liable. The surety was ordered to be arrested on 14th February 1920 and he preferred an appeal, A. S. No. 212 of 1920, on the file of the District Munsif of Guntur. The appeal was dismissed on 31st August 1920. Afterwards the surety paid Rs. 300 towards the decree debt. He then died. The decree-holder then filed E. P. No. 216 of 1922 on 2nd March 1922 against the surety's sons, the present respondents. This was dismissed for want of batta. The present execution petition, E. P. No. 480 of 1926, was filed on 9th June 1926 against the sons. The defence of the latter is that they are not liable for their father's debt. The learned District Munsif overruled their contention and ordered their property to be attached. On appeal to the Subordinate Judge he held that the suretyship was for appearance or assurance and so the sons are not liable. The decree-holder prefers this second appeal. The chief difficulty in the present case has arisen from the extraordinary defective nature of the bond which it is surprising that any Court should ever have accepted. It runs thus:

"Surety Khat filed by Kothapalli Venkata Subbiah, son of Venkata Krishniah, the surety on behalf of defendant 1. 1. When defendant 1 in the above suit was brought into Court in pursuance of a warrant of arrest in execution of the decree, the Court expressed the opinion that in case sufficient security is offered, the Court would grant time to defendant 1 to file an insolvency petition. 2. I have agreed to be surety (to be liable as surety) in case defendant 1 does not file

an insolvency petition within the time allowed by the Court and for producing defendant 1 whenever the Court requires. I have in the village of Cherukuru lands and houses of the value of Rs. 10,000. I have not made any kind of alienations of my property in favour of anybody. I therefore pray that the Court may be pleased to release defendant 1 on my surety in order to enable him to file an insolvency petition."

The astonishing thing about this bond is that the surety does not bind himself to do anything in case of default. The essence of a bond is that in case of default the surety undertakes to pay some money or do something else. As far as can be learnt the defence which the original surety put up against being held liable under the bond was quite an untenable one, namely that he only undertook to produce the judgment-debtor and did not undertake that the latter should file an insolvency petition. He might, it appears to me, have put forward a much sounder defence that he incurred no liability at all under the bond. In fact, most of the arguments that have been addressed to me to show that the sons are not liable under the bond, because it does not undertake to pay a sum of money, but only undertakes to do something which may in the end render the surety liable to have to pay money, are equally arguments which might have been advanced on behalf of the surety himself. It is perfectly clear that if the surety was not liable on the bond, as it stood, he could not be liable on anything outside the bond. In connexion with this the learned Subordinate Judge has discussed the whole matter very carefully in para. 6 of his judgment. With much of what he says, I agree but with a portion of it I disagree. He says :

"There is not a word in it that he was standing as surety for payment of the money lent to and decreed against defendant 1 in case of default of payment by the latter of such amount within the specified time."

That is quite correct. Then he says: "It is true that the contention set up by the appellants' father to the effect that he was not liable for any payment at all under the terms of the bond was, rightly enough, rejected by both the executing as well as the appellate Courts."

As regards that, it has certainly been rejected by both Courts, but whether, if I had to decide the matter *as res integra* here, I should say it was rightly rejected is another question, though the particular defence that the bond was only one for appearance was no doubt rightly rejected. Then he proceeds:

"I do not quite see how that fact converts the liability as one arising on account of an undertaking given for payment of money lent to the debtor. Suretyship from its very nature involves the payment of money due under the decree in case of default of the judgment-debtors for whom it was undertaken; but the question is what was the nature or character of the item in respect of the default of which the surety undertook to indemnify."

He then goes on to conclude that the default was one in respect of appearance or assurance. There is no doubt that suretyship for a judgment-debtor in its very nature involves payment of some money due under the decree. In a case of this sort where the undertaking is that the judgment-debtor should file an insolvency petition, it is usual to name a particular sum of money which may be less than the decree amount. *Prima facie* the very adjudication of insolvency which is anticipated renders it almost certain that the judgment-debtor will not be able to pay the decree debt in full and therefore ordinarily a surety would not contract to pay the whole amount of the decree in default of the insolvency petition being presented but of course there is nothing to prevent him doing so. The Allahabad High Court appears to have a special form of bond prescribed for such an undertaking but there is no prescribed form here.

In spite of all this I find it difficult to understand how a man can be held to have undertaken a liability as regards which the bond is entirely silent. The difficulty is that this extraordinary document is not, I imagine, a bond at all. But we are faced by the fact that it has been held to be a bond for the payment of the decree amount in default and as such has become a decree debt; and the initial question arises whether the sons can in execution challenge the nature of the debt. It is perfectly true that as stated in para. 7 of his judgment by the learned Additional Subordinate Judge that all decree debts are not *ipso facto* binding on the sons under the doctrine of pious obligation, but only such as would not fall under the exceptions recognized by Hindu law. For instance, a creditor who had supplied drink to a Hindu father might get a decree against the father for the money due to him, but that decree would not be binding on the sons under the doctrine of pious obligation because the debt would be an immoral one which is an exception to this.

doctrine. It would not however be open to the sons, I consider, to contend that the decree as against their father was a nullity because in fact he had incurred no debt. While therefore it would be perfectly open to the sons to have contested, had the nature of this surety bond not been settled by proceedings in execution carried to appeal, that it was not the sort of surety bond on which their father incurred any obligation at all, I hold that when in appeal an execution decree has been given on the bond as one by which the father undertook to pay the decree amount due by defendant 1 for whom he stood surety in case the latter did not present an insolvency petition, it is not open to the sons to contend that the whole bond is a nullity either as regards their father or as regards themselves.

If that view is correct there is an end to much of the discussion and the only point left open is whether the sons are liable for the particular obligation which their father incurred. If this is a bond for appearance or honesty they are not liable : vide *Tukaram Bhat v. Gangaram Mulchand* (1), *Thangath Ammal v. Arunachalam Chettiar* (2), *Dodhraj v. Mahabir Prasad* (3), and many other cases which set out the Hindu law as found in Colebrook's Hindu Law, Vol. 1, p. 164 and Max Muller's Sacred Books of the East, p. 327. Admittedly there was no default in producing the appearance of the judgment-debtor and therefore the question is what was the nature of the undertaking that he should file an insolvency petition. There are four classes of cases mentioned in Max Muller's Sacred Books of the East, p. 327, for appearance, for confidence, for payment and for delivering the assets of the debtor. The first says : "I will produce the man ;" the second says : "He is a respectable man ;" the third says : "I will pay the debt ;" the fourth says : "I will deliver his assets." For appearance and confidence the sons will not be liable but for payment and for delivery of the assets of the debtor they will. The learned Subordinate Judge holds that the undertaking that the debtor will file an insolvency petition is one either of appearance or assurance but I am unable to agree.

It seems to me that it is stretching language very widely to say that "this man will file an insolvency petition" is the same as saying "he is a respectable man." For the appellant on the other hand it is argued that even if the bond be not regarded as one for payment of money it is one for undertaking delivery of the assets of the debtor, because the insolvent must put all his property before the Court. With this contention also I am unable to agree. The insolvent does not actually put all his property before the Court at the time he files his insolvency petition, and if the debtor in this case had filed an insolvency petition but had subsequently failed to put his property before the Court, I do not see how it can be held that the surety would be liable for the latter's default. Therefore in my opinion the obligation undertaken that the judgment-debtor will file an insolvency petition is not any one of the four sorts mentioned above. It has therefore to be considered whether the sons would be bound by it. The general principle of course is that sons are under a pious obligation to pay the father's debts unless they are illegal or immoral. It would therefore appear that the debts which they need not pay are the exceptions and not the rule. From this point of view the two sorts of suretyship obligations, for appearance, and for assurance, for which they are not liable, are the exceptions to the general rule that they are liable for suretyship undertaken by their father. If that is the correct view they would be liable for this particular obligation unless they could show that it was either illegal or immoral and it is certainly not either of these two things. *Mahabir Prasad v. Siri Narayan* (4) has been quoted for the respondents. That is a very peculiar case and the head-note gives an inadequate idea of what was really held. The bond there was an indemnity bond. The head-note in one part runs as follows :

"A Hindu son or grandson governed by the Mitakshara law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money, but not for money due on a contract of indemnity unless the transaction comes within the meaning of the term Vyavaharika, i. e., lawful, useful or customary."

Another part of the heading states :

"A Hindu son is required to discharge such of the liabilities of his father as are usual or customary."

1. (1899) 23 Bom 454.

2. AIR 1919 Mad 831=48 I C 76=41 Mad 1071.

3 AIR 1921 Pat 72=57 I C 303=5 Pat L J 417.

4. AIR 1918 Pat 345=46 I C 27=3 Pat L J 396.

tomary, but he is not under a pious obligation to discharge out of the ancestral property in his hands every liability of his father which he cannot show was illegal or immoral."

This latter heading would appear to make the debts which a son has to pay the exception rather than the rule and the whole heading would convey the impression that he would not be liable on an indemnity bond even though he could not show that it was illegal or immoral. But if the text of the judgment is read it will be seen that the Court found that the liability created by the indemnity was an immoral one, the representation being known to be false to both parties. At p. 402 we find the following observations :

"If it was intentionally false and if it deceived the purchaser it might have rendered the father liable to prosecution for the offence of cheating. For myself, having regard to all the circumstances, I find it difficult to believe that it was true. The purchaser's failure to realize the enhanced rate by suit is strong evidence that the representation was not true, and the view I take is the purchaser did not honestly believe that the representation was true. Both parties knew that the true rent was Rs. 303."

Later on the learned Judge proceeds no doubt to hold that whichever view is taken as to its falsity the sons would not be bound. He says :

"I hold therefore that if the representation was intentionally false the liability created by the indemnity was immoral ; if it was not intentionally false the liability was not usual or customary and therefore not enforceable against the sons as a pious obligation."

But earlier in the judgment there is a remark which differentiates that case entirely from the present case. The learned Judge says :

"In the present case the indemnity given by the father would undoubtedly be enforceable against himself. If a decree upon it had been obtained against the father during his lifetime then it would be enforceable against the sons after his death provided it came within the list compiled by Mookerjee, J., in the above mentioned case."

That case is *Chhakouri Mahton v. Ganga Prasad* (5). In the case now under consideration there has been a decree against the father on the bond. Turning now to *Chhakouri Mahton v. Ganga Prasad* (5), there is a very long dissertation upon the liabilities of the sons to pay the debts of their father. No doubt at p. 869 suretyship debts appear in the list as debts which the sons are not under any obligation to pay. But the debt in question in that suit not being a suretyship debt the matter

5. (1912) 39 Cal 862=12 I C 609.

is not gone into and the learned Judge says at p. 875 referring to certain cases including *Tukaram Bhat v. Ganga Ram* (1), which deal with the liability of sons to satisfy a suretyship debt of a father, "it is not necessary however to discuss for our present purpose the question of the liability of a Mitakshara son for the suretyship debt of his father, because the determination of that question depends upon the interpretation of special texts, specially the text of Vishnu, which defines the different kinds of sureties, namely, for appearance, for honesty, for debt and for delivery of the debtor's effects."

I do not think therefore the obiter remarks in that judgment as regards suretyship debts and the fact that suretyship debts are apparently all classed as debts which prima facie the sons are not bound to pay can be taken as any authoritative ruling in the matter. It appears to me that a surety debt which is not either immoral or illegal is one which the sons are bound to pay unless it is one for honesty or appearance and in my opinion the obligation undertaken that the judgment debtor would file an insolvency petition being outside any of the four undertakings enumerated in the texts should be held as one binding on the sons. If there had not been a decree against the father that he was liable on the bond to pay the decree debt, I think the sons might very well have contended that there was no liability whatsoever created on anybody under the bond, but that defence being, in my opinion, not open to them in view of the fact that in appeal it has been held as against the father that the obligation under the bond was to pay the decree debt in case the judgment-debtor did not file the insolvency petition, the surety bond must be taken to be one by which in default of the judgment-debtor filing such petition the father undertook to be liable for the decree debt. Therefore in my opinion the bond being found to be of this nature is one by which the sons are bound. Even where the sons have been exonerated from the decree they will still be liable to pay the debts if they are not illegal or immoral.

In *Doraiswami Nadan v. Nagasami Naicken*, A. I. R. 1929 Mad. 898, a case decided by the late Sir Murray Coutts-Trotter, C. J., and myself, we held following the Full Bench ruling in *Subramania Ayyar v. Sabapathy Ayyar* (6) that a decree passed against the father

. A I R 1928 Mad 657=51 Mad 361 (F B).

personally and after his sons had been exonerated can be executed against the shares of his sons in the family property and such property is liable for the father's debt. The sons can claim exoneration from the liability only on the ground that the debt is immoral or illegal. This is a decree debt. It is not, I consider, exempted as coming under the two sorts of suretyship for appearance and for honesty for which the sons would not be liable, and it is not illegal or immoral. I therefore allow this appeal. The decree of the lower appellate Court will be set aside and that of the District Munsif restored with costs in this Court and in the lower appellate Court.

P.R.S./K.S.

*Appeal allowed.***A. I. R. 1933 Madras 821**

WALSH, J.

Appavoo Asary—Appellant.

v.

Sornammal Fernandez—Respondent.

Second Appeal No. 118 of 1929, Decided on 22nd March 1933.

(a) Civil P. C. (1908), O. 3, R. 1 and O. 16—Except for very good reasons, party should not be ordered to appear on application under O. 3, R. 1—Proper procedure is under O. 16.

No Court of law would be justified in ordering a party to appear in Court on an application put in under O. 3, R. 1, except for very good reasons. Where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness, the proper procedure to adopt is the one under O. 16 and not the one under the proviso to O. 3, R. 1: *A I R 1920 Mad 213, Rel on.* [P 822 C 1]

(b) Practice—Trial Court can strike out defence when order is disobeyed—But order should be free from ambiguity—Ambiguous order should be construed in favour of defendant—Civil P. C. (1908), O. 9, R. 12.

A Court has power to strike out defence, when an order is disobeyed and it is a matter within the power and discretion of the trial Court which it is not for the appellate Court to canvass. Striking off of the defence is a highly penal procedure and therefore the order, disobedience to which is made the ground for doing so, must be free from any possible ambiguity; and where, an order which may, if disobeyed, lead to highly penal consequences, it should be construed in favour of the defendant, if there is any ambiguity. [P 822 C 2; P 823 C 1,2]

(c) Practice—Simply because defence is struck out, plaintiff is not entitled to relief claimed—He must prove his case to satisfaction of Court.

Simply because the defence is struck out plaintiff is not thereupon necessarily entitled to the relief claimed. When he comes to Court he must prove his case and he must prove it to the satisfaction of the Court. His burden is not

lightened because the defendant is absent; on the other hand the responsibility is increased in one sense, for when a matter is heard *ex parte* in the absence of one of the contestants who is not represented, it is the duty of the counsel to bring to the notice of the Court adverse as well as favourable authorities. [P 822 C 2; P 823 C 1]

(d) Practice—Court cannot close case of plaintiff without hearing his evidence in full, unless it intends to grant him decree in full.

Court cannot close the case of the plaintiff without hearing his evidence in full and his counsel's argument, unless indeed it intended to grant him a decree in full. The delivery of judgment for only part of the relief asked for before plaintiff has closed his case and his argument has been heard is clearly illegal. [P 823 C 1]

(e) Minor—Guardian's disobedience of Court's order to appear should not prejudice minor's case.

A guardian's disobedience of an order of Court to appear should not prejudice the minor's case: *A I R 1920 Mad 213 and 17 I C 762, Ref.*

[P 824 C 1]

A. Swaminatha Ayyar—for Appellant.*T. L. Venkatarama Ayyar*—for Resp'dts.

Judgment.—The plaintiff brought the suit for payment for work done by him for defendant 1's deceased husband Cruz Machado who was a merchant in Tuticorin. His case was that he was engaged by defendant 1's husband to work in his salt pans and on some schooners, a bungalow, sheds, etc., and that he had settled accounts with Machado up to August 1917. Further dealings began on 10th February 1918 and went on during the lifetime of Cruz Machado who died some time in July 1922. The plaintiff then approached defendant 1, his widow, who asked him to go on with the work and he did so till 7th March 1923. There was a settlement of accounts between himself and defendant 1 attempted by P. Ws. 2 and 3 from which nothing resulted. Consequently the suit was launched for the recovery of the amount due to the plaintiff and Rs. 2,736-4-11 was claimed as due.

The trial began on 15th April 1926, and was transferred to the Court of the District Munsif of Tuticorin and was taken up there on 22nd June 1926. The case was heard on 23rd March 1926, 29th June 1926 and 10th July 1926, by which time nine witnesses on the side of the plaintiff had been examined and certain exhibits filed. On 15th April 1926, the plaintiff had made an application under O. 3, R. 1, S. 151, Civil P. C., praying that the Court should issue an order directing defendant 1 to appear before the Court; and this was accom-

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Now, assuming that the defence of defendant 1 was rightly struck off — a matter with which I shall deal later — it is, no doubt, perfectly true that the plaintiff was not thereupon necessarily entitled to a decree for the relief claimed. He was not in any better position than if defendant 1 had been ex parte; and in *Satyendra Nath v. Narendra* (4), it has been pointed out that:

"great caution should be exercised when suits are heard ex parte. This principle is of universal application. The fundamental principle of law is that the plaintiff, when he comes to Court, must prove his case and he must prove it to the satisfaction of the Court. His burden is not lightened because the defendant is absent; on the other hand the responsibility is increased in one sense, for, as observed by Sir Lawrence Jenkins in *Deonandan v. Janaki Singh* (5), when a matter is heard ex parte in the absence of one of the contestants who is not represented, it is the duty of the counsel to bring to the notice of the Court adverse as well as favourable authorities."

The plaintiff having admitted that Cruz Machado had made some part payment for his work had to prove what work he had done before his death, how much he had got for that and what was the balance; and certainly he had to prove the agreement with defendant 1 and the work done for her. But granting that he had to prove all this, it seems to me clear that the Court could not close the case of the plaintiff without hearing his evidence in full and his counsel's argument, unless indeed it intended to grant him a decree in full. It has been pointed out to me that there is evidence adduced that Cruz Machado maintained accounts and that some accounts have been produced on the side of the defendants on which it was argued that the plaintiff was prepared to rely. The delivery of judgment for only part of the relief asked for before plaintiff had closed his case and his argument had been heard was clearly illegal and calculated to prejudice the plaintiff, and the suit must be remanded for retrial. I think it necessary however to state the position of defendant 1. Striking off of the defence is a highly penal procedure and therefore the order, disobedience to which is made the ground for doing so, must be free from any possible ambiguity. Now, it is true that the application of the plaintiff for the appearance of defendant 1 was under

O. 3, R. 1; but when we come to the order passed on 2nd August 1926 it begins as follows:

"The plaintiff in the suit applies by this petition to have defendant 1 produced in Court and examined as his witness."

Then comes a part of the order which is not very relevant to the matter we are considering except this sentence:

"From the very beginning plaintiff has been urging the Court to have the defendant examined as he expects that defendant will speak to the truth according to him."

The plaintiff's own case before me is that he had been summoning defendant 1 for being examined as his witness; and the statement in the order about the plaintiff urging the Court to have the defendant examined must refer to this as there was no previous application under O. 3, R. 1. Finally the order says:

"I think it is necessary in the interests of justice that the defendant should be ordered to appear in person in Court for her being examined. No doubt, if defendant be examined on the side of the plaintiff, plaintiff will take the risk of being bound by her statement on oath. The defendant will appear in Court on 5-8-1926."

Reading this order it seems to me clear that it is an order to the defendant to appear to be examined as a witness for the plaintiff. There is certainly nothing in it inconsistent with such a view and where we are considering an order which may, if disobeyed, lead to highly penal consequences, it should be construed in favour of the defendant if there is any ambiguity. It has been argued that defendant 1 has by the petition put in by her on 6th August 1926, read the order as one for her appearance to be examined by Court and it cannot be denied that in the order passed rejecting this petition the learned District Munsif seems to consider that his previous order was of that nature and he therefore proceeded to strike off the defence. But we have to be guided, not by what defendant 1 or the learned District Munsif himself subsequently thought that the order meant, but by the terms of the order itself which starts without any ambiguity by saying that the petition was one by the plaintiff to have defendant 1 produced in Court and examined as his witness. It is conceded that if that was the nature of the order—if defendant 1 had been ordered to appear as a witness for the plaintiff—then disobedience to that order will be merely disobedience to a witness summons and would not justify the striking out of the defence. I must there-

4. A I R 1924 Cal 806=81 I C 867.

5. A I R 1916 P C 227=44 Cal 573 (PC).

fore hold that the striking out of the defence was not justified for disobedience to such an order.

A second ground is put forward against the order striking out the defence, namely that defendants 2 and 3 who are minors should not be made to suffer for the failure of defendant to appear. Two cases in this connexion have been quoted, one on each side. In *Raja Gopala Pandarithar v. Muthukumara Chettiar* (6), Sadasiva Ayyar, J., held that

"a Court has jurisdiction to direct the personal appearance of parties at any stage of the case even in the absence of specific provisions in the Code; but that a Court has no power to visit the disobedience of a next friend of a minor plaintiff to the Court's order to appear, on the minor himself, and to dismiss the suit on that account."

On the other side is quoted *Ayya Nadan v. Thanammal* (1) where it was held that in the case of a lunatic the only way the Court can give an order for his appearance is by directing his guardian to produce him; when such an order is given, it is in effect an order to the defendant to appear in person and the failure to comply with it will enable the Court to act under R. 12. In that case *Raja Gopala Pandarithar v. Muthukumara Chettiar* (6) is mentioned and distinguished. There is a clear distinction between the two cases, because in the former case the guardian was not ordered to produce the minor but to appear on their behalf, whereas in the latter case the guardian was ordered to produce the lunatic. The two cases are not therefore really in conflict. In the present case defendant 1 was ordered to appear not even specifically as representing the minors but apparently only as representing herself. In such a case the decision in *Ayya Nadan v. Thanammal* (1) would apply and disobedience to such order could not be made to prejudice the minors' case. In the result the decree of the lower appellate Court is set aside, as also the decree of the trial Court. The order striking out the defence of defendant 1 is also set aside. The case must be remanded for trial to the Court of first instance after allowing the plaintiff to close his case and defendant 1 to close hers, unless for any further disobedience to any order of Court it should be necessary again to take action under O. 9, R. 12. Costs throughout will abide the result of the decree. The stamp duty in

6. (1912) 17 I C 762.

this and the appellate Court will be re-und.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 824

PANDALAI AND CURGENVEN, JJ.

A.M. Ramaswami Chettiar--Appellant.

Rengan Chettiar--Respondent.

Appeal No. 94 of 1928, Decided on 2nd August 1933.

Civil P. C. (1908), O 23, R. 1, Sub-R. 1 and 4—Court can refuse to allow one of several plaintiffs to withdraw from suit, if such course is not consented to by other co-plaintiffs or would be prejudicial to their interests.

Irrespective of the question whether Sub-R. 4 governs sub-R. (1) of O. 23 R. 1, the Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and would be prejudicial to his or their interests: *A I R* 1925 Bom 425 and *A I R* 1928 Mad 496, *Rel on.* [P 525 C 2]

B. Sitarama Rao and *S. R. Muthuswami Iyer*—for Appellant.

K. S. Sankara Ayyar—for Respondents.

Curgenven, J.—Plaintiff 1 is the Zamindar of Naduvasal. He succeeded his father, who died on 18th August 1923. On 22nd November 1920, the father and son joined in executing a sale-deed of the suit property for a sum of Rs. 30,000. After plaintiff 1 had succeeded to the estate, on 14th August 1926, he mortgaged the same property to plaintiff 2. Both plaintiffs then brought the present suit for a declaration that the sale deed of 22nd November 1920, was invalid and inoperative beyond the father's lifetime, under the terms of the Impartible Estates Act. The defendants, who were the vendees, filed their written statements and the suit was posted for settlement of issues when plaintiff 1 applied to withdraw from the suit. This was objected to by plaintiff 2, the mortgagee, but was eventually allowed. We have been unable to find any order upon the application to withdraw itself, but the result is so stated in the learned District Judge's judgment. Having thus allowed plaintiff to withdraw, the question was considered whether plaintiff 2 was entitled by himself to continue the suit and was answered in the negative. This latter question will only arise if we confirm the order allowing plaintiff to withdraw.

Under Sub-R. (1), R. 1, O. 23, Civil P. C. the plaintiff may, at any time after the institution of the suit withdraw it as against all or any of the defendants; Sub-R. (2) enables the Court to permit the plaintiff to withdraw from a suit with liberty to institute a fresh suit; and Sub R. (3) relates to withdrawal without such permission. Sub-R. (4) runs as follows:

"Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others"

The use of the word "rule" supports the view that this qualification applies not only to Sub-Rr. 2 and 3 but also to Sub R. 1. On the other hand, it has been pointed out that under Sub-R. (1) no permission of the Court is necessary, so that Sub-R. (4), which contemplates an operation requiring such permission, is not suitably worded to apply to a withdrawal under Sub-R. (1). There is some authority for the view that Sub-R. (4) does not apply to Sub-R. (1). It was so held in *Mohamaya Chowdrain v. Durga Churn Shaha* (1), under the corresponding provision (S. 372), of the Civil P. C., 1877. That was a case of two co-plaintiffs and it was held that one could withdraw without the consent of the other under this provision of the Code. The matter came up in relation to an appeal in *Nilappagouda v. Basangouda* (2), where a similar view was taken by Shah, J. Fawcett, J., while agreeing that in that particular case one of the appellants might be permitted to withdraw, and being inclined to accept the construction put upon the rule, reserved his opinion whether apart from the terms of the rule the Court had no power to control a co-plaintiff who desires to withdraw from a suit, if such withdrawal would operate to the prejudice of his co-plaintiffs. He referred to an English case *Mathews In re, Cates v. Mooney* (3), in which it was held that one of several co-plaintiffs has no absolute right to withdraw from an action and have his name struck out.

The reason of course is that if one person engages with another or others to institute a suit he ought not to be allowed to resile if such action will be

to the detriment of his co-plaintiffs in the conduct of the proceedings. This, we think, is a perfectly valid principle and it finds support in the terms of Sub-R. (1), O. 23, R. 1 which says "the plaintiff" may withdraw. Where there are more plaintiffs than one, the expression "the plaintiff" must be read as all the plaintiffs collectively, and not so as to include one only amongst several plaintiffs. This principle has been recognised and acted upon in two cases cited before us, *Tukaram Mahadu v. Ramachandra Mahadu* (4) and *Pun. nayya v. Lingayya*, A. I. R. 1928 Mad. 496. Irrespective therefore of the question whether Sub-R. (4), governs Sub-R. (1) we think that the Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and would be prejudicial to his or their interests. In the present case plaintiff 1 we think, having given plaintiff 2 a mortgage, presumably on the understanding that the sale was not binding after the father's death, ought not to be allowed to abandon a suit intended to secure a declaration to that effect. We think accordingly that the withdrawal petition, I. A. No. 243 of 1926, should not have been allowed and we dismiss it. We further set aside the judgment and decree in O. S. No. 9 of 1926 and direct the lower Court to restore the suit to file and proceed with it according to law. The respondents will pay the appellant's costs of the appeal. The appellant will be entitled to a refund of the court-fee paid upon appeal memo. under S. 13 of the Court-fees Act.

P. R. S./K. S.

Order accordingly.

4. A I R 1925 Bom 425=89 I C 934=49 Bom 672.

A. I. R. 1933 Madras 825

VENKATASUBBA RAO AND REILLY, JJ.
(Rajah Bahadur) Dhanarajagerji —
Appellant.

v.

Rajah Panuganti Parthasarathy Rayanim Varu and others—Respondents.

Appeals Nos. 362 of 1929 and 161 of 1930 and Civil Revn. Petn. Nos. 626 and 627 of 1930, Decided on 12th December 1932, against order of Sub-Judge, Nellore, D/- 26th August 1929.

1. (1896) 9 C L R 332.

2. A I R 1927 Bom 244=101 I C 348.

3. (1905) 2 Ch. 460=54 W R 75=74 L J Ch 656=93 L T 158.

(a) Civil P. C. (1908), O. 20, R. 12—Onus of proving actual profits received is on defendant—Onus shifts to plaintiff, if he claims more, to prove that defendant ought to have received more—Evidence Act (1872), S. 106.

In a suit for mesne profits, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that, more might have been received : *A I R 1925 Mad 145 and 297 ; 24 All 475; 27 Cal 951 (P C) and 8 Cal 343, Ref.* [P 828 C 1]

(b) Civil P. C. (1908), O. 20, R. 12—Person in possession is presumed to get rent according to prevailing rate.

Prima facie it is fair to presume that a person in possession may by ordinary diligence get rent according to the prevailing rates. [P 828 C 2]

(c) Civil P. C. (1908), O. 20, R. 12—Court has only to see whether possession of defendant is wrongful—It is not justified in going further and inquiring into degree of defendant's misconduct or culpability.

The only relevant consideration for the Court is whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability is : *1931 M W N 813, Rel on.* [P 830 C 1]

(d) Words and Phrases — " Profits " and " receipts."

In their ordinary and popular sense the two words " receipts " and " profits " are very different expressions. Profits is the surplus by which the receipts exceed the expenditure : *Russell v. Town and County Bank (1889), 13 A C 418 and Gresham Life Assurance Society v. Styles, (1892) A C 309, Ref.* [P 831 C 1]

(e) Civil P. C. (1908), S. 47—Whether property awarded by decree has been damaged on date of delivery can be considered in execution—Decree—Execution.

When a decree awards a person a certain property, he is entitled to get it in the same state in which it was when that decree was passed ; and whether, when the property was delivered, it continued to be in the same state or in the meantime underwent deterioration, is a question to be determined in execution : *A I R 1923 Bom 391 and A I R 1925 Bom 335, Rel on ; 33 I C 520, Diss from ; 5 C L R 522, Ref.* [P 832 C 2]

(f) Civil P. C. (1908), S. 47 (1)—Matter falling under S. 47 should be decided in execution—Court has no discretion to refer parties to separate suit.

Section 47 (1) is mandatory and in regard to a matter that properly falls under that section, the Court is bound to decide it in execution and has no discretion whether or not to refer the parties to a separate suit : *A I R 1933 Mad 166, Foll.* [P 833 C 1]

Advocate-General, A. S. Krishna Rao and K. Umamaheswaran—for Appellant.

P. Venkataramana Rao, V. S. Narasimhachari, M. Seshachalapathy, A. Venkatachalam, V. Subramaniam and C. Basu Dev—for Respondents.

Venkatasubba Rao, J.—This appeal is filed by defendant 4 against the order dated 26th August 1929 of the Subordinate Judge of Nellore fixing the amount of mesne profits made in pursuance of the order of His Majesty dated 25th June 1924. The order in question was made on the execution petition No. 63 of 1924, filed by the plaintiffs, and the facts which led to the filing of that petition may be shortly stated.

As a result of a certain transaction between the late Rajah of Kalahasti and defendant 1 (after whose death defendant 4, his son, was brought on the record as his representative) the suit properties passed to the latter and the plaintiffs, who succeeded as auction purchasers to the rights in the properties of the Rajah, filed O. S. No. 55 of 1915 (which subsequently was renumbered as 1 of 1917), claiming to redeem them on the footing that the transaction was a mortgage. Alternatively the plaintiffs claimed to have the properties reconveyed to them upon payment of the purchase price on the ground that, if the transaction amounted to an out and out sale, the conditions entitling the Rajah to a reconveyance had been complied with by him and they succeeded to his rights. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale, but the High Court on appeal was of the opinion that it was an absolute sale of the properties, but found, agreeing with the trial Court, that the conditions entitling the Rajah to a reconveyance had been performed and that the plaintiffs were entitled to have the properties reconveyed to them on payment of the price. The question of fact that was discussed at great length both in the trial Court and the High Court was whether the late Rajah tendered as alleged by the plaintiffs the price of six lakhs on 31st August 1914. The Subordinate Judge held that the plaintiff's case regarding the tender was true, and treating, as I have said, the transaction as a mortgage, passed on 5th October 1918, a preliminary decree, declaring that the amount due by the plaintiffs to the defendant was rupees six lakhs and directing that on payment by the former of that sum on or before 5th March 1919, the latter should reconvey the properties to them and further ordering

the defendant to pay the plaintiffs Rupees 60,000 on account of past mesne profits for fasli 1324. The plaintiffs paid into Court the mortgage amount (six lakhs) on 5th March 1919, and the trial Court passed a final decree on 7th October 1919, directing the defendant to reconvey the properties to the plaintiffs. It was against these preliminary and final decrees that appeals were filed to the High Court. They were appeals Nos. 46/19 and 57/20 both filed by defendant 1, and the plaintiffs also filed a memorandum of objections. The High Court concurred with the finding of the trial Court on the point of tender, but having held, as I have said, that the transaction amounted to an absolute sale with an agreement to reconvey, passed a decree which varied materially the decree of the trial Court as to interest and mesne profits. In view of a certain contention raised before us to which I shall presently refer, it may be useful to point out here why the Subordinate Judge, awarded mesne profits only for fasli 1324. The tender of the price was, as stated above, made on 31st August 1914 and the suit claiming the properties back was filed in August 1915. The plaintiffs did not follow up the tender by paying the amount into Court, and the Subordinate Judge therefore held that they were entitled to mesne profits only up to the institution of the suit and not to the subsequent profits. Taking this view, the Subordinate Judge granted mesne profits for fasli 1324, i. e., for the period between the date of the tender and the date of the suit. When the matter came up before the High Court, the question as to mesne profits and interest was fully considered and the learned Sir John Wall, C. J., discussed in his judgment, what the true legal principles are that would apply to the case, in view of the High Court's finding that defendant 1 having refused the tender, continued to be in possession as mortgagee. The conclusion at which the High Court arrived, is thus stated in the judgment of Sir John Wallis:

Defendant 1 therefore will be entitled to interest on the sum of Rs. 600,000 from 1st September 1914 up to 5th March 1919, the date of the deposit, at 6 per cent per annum. On the other hand the plaintiffs will be entitled to mesne profits from 1st July 1914 until possession or until the expiry of three years from this date, whichever may be earlier."

It will be noticed that though the liability for the mesne profits was determined by the judgment, it did not fix the actual amount or the rate; but the decree that was drawn up (dated 24th February 1921), going further than the judgment, fixed the amount at Rs. 60,000 per annum. The result therefore was that under the High Court's decree, defendant 1 became entitled to interest at 6 per cent per annum on the Rs. 60,000 from 1st September 1914 (the tender having been made on the 31st August), up to 5th March 1919 (the money having been on that date deposited into Court); and the plaintiffs on the other hand became entitled to mesne profits at Rs. 60,000 per annum from 1st July 1914 until the delivery of possession. From this decree of the High Court defendant 1 filed an appeal to the Privy Council. On the question of tender their Lordships held, agreeing with the concurrent findings of the Courts in India, that the plaintiffs case was true, and as regards the character of the transaction, they decided, upholding the Subordinate Judge's view and differing from that of the High Court, that it amounted to a mortgage and not to an out and out sale with an agreement to reconvey. On these findings the Judicial Committee advised that the judgment of the High Court should be discharged and that the decree of the Subordinate Judge should be restored with the following variations: (1) that the plaintiffs were chargeable with interest upon the mortgage money at 6 per cent per annum from 1st September 1914 to 5th March 1919 when it was paid into Court, (2) that defendant 1 (by that time deceased and represented by defendant 4) was entitled to the interest earned by the mortgage money since it was so deposited into Court and (3) that defendant 4 should account to the plaintiffs for the mesne profits of the properties from 1st July 1914 until actual delivery. The order of His Majesty approving these recommendations of the Privy Council was made on 25th June 1924, and it was in due course transmitted by the High Court to the lower Court for its terms being carried into execution. It is in pursuance of this order that the learned Subordinate Judge has now determined the amount of the mesne profits, and from his decision both the parties have filed the appeals. (After

considering certain points not material to this report his Lordship proceeded. Some question has been raised as to the onus of proof, but in the circumstances of this case any discussion as to the onus seems unnecessary. Defendant 4 has put forward a specific case, that owing to certain reasons he was not in a position to collect the full rentals and has failed to make it out. But I may state what in my opinion the true rule as to the onus of proof is. When a party claims damages, he must adduce proof in support of his claim. The burden of proof rests in the first instance upon him; in order to succeed he must put the Court in possession of satisfactory evidence as to the quantum of damages to which he is entitled. The claim for mesne profits is virtually a claim for damages, and the rule that the plaintiff must discharge the burden applies therefore to such a claim. But the expression "mesne profits" is defined in S. 2, Cl. 12, Civil P. C., as meaning not only those profits which a person in wrongful possession actually received, but also such profits as he might with ordinary diligence have received. If the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge (S. 106, Evidence Act). On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. This is the effect of *Rammakka v. Nagesam* (1), on which both sides have relied. *Mohamed Abdul Gaffoor v. Mohamed Shamsuddin Rowther* (2) does not lay down a different rule. In *Ameer Kasim v. Darlarimal* (3) the learned Judges observe:

"In calculating such mesne profits, the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by the lessees (defendants) or with ordinary diligence might have been received by them."

Turning to the facts of the present case, the defendant had at his command all the machinery available to a zamindar to collect the amount fixed as the beriz, and the plaintiffs, on showing what that beriz is, must be deemed to have *prima facie* made out that the

opposite party could with ordinary diligence have collected it. This principle is recognised in *Brojendra Coomer Roy v. Madhul Chander Ghose* (4), where the learned Judges, after stating that it was proved that a certain jumma was payable in respect of the property, observed:

"It lay upon the judgment-debtors to give some explanation or offer some evidence to show that as a matter of fact and for causes over which they had no control this sum had not been realised by them."

In *Girish Chunder Lahiri v. Shoshi Shikareswar Roy* (5), the Judicial Committee also lay down the rule in more or less the same terms:

"And *prima facie*" their Lordships observe, "it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount."

An earlier passage from the same judgment may usefully be extracted:

"But the Amin, as directed by the Subordinate Judge, has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts. Whether if that had been produced it would have satisfied the inquiry cannot be known. It might still have been necessary to inquire into the possibility of larger receipts by ordinary diligence."

This case is an authority for the proposition that *prima facie* it is fair to presume that a person in possession may by ordinary diligence get rent according to the prevailing rates, in other words up to the beriz or the demand on the land. In this case, as I have said, the question of the burden of proof is of subsidiary importance, as defendant 4 has attempted to show by putting forward certain specific pleas, why the real receipts fell short of the gross demand and has failed to prove them by satisfactory evidence. In the result, we must hold that on the credit side of the account should be placed for the accounting period (fasli 1325 to fasli 1333) the sum of Rs. 1,42,250 per year, the same amount as we have fixed as the beriz or the gross annual demand. It may be recalled that the figure at which the lower Court has arrived is Rs. 1,48,096-6-2. Here his Lordship dealt with certain items and proceeded.

Devasthanam Expenses.—We now pass on to item 9 of Ex. 201, the Devasthanam expenses. The facts bearing on this point may be briefly stated: The Rajabs of Kalahasti, when they were

1. A I R 1925 Mad 145=92 IC 133=47 Mad 800.

2. A I R 1925 Mad 297=92 IC 139.

3. (1902) 24 All 475=(1902) A W N 145.

4. (1882) 8 Cal 343.

5. (1900) 27 Cal 951=27 IA 110=7 Sar 687 (PC).

the owners, used to make contributions to the temples in the taluk. They collected from the ryots what were known as srivarrusooms, and by adding moneys of their own made payments to the temples on a certain scale. The Court of Wards was for some time in management of the estate on behalf of the then Rajahs of Kalahasti. At that time an expenditure of Rs. 5,000 was sanctioned by the Court of Wards, and this sum was being paid out from time to time. There was also some suit relating to the succession to the zemindari, and in that proceeding, a receiver having been appointed, the Court seems to have sanctioned his spending Rs. 5,000 a year for this purpose. It is now urged for the defendant that he continued to make payments on the same scale and that the moneys he spent can properly be debited against the plaintiffs. We agree with the lower Court that this contention cannot be accepted. Any payments made to the Devasthanams beyond what was collected as srivarrusooms must be regarded as purely voluntary. There was no legal duty cast upon the defendant in his capacity as the mortgagee to make these payments. His position is different from that of the zamindars in this respect. The latter, who were the owners, could, to show their piety and devotion, pay what sums they liked. Again, as regards the Court of Wards, whether they rightly made the payments or not is not a matter which we are called on to decide; but in any case they were managing the estate for the owners, and, if the latter did not object, there was no reason why the usual contributions should be withheld.

Similarly the receiver in the succession suit represented the parties either entitled to or claiming the zamindari, and he must be deemed, while making the payments with the sanction of the Court, to be performing the duties, which the Rajahs, if in possession, would have carried out. The defendant's position is entirely dissimilar, and he cannot hold the plaintiffs liable for the moneys he paid. It may be added that the temples on which the Rs. 5,000 a year was spent by the Court of Wards and the receiver included some in that part of the Pannur Taluk which never came into the possession of defendant 1 or defendant 4. (After again dealing with cer-

tain other items the judgment proceeded.)

Collection Charges (generally).—A question has been raised whether the defendant can be allowed to charge the estate with the expenses of collection. The learned Judge has allowed these charges to be defrayed out of the mesne profits to the end of fasli 1328, but for the subsequent period he has held that the defendant is disentitled to recover those charges. The distinction appears to be based on the ground that, when the act of trespass is, besides being wrongful, (every trespass is wrongful) also tortuous and malicious, the trespasser is in equity disentitled to charge such expenses as have been voluntarily incurred. The charges are divided into two categories: first, necessary payments such as Government revenue or ground rent, these every wrongdoer is entitled to recover; and secondly, ordinary expenses which would be voluntarily incurred, such as collection fees, which only an honest trespasser can recover. This distinction was recognized and acted on in *Altaf Ali v. Lalji Mal* (6). In that case the Court (Stuart, C. J. dissenting) held that when the trespasser entered or continued on the property without any bona fide belief that he was entitled to do so, it is not imperative on the Court to allow him to charge the estate with the expenses of collection. This was followed in *Dungar Mal v. Jai Ram* (7). The test to be applied according to this decision is, is the trespass tortuous and malicious; in other words is the misconduct of an aggravated character? If so, the collection charges should not be allowed to the trespasser. This view seems to have been accepted by the Calcutta High Court in *Rajah Sashikanta v. Sarat Chandra* (8). Another case that has been cited as supporting this view is *Dakshina Mohun Roy v. Saroda Mohun Roy* (9). We may at once state that the last mentioned case does not deal with the point at all.

The question then is, whether the view taken by the lower Court can be supported. Wrongful possession is the very essence of a claim for mesne profits; that is what the definition of the expression "mesne profits" states. Mesne

6. (1876) 1 All 518 (F B).

7. (1902) 24 All 375=(1902) A W N 90.

8. AIR 1921 Cal 699=70 I C 6.

9. (1893) 21 Cal 142=20 IA 160=6 Sar 366 (PC).

profits are defined (S. 2, Cl. 12) as those profits which a person in wrongful possession actually received or might with ordinary diligence have received. The only relevant consideration under this definition is, whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability is. With great respect sufficient attention does not seem to have been paid to the definition in the Code, in the cases to which we have referred, and we are unable to follow them. Our view is in accordance with a decision of this Court in *Thirumalayappa Mudaliar v. Kalyani Anni* (10).

Neither side supports the actual method adopted by the learned Judge. On the one hand, it is argued for the plaintiffs that the defendant's possession should from the very beginning be treated as tortuous, and malicious, and for the defence it is contended on the other, that this distinction is totally unfounded and ought not to be recognized. In the opinion we have formed it is unnecessary to decide whether at any point of time the trespass was of an aggravated character. I therefore hold that for the whole period of accounting the defendant is entitled to charge the estate with collection charges.

The decree of the lower Court is modified accordingly. We make the following order as to the costs of the appeal. The plaintiffs shall pay defendant 4's costs, which are hereby fixed at Rs. 2,000, and defendant 4 shall pay the plaintiff's costs, which are fixed at Rs. 6,000. The order of the lower Court as to costs shall stand.

Reilly, J.—I agree.

C. M. A. No. 161 of 1930.

Venkatasubba Rao, J.—We have just disposed of the appeal filed by defendant 4. The plaintiffs have filed the present appeal, attacking the same order of the learned Subordinate Judge, and it mainly raises a question relating to the construction of the order of His Majesty. The plaintiffs contend that they are entitled to gross receipts as distinguished from mesne profits. Mr. Venkatarama Rao, their learned counsel, urges that as the Judicial Committee has found that the legal relationship

was one of mortgagor and mortgagee, the proper inference is that S. 76 (1), T. P. Act, applies, and the plaintiffs are entitled to gross receipts without deductions. This position is untenable; for our duty is not to consider what the rights of the parties are, but we are merely concerned with giving effect to His Majesty's order. Is it to be supposed that when their Lordships used the expression "mesne profits," they intended it to mean gross receipts? First, it must be observed that the term "mesne profits" was used as meaning net receipts throughout the proceedings by the parties, the trial Judge and the High Court, and there is no warrant for supposing that the Judicial Committee intended to use it in a different sense. In their plaint the plaintiffs were careful enough to distinguish the gross income (estimated at Rs. 1,40,000) from the net income (stated to be Rs. 80,000). Having thus referred both to the gross income and the net, they describe the latter sum alone as mesne profits.

It is doubtful whether any claim was made in the plaint for gross receipts at all; but granting that the plaint is susceptible to such a construction, it is clear beyond doubt, as we have said, that the expression "mesne profits" was used as meaning net receipts. Then the trial Judge found that the transaction in dispute amounted to a mortgage, and the question therefore arose, whether the defendant as mortgagee in possession was liable under the Transfer of Property Act to account for gross receipts. Applying his mind therefore to this distinction, the learned Subordinate Judge observed:

"In the present case the plaintiffs have claimed only the net receipts as mesne profits."

When the case was taken in appeal to the High Court, it became necessary in the view the learned Judges took that the transaction amounted to a sale, to consider the nature of the relief to which the plaintiffs were entitled. The judgment of the High Court shows that what was then being considered, was a claim to mesne profits and not to gross receipts. It is inconceivable that the Privy Council for the first time departed from this meaning and used the expression in a different sense. Further, the words neither in ordinary parlance nor in their legal acceptation mean gross re-

ceipts. The term "mesne profits" occurring in the Code is very different from "gross receipts" used in the Transfer of Property Act. Each of these terms has a different connotation and is used in a particular sense, and it is difficult to believe that their Lordships, when they meant gross receipts used the term "mesne profits." Mr. Venkataramana Rao suggests that there are some judgments where these expressions are treated as convertible terms; but surely that does not justify us in holding that there has been a similar lapse on the part of the Judicial Committee. In their ordinary and popular sense the two words "receipts" and "profits" are very different expressions. Profits, as has been repeatedly pointed out, is the surplus by which the receipts exceed the expenditure: see *Russell v. Town and County Bank* (11), and *Gresham Life Assurance Society v. Styles* (12). at p. 323. In the last mentioned case Lord Herschell observes:

"Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise."

In *Hurro Durga Chowdhurani v. Surut Sundari Debi* (13), at p. 335 His Majesty in Council defines what mesne profits are:

"Now that depends really upon the question what was the meaning of the term 'mesne profits.' In their Lordships' opinion, the amount which might have been received from the land, deducting the collection charges, was the profits of the land."

Lastly, the conduct of the plaintiffs themselves shows that they did not understand the term as equivalent to gross receipts. Even in their latest execution petition, they claimed the net profits and not gross receipts, and filed particulars showing how the amount they claimed was arrived at. Some time later they applied, by way of amendment, to be allowed to correct mesne profits into gross receipts. I have not the slightest doubt that this contention of the plaintiffs must be rejected as being wholly untenable. The only other point taken in this appeal is, that the Judge should have disallowed the collection charges for the whole period of the accounting, on the ground that

11. (1839) 13 A C 418=58 L J P C 8=53 J P 244=59 L T 481.

12. (1892) A C 309=62 L J Q B 41=56 J P 709=67 L T 479=41 W R 270.

13. (182) 8 Cal 3 2=9 I A 1=4 Sar 304 (P C).

the defendant's trespass was of an aggravated nature. I have already shown in the connected appeal that this contention is untenable. In the result the appeal fails and is dismissed, and we direct the appellants (plaintiffs) to pay the costs of defendant 4, which we fix at Rs. 4,000.

Reilly, J.—I agree.

(Their Lordships then allowed C. R. P. No. 627 of 1930 and proceeded.)

C. R. P. No. 626 of 1930.

Venkatasubba Rao, J.—This Civil Revision Petition has been heard along with the appeals, which we have just disposed of. The plaintiffs applied by E. A. No. 120 of 1928 for leave to amend their execution petition (E. P. 63 of 1924). The order now attacked was made by the learned Judge on 26th August 1929, i. e., the same day when he delivered judgment in the main petition. That order runs thus:

"The execution petition E. P. 63 of 1924 has been allowed today. Though this matter seems to arise in execution, inasmuch as it covers a large amount and must involve intricate questions of law and fact, this will be filed as a suit subsequent to payment of court fees, etc., by the petitioner. Time one month."

This order, it will be observed, allows the proceeding to be treated as a suit. We shall consider presently the question, whether the learned Judge was right in converting the application into a suit. The first point, however, that is to be determined is, was the lower Court justified in entertaining the plaintiffs' application at all? The answer depends upon the correct view to be taken of the nature of the relief claimed in it. The plaintiffs filed an affidavit in support of their petition, and in that they claimed not only the premia but also compensation or loss sustained by them on account of the alleged wrongful conduct of the defendant. The conduct that is stated to be wrongful is thus described:

"After the possession of the taluk was taken in December 1924, it was discovered that in a number of cases the judgment-debtor, who in law was merely a trespasser from the date of the tender of the money in 1914 and had therefore no power or authority to make fresh assignment of lands to the raiyats which a landholder alone could do under the Estates Land Act, has acted fraudulently and dishonestly and has let into possession of unoccupied lands a number of tenants who now claim rights of occupancy."

Mr. Venkataramana Rao, the plaintiffs' learned counsel, contends that this petition relates to two distinct matters;

first, the premia that were either collected or might with ordinary diligence have been collected and secondly, the loss sustained by the value of the property being impaired on account of occupancy rights having been unlawfully conferred. We think on a proper reading, the petition comprises these two distinct claims as contended. It is not for us now to consider whether the plaintiffs' claims are in law sustainable or whether any relief can be ultimately granted to them. But each of the two claims, to which the petition relates, must be considered separately; and the the plaintiffs' request, in so far as it relates to the premia, should in our opinion not have been granted by the lower Court. In the first place, the plaintiffs, when they filed E. P. 63 of 1924, expressly reserved their claim to the premia to a future proceeding. Secondly, the application in question was made at a very late stage. It was filed after the expiry of four years from the date of the original execution petition. There was a prolonged inquiry before the Commissioner regarding the mesne profits, and even that inquiry came almost to a close. It was seven months after the conclusion of the taking of the evidence that the application was made; and all that remained to be done was for the Commissioner to submit his report. It has not been seriously disputed that premia are a part of mesne profits. That being so, the plaintiffs cannot reasonably ask that a fresh inquiry should now be held for the purpose of deciding to what additional profits, if any, they are entitled.

But then their claim in respect of the alleged loss stands on a different footing, and is not in any way connected with the mesne profits. Under the decree of the Privy Council they were entitled to recover possession as well as mesne profits. In E. P. 63 of 1924 which they filed in the lower Court for enforcing that decree, they prayed inter alia for two reliefs: (1) for being placed in possession of the properties and (2) for an inquiry being held as to the mesne profits. In execution they obtained possession of the property and then discovered (so they allege) that its value had been greatly impaired. Mr. Venkataramama Rao's argument may be thus put. When a decree awards a

person a certain property, he is entitled to get it in the state in which it was when that decree was passed; and whether, when the property was delivered, it continued to be in the same state or in the meantime underwent deterioration, is a question to be determined in execution. We think this argument is well founded. This very point arose for decision in *Hari Shridhar Prabhu v. Shakharam Padmanna Magdum* (14), and the following passage contains, in our opinion, a correct statement of the law:

"But we think that the question with regard to the waste committed by the judgment-debtor after decree was a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree, and not by a separate suit. The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property was depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether the defendants are liable to make good the loss."

This case was followed by another Bench of the same Court in *Bai Lalbu v. Mohanlal* (15). The question is whether a successful party can be said to get possession of what has directed to be given to him by the decree, if the property, while in the opponent's possession, suffered deterioration by damage subsequent to the decree; and whether a claim to compensation is well founded or not is a matter that should be considered in execution under S. 47, Civil P. C. A different view was no doubt taken in *Ramu Shetti v. Maniappa Shetti* (16). The point was there disposed of in a brief sentence, and no reasons were given in support of the view taken. The learned Judges purport to rely upon *Beecharam Paul v. Bhagwan Chunder Ghose* (17) which on examination does not support their conclusion. We therefore think that both in principle and on authority the plaintiffs' contention must be upheld. Then remains the question if that is a matter coming within S. 47, was the lower Court justified in directing the proceeding to be converted into a suit? The same point was considered recently in *Seetharaman Chettiar v. Chidambaran Chettiar* (18) and we there

14. A I R 1923 Bom 391=73 I C 443.

15. A I R 1925 Bom 385=89 I C 205.

16. (1916) 33 I C 520.

17. (1892) 5 C L R 522.

18. A I R 1933 Mad 166=141 I C 54=56 Mad 447.

held that S. 47 (1) is mandatory and in regard to a matter that properly falls under that section, the Court is bound to decide it in execution and has no discretion whether or not to refer the parties to a separate suit. It is unnecessary to restate our reasons for this view, and we hold that the order of the lower Court directing the proceeding to be converted into a suit was wrongly made and must be set aside. There is one other matter to which we must refer. The petition, we have said, must be confined to the loss alleged to have been sustained by the plaintiffs. But should they be permitted to claim that loss by being allowed to amend the original execution petition? There is no reason why in the circumstances we have set forth, that indulgence should be granted to the plaintiffs. When this was pointed out, Mr. Venkataramana Rao says that he has no objection to this amendment petition being treated as an independent proceeding. Treating it in that way, we must hold that the lower Court has not properly disposed of it, and we now remand it for proper disposal in the light of our observations.

Reilly, J.—I agree. The learned Advocate-General represents that his client has various contentions, including one of limitation, to raise in connexion with this remanded application. Those contentions we have not considered. We make no order as to costs.

Civil Misc. Appeal No. 362 of 1929, etc., posted for being spoken to. These cases at the request of counsel are now posted for being spoken to. The first point raised is, that we should have found the amount due on the date of the lower Court's order, and not as we did, on the date of our judgment. This contention, is in our opinion, well founded, and we therefore direct that the account shall be made up as on dated 26th August 1929, the date of the order of the lower Court. In the table annexed to our judgment for the words "to this day", must therefore be substituted the words "to dated 26th August 1929." The aggregate balance due on that date shall carry interest at 6 per cent per annum. The next point relates to interest upon Rupees 7,000 the mesne profits for fasli 1334. We direct that this sum shall carry interest at 6 per cent per annum from 1st December 1924 to 26th August 1929. In arriving at the aggregate

balance due on dated 26th August 1929, this sum with interest as aforesaid shall also be taken into account. The learned Advocate-General contends that we should allow interest on the sum of Rs. 1,62,400 from 27th July 1921. We referred in our judgment to a similar contention, but the interest then claimed was from an earlier date, namely 5th March 1919. The learned counsel points out that he has now chosen dated 27th July 1921, as in an execution petition filed on that date, his clients were given credit for this sum of Rs. 1,64,400. The argument seems to be that the act of the opposite party amounts to an admission that interest runs from that date. As we pointed out in our judgment, we are guided by the terms of the order of His Majesty in Council which we are carrying into effect, and under that order the sum of Rs. 1,62,400 carries interest only from 1st September 1914 to 5th March 1919. In the absence of any direction that the amount should carry interest for any subsequent period we cannot allow it. The fact that before the rights of the parties were ultimately settled by the final order in Council the amount was credited in the execution petition in accordance with the High Court's judgment then in force makes in our opinion no difference.

Lastly, it is now brought to our notice that the plaintiff drew the following sums subsequent to the lower Court's order; part satisfaction to that extent is recorded.

(1) Rs. 2,50,000 on 6th September 1929.

(2) Rs. 83,382 on 22nd August 1930.

P.R.S./K.S.

Order accordingly.

A. I R. 1933 Madras 833

MADHAVAN NAIR AND JACKSON, JJ.

Pidikiti Kotayya and others—Defendants—Appellants.

v.

Anne Radhakrishnamurthi and others—Plaintiffs—Respondents.

Appeal No. 11 of 1927, Decided on 1st February 1933, against preliminary and final decrees of Sub-Judge, Bezwada.

(a) Minor—Decree obtained against minor's father and paternal uncle as trespassers—Death of father—Latter cannot re

present interest of minor in execution of such decree.

A decree was passed against a minor's father and his paternal uncle as trespassers and not as persons representing the properties of the joint family. The father died:

Held: that in execution of such a decree, the paternal uncle, could not in law sufficiently represent the interests of the minor: *AIR* 1929 *Mad* 275 and *AIR* 1919 *Mad* 16, *Dist.*

[P 835 C 1]

(b) Minor — Decree obtained against minor's father and death of father — Minor not impleaded in execution but widow brought on record as legal representative—Sale held in execution should not be set aside merely on ground that minor is not brought on record—Decree—Execution.

A decree was obtained against the minor's father and on the death of the father, execution was taken and the widow was brought on record as his legal representative, but the minor was not brought on record; and a sale was held in execution of the decree:

Held: that the sale should not be set aside merely on the ground that the minor was not brought on record, as even had he been brought on record he would have been represented only by the widow as his guardian: 6 *I A* 233 (PC), *Ref.*

[P 835 C 2; P 836 C 1]

Advocate-General and *P. Satyanarayana Rao*—for Appellants.

Ch. Raghava Rao and *Pattabhirama Sastri*—for Respondents.

Madhavan Nair, J.—Defendants 2, 3, 4 and 5 are the appellants. The plaintiff is the son of one Gopayya. Gopayya's brother is Rathayya, defendant 1. The wife of Gopayya is Seetaramamma. The suit out of which this appeal arises was instituted by the plaintiff for recovery of one half share of the suit properties. The circumstances in which the suit was instituted are these: In O. S. No. 50 of 1911 defendant 5 obtained a decree against the plaintiff's father and defendant 1 for recovery of possession of the suit property and other properties together with mesne profits and costs. The ground of his claim was that he was entitled to the properties as the reversioner to the last male owner and that the plaintiff's father and defendant 1 were in possession as trespassers. The decree was dated 24th February 1914. After the decree defendant 5 applied for possession of the properties, on 26th September 1914, but did not ask for mesne profits and costs. But immediately after delivery of possession on 27th September 1914, the property contained in Sch. A was gifted by defendant 5 to Gopayya and defendant 1. Gopayya died on 6th December 1915. The plaintiff was not born at that time. Later

on defendant 5 took steps to execute the decree in O. S. No. 50 of 1911 for the mesne profits and costs. It is the case of the plaintiff (respondent 1) that there was an adjustment between the parties at that time, that the decree for mesne profits and costs should not be executed and that the proceedings in execution were taken to deprive Gopayya's widow and subsequently the plaintiff of possession of these properties. The decree for mesne profits was transferred from Masulipatam to Bezawada for execution on 12th January 1916. On 22nd February 1916, the defendant applied for attachment of Schs. A and B properties and on 9th April 1916 the properties were attached. Before the sale of the attached properties, the plaintiff was born on 5th August 1916, and he was not specifically brought on the record as representative of his father. It is one of the disputed questions in the case, to which we shall have to refer later, whether the widow Seetaramamma continued on the record in the execution proceedings. On 4th November 1916 the properties were sold, and the sale was confirmed on 4th December 1916, and the sale certificate was issued on 2nd February 1917. Defendant 5 got possession of Schs. A and B properties on 26th February 1917, and later on portions of those properties were sold to the various appellants under different deeds.

The plaintiff's contention is that the sale of these properties is not binding on him because his interests were not represented by the widow and that he himself was not represented as a party. For these reasons he says that the sale is a nullity. He has also taken the ground that the adjustment pleaded is true and that the proceedings were carried on by defendant 5 with the knowledge that there was such an adjustment and that therefore the proceedings were fraudulent. In reply, the appellants contend that defendant 1 was admittedly on the record in the execution proceedings and was competent to represent the interests of the minor plaintiff, that even if he was not competent, the widow Seetaramamma continued to be on the record after receiving notice of the execution proceedings and was therefore competent to represent the interests of the minor; and that

no case of fraud with regard to the adjustment has been made out. There are three points therefore for determination: 1. Whether defendant 1 sufficiently represented the interests of the minor; 2. Whether notice of execution proceedings had gone to Seetaramamma and if so, whether she could represent the interests of the minor; and 3. Whether the proceedings were vitiated by the fraud alleged by the plaintiff. We will deal with each of these questions separately.

On the first question we are of opinion that defendant 1 could not in law sufficiently represent the interests of the minor. The reason is this: The decree that was being executed was not one which was obtained against the joint family manager nor was it directed against the joint family property. That decree was obtained against the father of the plaintiff and defendant 1 as trespassers and not as persons representing properties of the joint family. In these circumstances the decisions relied on by the learned counsel for the appellants in *Ramanathan Chettiar v. Ramanathan Chettiar*, A.I.R. 1929 Mad. 275, *Soorayya v. Chinna Anjaneyalu* (1) and the other allied decisions do not apply to the case.

The next question is whether the widow Seetaramamma, the mother of the plaintiff, had notice of the execution proceedings. The learned Judge holds that she had no notice and therefore the proceedings are not binding on the plaintiff. The evidence on this point consists of the proceedings taken by defendant 5 to transfer the execution of the decree to the Bezwada Court and of the oral evidence of a few witnesses, viz., plaintiff's maternal uncle (P. W. 1), the widow (P. W. 3), defendant 1 (D. W. 1), and defendant 5 (D. W. 2). According to R. 138 of the Civil Rules of Practice, when an application for transmission of a decree to another Court for execution is made, notice of the application shall be given in all cases in which under O. 21, R. 22, Civil P. C., notice of an application for execution is required. O. 21, R. 22 says that where an application for execution is made against the legal representative of the party to the decree, then notice shall be issued to the person against whom execution is applied for. Therefore we must in, considering the

1. AIR 1919 Mad 16=52 I C 509.

evidence in the case start with the presumption that when the transmission application was made, notice would have gone to the widow Seetaramamma, her husband having died prior to that application. S. 50, Civil P. C., says that when a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. Such an application would in the ordinary course have been made in this case. Therefore we start with the presumption that Seetaramamma was brought on the record on the death of her husband and notice of the application was sent to her. (After examining the evidence both documentary and oral, his Lordship held that when the husband of Seetaramamma died, she was brought on the record as his legal representative and she continued to remain on the record throughout after receiving notice of execution proceedings and that the learned Judge's finding that Seetaramamma had not received notice cannot be upheld, and proceeded). Assuming that Seetaramamma had notice, can it be said that her representation of the plaintiff's interests was competent and that the sale therefore cannot be called into question even though the plaintiff himself was not brought on the record? If our finding with regard to notice is correct then it follows that she and defendant 1 had notice of the proceedings and that if there was anything to be done on behalf of the interests of the minor or of themselves, they would have taken steps to safeguard them. It is argued by Mr. Raghava Rao that strictly speaking a legal guardian should have been appointed for the minor. Now if a guardian had been appointed, in all likelihood that guardian would have been either the mother or defendant 1. It has been pointed out by their Lordships of the Privy Council in *Bissessur Lall Sahoo v. Luchmessur Singh* (2) that:

"In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right."

In this case we have no doubt that the execution proceedings were in substance correct, and if there was any re-

2. (1879) 6 I A 233 (P C).

presentation to be made on behalf of the minor, such representation would have been made by his mother or by defendant 1. As we have said, if the minor had been made a party to the execution proceedings, he would have appeared by his mother as guardian, and there is no reason to suppose that anything would have been done differently in the execution proceedings if she had been described as his guardian instead of her being there as the representative of his estate. In this connexion our attention was drawn to the decision in *Devi v. Sambhu* (3). No doubt that case is distinguishable from the present case, having regard to the fact that the widow herself was sued in that suit; but that distinction does not make any difference having regard to our opinion that the execution proceedings were substantially right. That being our finding we cannot give effect to the merely technical objection that is now urged to invalidate the execution proceedings. We therefore hold that the representation by the widow was sufficient in this case to make the proceedings binding on the plaintiff.

The last question is whether the proceedings were vitiated on account of the alleged fraud. The evidence with regard to fraud is not very full. It may be for this reason, viz., that fraud as a distinct ground of attack was not alleged in the plaint, nor was a specific issue raised about it. As already stated, the allegation of fraud was made with regard to the adjustment which was alleged to have taken place between defendant 5 and the plaintiff's father and defendant 1 that he would not execute the decree for mesne profits and costs. (After examining the evidence, his Lordship held that the fraud was not made out and concluded). These being our findings it follows that the plaintiff is not entitled to succeed in the suit for the recovery of a half share of the property. We therefore set aside the decision of the lower Court and dismiss the plaintiff's suit, but in the circumstances direct each party to bear his costs in this Court. The memorandum of objections is dismissed.

P.R.S./K.S.

Appeal allowed.

3. (1900) 24 Bom 135=1 Bom L R 627.

A. I. R. 1933 Madras 836

CURGENVEN, J.

Thayammal—Defendant—Appellant.

v.

Sankaranarayana Pillai and another—Plaintiffs—Respondents.

Second Appeal No. 137 of 1929, Decided on 14th December 1932, against decree of Sub-Judge, Tuticorin.

(a) **Hindu Law—Debt—Partition suit by son—Mortgage executed by father challenged—Mortgagee relying as to binding character of mortgage on actual application of money for purpose binding on son—He cannot, on failure to prove this, raise plea that he made inquiries.**

Where in a partition suit, a son challenges a mortgage executed by his father and the mortgagee relies only on the actual application of the money for purposes binding on the son but fails to prove it, he cannot subsequently raise the plea that he is not bound to prove the actual application but only to make due inquiries as to existence of necessity : *AIR 1927 P C 37, Ref.*

[P 837 C 1; 2]

(b) **Hindu Law—Partition—Partition suit by son—Mortgage executed by father—Mortgagee putting forward claim only as mortgagee and not as simple debtor—Part of mortgage debt not proved to be binding on son—Mortgagee cannot in second appeal ask Court to make provision for such debt in partition decree.**

Where in a suit for partition by a son, a mortgage executed by the father is challenged and the mortgagee puts forward his claim only as mortgagee, but not in a subsidiary capacity as a simple debtor, but fails to prove that a portion of the mortgage debt is binding on the son, he cannot at the time of second appeal, ask the Court to make provision for such debt in the partition decree; for a necessary condition for including a debt in the decree is that it should not be illegal or immoral and such prayer involves trial on this question of fact *AIR 1932 P C 182 Rel on*

[P 837 C 2]

T. M. Krishnaswami Iyer—for Appellant.

T. L. Venkatarama Ayyar—for Respondents.

Judgment.—The plaintiff sued his father, defendant 1, for partition and the point arose for decision whether a mortgage bond, Ex. 7, executed by the father on 29th July 1922 for Rs. 1,000 to defendant 6 was for valid consideration which was binding upon the son. Both the lower Courts have found that the money was actually paid but they differed with regard to the question of its binding character so far as the excess over Rs. 108.5.0 is concerned, this sum having admittedly been devoted to the discharge of prior debts. Out of the balance of Rs. 891.11.0 the learned District Munsif has found that a sum of

rather less than Rs. 400 was spent by defendant 1 upon constructing a house, a purpose binding upon the plaintiff. He has analysed such evidence as there is with regard to the amount so spent and evidently found it very inconclusive, because he concludes by saying that taking a very lenient view it may be that the expenses of restoration and improvement of the house together with the money spent in discharge of prior debts might have amounted to Rs. 500. When this finding came up for consideration on appeal the learned Subordinate Judge expressed the view that the sum arrived at by the lower Court was based purely upon a surmise and that it was incumbent upon the mortgagee to prove that defendant 1 did build a house and how much exactly he had spent in so doing. That I think, is incontestably correct, and although the learned Subordinate Judge's discussion of the evidence has been criticised on one or two points I do not think that the criticisms affect the correctness of his general position that there really is no evidence to show how much money was devoted to this object. The most that has been shown is that about that time defendant 1 did do some building, but whether it amounted to improving an already existing house or to more than that is not clear. Still less is it clear how much of the money received under the mortgage was spent in the operation. I cannot therefore say that the lower appellate Court is wrong in describing the District Munsif's conclusion as a surmise which is only another word for guess, nor is it even possible to name with certainty, the minimum sum as having been so expended. In these circumstances, I can find no justification in second appeal for disturbing the finding upon this point of the lower appellate Court.

It is then urged on the authority of the Privy Council case in *Sri Kishen Das v. Nathu Ram* (1) that if the mortgagee made due inquiry, she was not bound to account for the actual expenditure of the money. That would no doubt be the case if such a plea had been raised. There is indeed a statement by the mortgagee's husband that defendant 1 wanted to build a house with the

money, but the question of any real inquiry being made as to how much was required has not been investigated by the lower Court and it is plain from para 7 of the written statement that defendant 6 staked her case upon proving the actual application of the loan. This plea accordingly cannot be raised now. A further point is taken that even if the money is not proved to be binding upon the plaintiff, provision should be made in the partition decree for the payment of the debt, on the footing that a son is liable for his father's debt. Reference is made to the Full Bench case in *Venkureddi v. Venkureddi* (2) in which this principle has been given expression to. It is no doubt the case that where creditors put forward their debts for the purpose, Courts should provide in the decree for their discharge before arranging for the partition of the net assets. In this case however no such application to the Court was made and the mortgagee contented herself with putting forward her claim in that capacity only and not in the subsidiary capacity of a simple debtor.

The question is whether I ought to disturb the finding now in order that this omission may be rectified. The other side has referred me to a recent Privy Council case in *Benares Bank, Ltd. v. Hari Narain* (3) in which a similar point was taken in the appellate stage but the Judicial Committee refused to entertain it on the ground that it was not taken in the Courts below and might involve, as was conceded, questions of fact not yet tried. I think that the same objection exists in the present case. A necessary condition for including the debt in the decree is that it should not have been contracted for an illegal or immoral purpose, and there is no question that that point would have to be tried before the decree could be modified in the manner the appellant desires. The Full Bench judgment was passed in November 1926, and must have been available early in 1927. It is true that the decree in this case was passed in December 1926, but the appeal was not presented by the plaintiff until September 1927. The present appellant might

1. AIR 1927 P C 37=100 I C 130=54 I A 79=49 All 149 (P C).

2. AIR 927 Mad 471=100 I C 1018=50 Mad 535 (F B).

3. AIR 1932 P C 132=137 I C 781=59 I A 300=54 All 564 (P C).

therefore have taken steps to bring this matter to the notice of the Court in that appeal. Apart from that the Full Bench only affirmed a rule of law which was common knowledge before and will be found set forth in Mayne's Hindu Law. I cannot therefore find any sufficient excuse for the matter being only brought up in second appeal and inasmuch as the appellate decree is not open to objection on the score of any illegality I cannot set it aside in second appeal on this ground. The second appeal is dismissed with costs of respondent 1.

P.R.S./K.S.

Appeal dismissed.

A. I. R. 1933 Madras 838

CURGENVEN, J.

S. Rama Ayyar — Appellant.

v.

Ramachandran and others — Respondents.

Appeal No. 164 of 1928, Decided on 22nd November 1932, against order of Dist. Judge, Calicut, D/- 4th February 1928.

(a) Civil P. C. (1908), O. 21, R. 90—Scope.

Where there is no irregularity or fraud in the actual conduct of the sale, the case does not fall under O. 21, R. 90. [P 838 C 2]

(b) Civil P. C. (1908), S. 100 and O. 21, R. 90—Case falling under O. 21, R. 90 — No second appeal lies.

In a case falling under O. 21, R. 90 no second appeal lies to the High Court. [P 838 C 2]

(c) Execution Sale — Purchase of property in suit by puisne mortgagee subject to decree to enforce prior mortgage — No irregularity arises by not impleading purchaser in execution of mortgage decree — Civil P. C. (1908), S. 47.

Where a person purchases a property in a suit by a puisne mortgagee subject to a decree passed to enforce a prior mortgage, the purchaser is subject to doctrine of lis pendens and no irregularity occurs by not impleading him in execution-sale proceedings of the mortgage decree. [P 838 C 2]

(d) Civil P. C. (1908), S. 47 — Purchase of property subject to mortgage decree—Agreement between purchaser and decree-holder not to bring property to sale — Sale held in breach of agreement by decree-holder challenged by purchaser— Matter does not come under S. 47.

A purchaser of property subject to a mortgage decree entered into an agreement out of Court with the decree-holder not to bring the property to sale and that he would pay the decree amount. But the decree-holder brought the property to sale without impleading the purchaser and the latter challenged the sale :

Held : that the matter did not come within the terms of S. 47, even though it may be open to the purchaser to proceed against the decree-holder for breach of an out of Court agreement : *A I R 1929 Cal 374 (F B), Rel on.* [P 839 C 1]

T. S. Anantaraman—for Appellant.*P. S. Narayanaswami Ayyar* and *P. S. Ramachandra Ayyar* — for Respondents.

Judgment.—In a suit, O. S. No. 241 of 1918, by a puisne mortgagee, the appellant bought the property subject to a decree (O. S. No. 322 of 1917) passed to enforce the prior mortgage. Subsequently the holders of this latter decree brought the property to sale without impleading the appellant and bought it themselves. The appellant, who had paid Rs. 1,050 for the equity of redemption at his sale, was thus left without any title to the property. He has instituted proceedings in execution in O. S. No. 322 of 1917 with the object of having the sale under that decree set aside, but he has failed in both the lower Courts.

It is conceded before me that the case does not fall under O. 21, R. 90, Civil P. C., because there was no irregularity or fraud in the actual conduct of the sale. Indeed if it had fallen under that rule, no second appeal would lie to this Court. Taking it as a case under S. 47 we must, in the first place, consider what the position is which the appellant occupies in that suit. The action proceeded both to preliminary and final decrees and though the second mortgagee, from whom he derived title, was a party, he himself was not impleaded. It is stated that some time before the sale was held the decree-holders applied to have him impleaded and that the application was refused. The order is not produced ; but it was certainly discretionary to the Court so to refuse it. The appellant accordingly is in no better position than any person who, after a decree has been passed against a certain property, takes a conveyance from the judgment-debtor of that property. He is subject to the doctrine of lis pendens and takes upon himself every liability which the decree attaches to the property. Speaking generally therefore it cannot be contended that any irregularity arose out of the failure to implead the appellant after the suit proper had terminated and before the property was sold in execution of the mortgage decree.

There is however a further aspect to the case. It appears that after the appellant had made his purchase he approached the decree-holders in O. S. No. 322 of 1917 through their mother,

they being minors, and expressed his willingness to pay off the decree. For this purpose security would have to be given and the mother seems to have expressed her willingness to comply with this suggestion and not to bring the property to sale. The learned District Judge has accepted this agreement as true and upon it the appellant's learned advocate has sought to make out a case of fraud invalidating the proceedings in execution. Whatever remedy the appellant may have upon this ground, I am quite clear that it cannot be by setting aside the execution proceedings. The agreement amounted to acceptance of a proposal to adjust the decree, and even had it been carried out, O. 21, R. 2, Civil P. C., would have prevented such action, unless it had been certified to the Court, from affecting the course of execution. A somewhat similar case was dealt with by a Full Bench of the Calcutta High Court in *Lakshmanachandra Naskar v. Ramdas Mandal* (1). It was a case of an alleged adjustment of the decree and the learned Judges expressed the view that the defendant could obtain no relief under S. 47 though it may be that he could bring a suit for damages for the decree-holder's breach of contract or for recovery of the money paid under the adjustment; they were not questions of execution of the decree nor were they proper to be raised in a Court whose duty is confined to executing the decree; they might, in some wide sense, be questions "relating to the discharge or satisfaction of the decree," but they were not within the meaning of those words as used in S. 47.

Similarly in the present case it may be that the appellant could have proceeded against the decree-holders or their mother on the footing that breach had been committed of an out-of-Court agreement not to bring the property to sale, but the matter is not one which can properly be brought within the terms of S. 47, Civil P. C. I agree accordingly with the conclusions of the Court below and dismiss the second appeal with costs of respondents 1 and 2.

P.R.S./KS.

Appeal dismissed.

1. AIR 1929 Cal 374=118 I C 857=57 Cal 403 (FB).

A. I. R. 1933 Madras 839

WALSH, J.

(*Payidi*) *Gunnam Naidu*—Plaintiff—
Petitioner.

v.

Kuna Chendri Naidu and others—De-
fendants—Opposite Parties.

Civil Revn. Petn. No. 370 of 1932, De-
cided on 14th December 1932, from
order of Dist. Munsif, Ramzam, D/- 14th
August 1931.

Hindu Law — Joint family — Creditor
against father of joint Hindu family can at-
tach and proceed against whole of joint pro-
perty, even though his sons are not parties
to suit.

A creditor against the father of a joint Hindu
family for a debt contracted by the father per-
sonally can attach and proceed against the
whole of the joint family property, even though
his sons are not parties to the suit; and their in-
terests are liable for the debt, unless they prove
that the debt is illegal or immoral: 3 Cal 198
(PC), Dist. [P 840 C 1, 2]

B. Jagannadha Das—for Petitioner.

U. Suryanarayana — for Opposite
Parties.

Judgment.—The facts of this case are
simple. The petitioner filed a suit, O. S.
No. 140 of 1921, on a pronote against the
counter-petitioners, defendants 2 and 3,
who are father and son respectively,
and attached before judgment their pro-
perty. The order for attachment was
on 18th February 1931. On the same
day the first counter-petitioner had ob-
tained a sale deed from the defendants
and he came forward with a claim peti-
tion. The District Munsif found that
the execution of the sale deed was sus-
picious and that on the date of the
attachment the defendants continued to
have possession of the property. He
however dismissed the claim only as
regards two-fifths of the property be-
cause the sale deed which was taken
from the two defendants also purported
to be executed by three other minor
sons. The petitioner contended in the
proceedings that these three minors
were illegitimate sons. But this point
was found against him. In revision it
is objected that the order is wrong on
the ground that under O. 21, R. 61,
Civil P. C., 1908, the defendants having
been found to be in possession, the claim
petition had to be disallowed in toto;
that the Court was wrong in thinking
that what was attached was only the
share of defendants 1 and 2 and that
the three other sons would not also be

liable in execution for the decree against their father. I think all these contentions are sound. There is no doubt that the attachment of the whole property was asked for on the ground that it was in possession of the defendants in that suit. In any case, if the share of the three other sons was not attached, then they have no locus standi to appear at all before the Court. In Mulla's Hindu Law at S. 294, it is laid down that

"where the father has contracted a debt for his own personal benefit the creditor may obtain a money decree against the father alone and may enforce the decree by attachment and sale of the entire coparcenary property including the son's interest therein. The sons though not parties to the suit are bound by the sale by reason of their pious duty to pay their father's debt and they cannot recover their share of the property unless they prove (and the burden lies upon them to prove) that the debt was contracted by the father for an immoral or illegal purpose "

In Sir H. S. Gour's The Hindu Code para. 155, it is said,

"in a suit by the son for the recovery of coparcenary property sold in execution of a decree against the father the son is bound to prove that the debt for which the decree was passed is not binding upon him and that the purchaser had notice thereof."

For the counter-petitioner *Deendyal Lal v. Jugdeep Narain Singh* (1), at pp. 250 and 251 (of 4 I A), was relied upon. That case has been referred to by Mayne in his Hindu Law, Edn. 9, at p. 426. In para 316 he says,

"some of the cases" (which he quotes) were for some time taken by the Courts in India as to a certain extent overruling *Muddun Thakoor v Kantoo Lal* (2) and as laying down a general principle that where a decree has been obtained against a father on a mere money debt it could not be executed so as to bind the rights of the sons unless they were parties to the decree. It is abundantly clear however that the Judicial Committee did not intend to overrule that decision. It was never referred to from the beginning to the end of *Deendyal's* decision (1). It never seems to have occurred to anyone that it had any bearing upon the decision. Both the original Court and the High Court had accepted as an undisputed fact that the judgment-creditor chose, for reasons of his own, to sell only the right, title and interest of the father. The Privy Council adopted this finding and acted upon it."

It is clear in this case that, whether he knew of the existence of the minor sons or not, the petitioner-plaintiff asked for an attachment of the whole family property as being in the possession of defendants 1 and 2, and on the authorities he was entitled to attach and pro-

ceed against that property. The sale to the vendee having been set aside the claim should have been dismissed entirely. The revision petition is therefore allowed with costs and the attachment of the whole property confirmed. I see no merits in the memo of cross-objections which is dismissed with costs.

P.R.S./K.S.

Petition allowed.

A. I. R. 1933 Madras 840.

CURGENVEN, J.

Ramaswamy Naicken—Complainant—
Petitioner.

v.

Dandakaran and others — Accused—
Opposite Parties.

Criminal Revn. Case No. 688 of 1932, and Criminal Revn. Petn. No. 643 of 1932, Decided on 16th November 1932, against order of Sess. Judge, North Arcot.

(a) Penal Code (1860), S. 379—Property not belonging to judgment-debtor attached and handed over to other persons on giving security—Real owner rescuing property from such persons is not guilty of theft—*Obiter*.

Obiter.—Where property which does not belong to the judgment-debtor is attached and handed over to other persons on giving security, the real owner of such property, who rescues it from such persons, is not guilty of theft: *Thomas Knight*, (1903) 1 Cr App 186, *Rel. on.*; *AI R* 1926 All 832, *Ref.* [P 841 C 1]

(b) Penal Code (1860), S. 378—Rescue of attached property — Action should not be left to be taken by private complainant.

Where property attached is rescued, it is the business of those who are responsible for the administration of justice to take action where necessary, and not to leave it to a private complainant. [P 841 C 2]

A Gopalaswamy—for Petitioner.

A. Viswanatha Ayyar and *S. Vepa*—
for Opposite Parties.

Public Prosecutor—for the Crown.

Order.—In this case a conviction of theft was based upon the rescue by the respondents of certain buffaloes which had been attached under a decree by an amin and had been handed over to two persons on their furnishing security. The conviction has been set aside and the respondents acquitted by the learned Sessions Judge and this is a revision petition against the acquittal.

The first question which it raises is whether in the circumstances the respondents' act in rescuing the buffaloes amounted to theft. It may very well be that they committed an unlawful act in taking them out of the custody of the sureties, but it does not seem to me ne-

1. (1877) 3 Cal 198=4 I A 247=3 Suther 468=3 Sar 730 (PC).

2. (1874) 1 I A 321 (PC).

cessarily to follow that that unlawful act was in the nature of theft. The finding of the lower appellate Court, though it is expressed in somewhat indefinite terms, appears to be that the respondents actually owned the cattle which were attached and that they did not belong to the judgment-debtor. Such a case of course differs entirely from one in which the property attached is rescued either by the judgment debtor or by somebody on his behalf. I have been referred to *Emperor v. Kamla Pat* (1) for support of the proposition that in all cases of rescue from lawful custody (that particular case was from the possession of a receiver in insolvency) it must be held that theft is committed. But I do not find that the question of the presence of the element of dishonesty has been very explicitly discussed by the learned Judges. Mukerji, J., does not appear to allude to it and only points out that it is not in accordance with public policy to allow persons in the position of receivers, etc., to be dispossessed of property except by due process of law; and Sulaiman, J., contents himself with the view that any person who takes possession of such property would obviously be guilty under S. 379, if he knew that the property had been attached and was therefore necessarily acting dishonestly.

The learned Public Prosecutor has shown me an English case: *Thomas Knight* (2), where this particular point of the ownership of the property attached was considered and it was held that where the property of which execution had been taken belonged to the person who had rescued it and not to the judgment-debtor, he could not be found guilty of larceny; and, contrariwise that only if the execution had been issued against the goods of that person could he have been held so guilty. This seems to me to express a very reasonable position though I do not think it is really necessary to reach a definite decision on the point here, because even were the act technically theft, I have not been satisfied that the acquittal in this case ought on general grounds to be revised. The petition is presented by an agent of the decree-holder, and al-

though it is quite rightly urged upon me that it is against public policy to allow such rescues to take place, I cannot but think that it is the business of those who are responsible for the administration of justice to take action where necessary and not to leave it to a private complainant. And if the buffaloes really did belong to the respondents I am clear that the case is not a fit one to exercise the powers of revision. I therefore dismiss the petition.

P.R.S./K.S.

*Petition dismissed.***A. I. R. 1933 Madras 841**

CURGENVEN, J.

A. Ramanna—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 624 and Criminal Revn. Petn. No. 579 of 1932, Decided on 17th November 1932, from order of Subdivisional Magistrate, Ellore, D/- 9th August 1932.

Criminal P. C. (1898), S. 350 (1)—Magistrate who framed charge after hearing prosecution witnesses transferred—His successor cannot ignore charge but accused has right under S. 350 to have any of witnesses recalled or reheard.

Where a Magistrate, who has framed a charge after hearing prosecution witnesses, is transferred, it is not open to his successor to ignore the charge; he must proceed with the case on the footing that the charge has already been framed. But the accused are entitled under S. 350 to have any of the witnesses recalled and re-heard, and that is the extent of their right. They cannot have them recalled and reheard a second time : 38 *Mad* 585, *Rel. on.*

[P 841 C 2; P 842 C 1]

*B. Satyanarayana—*for Petitioner.*Public Prosecutor—*for the Crown.

Order.—I have not been shown that the learned Subdivisional Magistrate was wrong in refusing a further opportunity to the accused to cross examine the prosecution witnesses. His predecessor had heard the prosecution case and framed a charge before he was transferred. As has been held in *Sriramulu v. Veerasalingam* (1) it is not in such circumstances open to the second Magistrate to ignore the charge. He must proceed with the case on the footing that the charge has already been framed. The right of the accused then is to be found in proviso (a) to S. 350 (1), Criminal P. C. It is sometimes loosely described as a right to a de novo trial, but all that the provision allows is that he may

1. AIR 1926 All 382=95 I C 940=27 Cr L J 860=48 All 369.

2. (1908) 1 Cr App 186.

1. (1915) 38 *Mad* 585=15 Cr L J 673=25 I C 1001.

demand that the witnesses or any of them be resummoned and reheard. When a charge has already been framed, this, as Ayling, J., remarks, makes the Magistrate's position practically the same as that of his predecessor would have been if, after framing a charge, he had heard further cross-examination of the prosecution witnesses under S. 256 (1). It follows that, if the second Magistrate is not to frame a fresh charge but to act upon the charge already framed, no occasion can arise for any cross-examination after the framing of the charge, and in fact the reasons for allowing such further cross-examination cannot in the circumstances exist. The accused are entitled under S. 350 to have any of the witnesses recalled and reheard, and that is the extent of their right. They cannot have them recalled and reheard a second time. This criminal revision petition is dismissed.

P.R.S./K.S.

*Petition dismissed.***A. I. R. 1933 Madras 842**

CURGENVEN, J.

Nadumogru Ammu Shetty and others—
Petitioners.

v.

*Bapa—*Opposite Party.

Criminal Revn. Case No. 328 of 1932 and Criminal Revn. Petn. No. 302 of 1932, Decided on 16th November 1932, against order of Sess. Judge, South Kanara.

Penal Code (1860), Ss. 148, 149 and 326—
Unlawful assembly with common object —
Substantive offence under S. 326 committed in prosecution of common object by some —
All can be convicted under S. 326 read with S. 149, even though no conviction under S. 148 is passed.

Where the Court finds that there was an unlawful assembly with a common object and that a substantive offence under S. 326 was committed in prosecution of that object by some of the accused, all the accused can be convicted under S. 326 read with S. 149, even though there is no conviction under one of the rioting sections, such as S. 148. [P 842 C 2]

*B. Lakkappa Rai—*for Petitioners.

*M. C. Sridharan—*for Opposite Party.

*Public Prosecutor—*for the Crown.

Order.—It is unnecessary for me to express any opinion here with regard to the merits of the learned Sessions Judge's view that the convictions under Ss. 326 and 148, I. P. C., cannot stand together. He has accordingly set aside the convictions under S. 148, and the argument now advanced before me is

that having set aside those convictions the constructive liability of those accused who were not found guilty of actually beating the complainant cannot now be visited by a conviction under S. 326 read with S. 149, I. P. C. I do not think that there is any force in this contention. S. 149, I. P. C., only lays down that where an offence is committed by a member of an unlawful assembly in prosecution of a common object or such as the members knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence. Accordingly the Court has only to satisfy itself that there was an unlawful assembly with a common object and that the substantive offence was committed in prosecution of that object. It is clear that this condition can be satisfied without any actual conviction under one of the rioting sections such as S. 148, and the mere fact that the Court has thought it necessary to set aside the convictions under S. 148 on a technical point and not on a finding that the facts would not warrant such a conviction can be no obstacle to applying the provisions of S. 149. I think therefore that the convictions of accused 4, 5, 8, 9 and 10 under Ss. 326 and 149 are perfectly legal. The learned Sessions Judge having found that there was a riot and that the common object of the assembly was to cause injuries to P. W. 2, and having further found that the causing of grievous hurt was a probable consequence, those of the accused who were members of the assembly have rightly been convicted of it.

It has been suggested then that the facts will not warrant the inference that these persons by their presence sufficiently promoted the common object as to make them liable under S. 149. But they were not only present, they surrounded the victim when he was being beaten and they kept away other persons. It can hardly be doubted that they thereby furthered the common object of the assembly. The sentences of three months' rigorous imprisonment imposed upon them for this conduct are certainly not too severe. The criminal revision petition is dismissed.

P.R.S./K.S.

Petition dismissed.

A. I. R. 1933 Madras 843

WALSH, J.

Baluchami—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 925 of 1932 and Criminal Revn. Petn. No. 851 of 1932, Decided on 20th April 1933

(a) Penal Code (1860), S. 159—For affray there must be two or more persons.

For a charge under S. 159 there must be two or more persons concerned. Where there is no finding by the Court as to who the second person concerned is, a charge under S. 159 cannot be maintained. [P 843 C 2]

(b) Criminal P. C. (1898), S. 237 — For application of S. 237 there should be no doubt about facts.

If S. 237 is to be applied there must be no doubt about the facts but only about the law applicable to those facts. [P 843 C 2]

(c) Penal Code (1860), Ss. 325 and 160—Where accused is prejudiced by not having notice of facts which constitute ingredients of offence his conviction of such offence must be set aside — Criminal P. C. (1898), S. 537.

Accused who was charged with causing grievous hurt was acquitted of this charge but was convicted under S. 160, I. P. C., without any fresh charge being framed under that section :

Held : that accused was prejudiced by not having notice of these facts which constitute the necessary ingredients of the offence of affray and that the conviction must be set aside. [P 843 C 2 ; P 844 C 1]*K. V. Srinivasa Ayyar*—for Petitioner.
Public Prosecutor—for the Crown.*Order*.—The accused is charged with causing grievous hurt to P. W. 1 and hurt to P. W. 2. The learned Subdivisional Magistrate acquitted him of both these offences but, without framing any fresh charge, found him guilty of affray under S. 160, I. P. C. It is contended that this conviction is illegal both because there is no evidence to establish such a charge, and secondly because the accused could not be convicted on such a charge without a fresh charge being framed.

With regard to the first point the prosecution case briefly was that the accused taxed P. W. 3 with saying that he suspected him of breaking an idol and the accused said he would not let him go until he proved it. In the course of argument accused caught hold of P. W. 3 and threw him on to the ground. Two friends of the accused, who have not been charged, assisted the accused and one of them beat P. W. 3 with his belt. P. W. 2 came from his house about 20 feet away and separated the accused and P. W. 3.

The accused then asked him what right he had to separate them, produced an aruval and cut P. W. 2 on the left side of the head. The accused then ran away and P. W. 1 tried to obstruct him by holding out his hand. The accused then cut P. W. 1 on the left shoulder with the same aruval and made good his escape. On this prosecution evidence I agree that there is no material for a conviction of affray. For a charge under S. 159 there must be two or more persons concerned. There is no finding by the Court as to who the second person concerned is. The statement which the learned Magistrate makes is rather an indefinite one : "I should not be surprised if there was some sort of general street fight." Moreover as to disturbing the public peace the learned Magistrate finds that :

"there is some discrepancy as to the number of people who collected at the spot and exactly at what stage they collected."

He is correct, no doubt, in not attaching much importance to this with regard to the charge of hurt, it is a matter of importance if the offence is one under S. 159 as to how the public peace was disturbed. On the second point I consider the objection is good also. *Begu v. Emperor* (1) is quoted by the learned Public Prosecutor where five persons were charged with murder and two of them were convicted of murder and three with disposing of the body, an offence under S. 201. Their Lordships of the Privy Council held that this latter conviction was not illegal because no separate charge was framed. There is however a connexion between murder and the disposing of the body. Moreover it has been laid down in *Meher Sheikh v. Emperor* (2), that if S. 237 is to be applied there must be no doubt about the facts, but only about the law applicable to those facts. The learned Judges do not find anything in *Begu v. Emperor* (1) opposed to this. They say:

"The true test is whether the facts charged give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. A case of no prejudice is met by S. 537, Criminal P. C."

It is argued by the learned Public Prosecutor that the conviction can be

1. AIR 1925 P C 130=88 I C 3=52 I A 191=6 Lah 226 (PC).
2. AIR 1931 Cal 414=1931 Cr C 510=132 I C 254=32 Cr L J 892=53 Cal 8.

upheld because there was no prejudice in this case. I am unable to agree. Before being convicted of an affray the accused should have had clear notice as to the person or persons with whom he was fighting, that the place was a public place and that the public peace was disturbed. On all these points he might have adduced defence evidence if a correct charge had been framed against him, and it cannot, in my opinion, be said that he was not prejudiced by not having notice of these facts which constitute the necessary ingredients of the offence. In the result the conviction must be set aside, and I consider it unnecessary to order a re trial. The accused is therefore acquitted. The fine if paid will be refunded.

P.R.S./K.S. *Conviction set aside.*

A. I R. 1933 Madras 844

WALSH, J.

(Valluri) *Suryaprakasa Rao* — Appellant.

v.

Bhamidipati Venkata Dikshitalu and another—Respondents.

Appeal No. 2 of 1929, Decided on 1st December 1932, against order of Dist. Judge, Rajahmundry, D/- 26th March 1928.

(a) Equity—Specific contract between parties—Principle of equity can still be applied, if what subsequently occurs is contemplated by neither side.

Even though the matter between the parties has been reduced to a specific contract, still, if what subsequently occurs is neither contemplated nor provided for, the principle of equity can be applied: *A I R 1918 P C 129* and *A I R 1930 Lah 131, Ref.* [P 845 C 2]

(b) Execution — Res judicata — Decision against persons in his absence on matter of which he had no notice is not binding on him.

If a Court decides against a person in his absence a matter in execution of which he had not been given notice, he cannot be bound by such decision: *Case law referred.* [P 846 C 1]

(c) Decree — Execution — Mere fact that judgment-debtor does not object to amount for which execution is taken at one stage, does not bar him from raising the plea in subsequent execution proceeding.

The mere fact that the judgment-debtor does not at one stage of execution object that the amount for which execution was taken is in excess of the decree itself does not bar him from raising the plea in subsequent execution proceedings: *Case law discussed.* [P 847 C 1, 2]

C. Rama Rao—for Appellant

G. Lakshmananna and *G. Chandrasekara Sastri*—for Respondents.

Judgment — The respondent in this second appeal had filed a suit for specific

performance against three defendants with regard to the execution to him of a sale-deed. A compromise decree was passed. The main terms of the decree were that defendants 1 and 3 should execute a sale-deed in favour of the plaintiff, and the said document be filed for registration on 30th May 1917, at the expense of the defendants, who should get it registered, that the plaintiff do pay to the defendants Rupees 4,570-8-0 settled to be paid before the Registrar at the time of registration. that the defendants do receive the said sum, that a certain kadapa should be cancelled, and the registered sale-deeds executed in favour of the husband of defendant 1, and that this kadapa and certain other documents should be handed over to the plaintiff, that as defendant 2 did not join with defendants 1 and 3 in the execution of this document and had become ex parte, and an ex parte decree had been passed against him, in his place the document should be signed by the Court and registered

“in case the sale-deed cannot be executed and filed for the purpose of registration in due time, thereupon an execution application shall be filed in Court, and sale deed shall be caused to be executed,”

that the plaintiff should be entitled to have the costs of such proceedings deducted from the sale amount, that the plaintiff should pay Rs. 200 in respect of past kists due to defendants within two months separately to defendants 1 and 3, that the defendants should give up all the rest of the kist, that each party should bear their own costs, that from Fasli 1326 (1916-17) the plaintiff should enjoy the suit land with all absolute rights, and that, if the plaintiff cannot pay the amount before the Registrar on the aforesaid due date, that is, on 30th May 1917, the defendants should recover the amount thenceforward with interest at 12 annas per cent per month till the amount is paid.

As defendants 1 and 3 were quarrelling among themselves as regards their shares of the purchase money, the sale-deed was not executed or got ready by the defendants on 30th May 1917, and the plaintiff having got into possession of the land did not trouble himself to execute the decree, and get the sale-deed executed by Court. On the other hand the defendants filed E. P. No. 49 of 1917 in the Temporary Sub-Court of Cocanada,

and after notice the plaintiff appeared by a vakil and put in a counter on 19th October 1917, in which he said he was ready to pay the money as per the decree, but that defendants 1 and 3 were attempting to receive all the money from him after themselves executing the sale-deed without defendant 2. As the sale-deed was not registered within the time allowed the proceedings were stopped. Next came an E. P. on 5th September 1923, as a result of which a sale-deed was executed on 17th December 1924. Another E. P. No 5 of 1924, was put in on 10th January 1924, but apparently dismissed without orders. The present E. P. No. 20 of 1926, was put in on 18th January 1926. Defendant 4, the present appellant, and defendant 2 filed this E. P. in which they asked the Court to issue notice to the plaintiff of the proceedings and also direct him to deposit into Court the amount due to defendants 2 and 4 in respect of the sale-deed executed by them in favour of the plaintiff, and deliver the sale-deed to the plaintiff. In this petition they claimed interest from 30th May 1917, till 10th January 1924. The plaintiff was absent and the Court made an order that he should deposit Rupees 7,489-11-6 in ten days and take delivery of the sale-deed. In default the property in the sale-deed would be put up for sale and the amount realised. This amount includes the interest, but not the costs claimed in the petition. The plaintiff paid about Rs. 2,000 under this decree, but objected to paying interest from 30th May 1917.

It was urged before the learned Subordinate Judge that the matter was res judicata owing to the order in E. P. No. 5 of 1924. The learned Subordinate Judge found against this contention. He held however that under the decree the interest claimed was due. The District Judge also held that the matter was not res judicata, but that interest was not due under the decree as from 30th May 1917, so he awarded only interest from 16th February 1924, when the plaintiff-respondent had notice that the deed has been executed. Defendant 4 in E. P. No. 20 of 1926 has appealed against this order. The first question is from what date the interest claimed as under the compromise decree is due. I agree with the learned District Judge that the

reference to interest in the decree contemplates it as due from and after the date of the execution of the document. The words

"if the plaintiff cannot pay the amount before the Registrar at his office on the aforesaid due date,"

cannot possibly mean, in my opinion, "if he cannot pay the amount because the defendants have not executed the document." Under such a construction the defendants would be entitled to recover the whole amount of the purchase money and also interest thereon without executing any sale-deed. That is clearly an impossible construction. The trial Court says that the plaintiff

"did not deposit the money into Court even then (on 19th October 1917, when he put his counter in E. P. No. 49 of 1917) or after he was personally served with notice in E. P. No. 5 of 1924 put in by the same defendants. On that petition the learned Subordinate Judge of Cannada even asked him to deposit the money into Court in ten days. He did not do so. He must therefore be deemed to have been unable to deposit the money on 30th May 1917 as mentioned in the decree."

I agree with the lower appellate Court that there is no warrant for the conclusion that the plaintiff was unable to deposit the money on 30th May 1917. Then the trial Court says:

"Equity also demands that plaintiff should pay interest, he being in possession of the land and the defendants not being paid the consideration for the sale."

The learned District Judge does not deal with this plea of equity. It is argued for the respondent that as the matter is one of specific contract between the parties under the compromise decree there is no question of equity. That would be the case if the point was specifically provided for under the contract. But what appears to have happened is that the contracting parties never contemplated that the plaintiff would not proceed to take out execution of the compromise decree if defendants 1 and 3 defaulted in executing the sale-deed. The condition under the decree is very stringent that in case the sale-deed cannot be executed execution application shall be filed in Court, and the sale-deed shall be executed. In my view what has actually occurred is what neither side contemplated nor provided for and the principle of equity would therefore be applicable. There is a clear authority that it should be applied in such

cases as these where the vendee is in possession of the property : vide *Ratnalal Chunilal v. Municipal Commissioner, Bombay* (1) and *A. Tomlinson v. W. F. Harding, A. I. R.* 1930 *Lah.* 131. I would therefore allow the claim for interest from 30th May 1917, as the plaintiff was in possession of the property.

Although this renders it not necessary to go into the question of res judicata I will say a few words about this. The lower appellate Court has stated quite clearly in this matter that the notice did not convey information that the execution application contained a claim for interest from 30th May 1917 for the sum under controversy. It was attempted to be argued that no notice under O. 21, R. 22 was necessary, because there had been a previous E. P., viz., E. P. No. 5 of 1924. But as no order was passed against the plaintiff in this E. P., notice has to issue. A notice simply calling on the plaintiff to show cause why the decree should not be executed, without further details would comply with the requirements of the section, and when the learned District Judge says as a fact that the notice did not convey information that the execution petition claimed interest from 30th May 1917, it must be taken to be a fact. It has not been stated in the memorandum of grounds in this second appeal that this is a misstatement of fact. Thereupon on the first ground on which the learned District Judge has negatived the plea of res judicata he is, I think, correct. In the Full Bench case in *Chidambaram Chetty v. Theivanai Ammal* (2), it was held by their Lordships that want of notice renders a point decided in the proceedings of an execution petition in the absence of the judgment-debtor not res judicata and the learned Judges referred to *Subramania Ayyar v. Raja Rajeswara Dorai* (3). At pp. 1025 and 1026 Ramesam, J., says that he entirely agrees with the remark made by Seshagiri Ayyar, J., to this effect:

"One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of res judicata should have an opportunity

1 A I R 1918 P C 129=48 I C 404 = 45 I A 233 =43 Bom 181 (P C).

2. A I R 1924 Mad 1=74 I C 155=46 Mad 786 (F B).

3. (1917) 40 Mad 1016=38 I C 627.

of putting forward his contention against such a decision."

In the same passage the learned Judge repels the argument that in the course of the same execution application an order made at one stage of it would be res judicata at its further stage and says:

"The principle of constructive res judicata should be very cautiously applied to execution application."

It has been argued for the appellant that this last opinion has been overruled by the decision of the Privy Council in *Hook v. Administrator-General of Bengal* (4). In *Gadigappa v. Shiddappa* (5), it is certainly stated that this opinion is overruled by that case. But it has been pointed out to me that *Hook v. Administrator-General of Bengal* (4), referred to decisions given at different stages in an administration suit. Seshagiri Ayyar J.'s dictum in the above case rests on his argument that execution can be taken piecemeal. This differentiates execution proceedings from a suit and I am not convinced that *Hook v. Administrator-General of Bengal* (4) has already overruled his view. At any rate, with regard to the first point no authority has been quoted to me overruling one of the essential elements of justice, that if a Court decides against a person in his absence a matter of which he had not been given notice he cannot be bound by such decision. On this short ground therefore both Courts are, I consider, right as regards the question of res judicata. The second reason given by the learned District Judge is that the dismissal of the application had the effect of vacating the prior order passed on the same. This is perhaps doubtful looking to *Periakaruppan Chetty v. Chidambaram Thambiran* (6). One other matter I feel bound to mention in connexion with the recent decision of this Court reported in *Ulganatha v. Algappa, A. I. R.* 1929 *Mad.* 903, in which I delivered the judgment. We followed in that case *Kalyan Singh v. Jagan Prasad* (7). There was one peculiar feature in that case that the objection to the amount had been actually raised by the judgment-debtor and de-

4. A I R 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (P C).

5. A I R 1924 Bom 495=83 I C 155=48 Bom 638.

6. (1916) 33 I C 443.

7. (1915) 37 All 589=30 I C 523.

cided by the Court but on an objection raised to grant leave to bid at the sale. We therefore held that the point as to whether anything was still due under the decree was not raised and decided in any judicial or appealable order and hence that the order passed was not operative as *res judicata*. The remarks at p. 904, right hand column, were made in discussing the order made, on that application. I said:

"In dealings with this order we have to consider whether the matter of anything being due under the decree was raised and decided, in which case of course it would clearly be *res judicata*."

These remarks must be read in their context. Later on I have mentioned four matters which have been held as *res judicata*, after service of notice on the judgment-debtor. The correctness of the amount of the decree is not one. We held that the mere fact that the judgment-debtor did not at one stage of execution object that the amount for which execution was taken as stated in the sale proclamation was in excess of the decree itself does not bar him from raising the plea in subsequent execution proceedings. I have not been convinced that our view is wrong nor that *Kalyan Singh v. Jagan Prasad* (7) has been overruled. It was sought to show that the latter case had not been followed in other cases in Allahabad. *Ghulam Mahomed Khan v. Narain Das* (8) was a case decided many years before *Kalyan Singh v. Jagan Prasad* (7). In *Phul Chand v. Kanhaiya Lal* (9) the question was not what amount was due under the decree but with regard to the parties from whom it was due. The learned Judges differed as regards *res judicata*. In *Kapur Chand v. Kanhaiya Lal* (10), in which the matter was referred to a third Judge, no reference was made to *Kalyan Singh v. Jagan Prasad* (7). It may be mentioned that in *Kalayan Singh v. Jagan Prasad* (7), the fact that the judgment-debtor had from time to time made certain payments as in the present case under the execution petition was held not to prevent him from taking exception to the total amount claimed under the decree.

As I have pointed out in *Ulaganatha v. Alagappa*, A. I. R. 1929, Mad. 903, one has to note what are the exact

8. (1901) A W N 32.
9. A I R 1922 All 247=35 I C 295=44 All 130.
10. A I R 1924 All 14=74 I C 513=45 All 735.

things which have been held to be *res judicata*. Omission to take exception to the amount erroneously set forth in an application for execution of a decree was the point with which *Kalyan Singh v. Jagan Prasad* (7) was concerned, and it is that with which the present case is concerned. *Dip Prakash v. Bhora Dwarka Prasad* (11) was on a matter which had been expressly brought in the execution petition, and so far from dissenting from *Kalyan Singh v. Jagan Prasad* (7), Daniel, J., expressed the opinion that the rulings on the matter of *res judicata* were not entirely consistent and that he expressed no opinion as to the correctness of that decision. Both *Kalyan Singh v. Jagan Prasad* (7), and *Budan v. Ramachandra* (12) are cases in which a decree had been extended beyond the real meaning of its terms without any contest before the Court in execution proceedings. *Ram Kripal v. Rup Kuari* (13), which is relied on to prove *res judicata*, was one where the scope of the decree was decided in execution proceedings after contest, and so the matter became *res judicata*, whether the decision was a right interpretation of the decree or not. I have only mentioned this matter because I consider the judgment in *Ulaganatha v. Alagappa*, A. I. R. 1929 Mad. 903 is clear on the points we decided, and I cannot see that there are remarks in it which can be taken as opposed to *Kalyan Singh v. Jagan Prasad* (7) which we followed. In the result the appeal is allowed and the decree of the first Court will be restored with costs throughout.

P. R. S. / K. S.

Appeal allowed.

11. A I R 1926 All 71=90 I C 83=48 All 201.
12. (1887) 11 Bom 537.
13. (1886) 6 All 269=11 I A 37=(1886) A W N 286 (P C)

A. I. R. 1933 Madras 847

REILLY AND BURN, JJ.

S. M. Arumugha Chetty—Plaintiff—Appellant.

v.
Ranganatham Chetty — Defendant—Respondent.

O. S. Appeal No. 39 of 1932, Decided on 11th August 1933, from order of Wallace, J., D/- 16th March 1932, in C. S. No. 164 of 1930.

Hindu Law—Partition—Agreement for consideration between two co-parceners not to exercise right of partition is valid.

There is no legal obstacle to prevent two co-parceners from agreeing for consideration that for a certain time or until a certain event or for their lives they will not exercise their right to divide: *Case law referred.* [P 850 C 2]

C. Viraraghava Iyer for *T. R. Sundaram*—for Appellant.

K. S. Krishnaswami Iyengar for *Srinivasa Raghavan* and *Thyagarajan*—for Respondent.

Reilly, J.—The plaintiff and the defendant, his grandson, are the only co-parceners in a Hindu joint family. The plaintiff sues for a declaration that a written instrument, Ex. A, dated 25th January 1930 and admittedly signed by him, is void, and for partition of the family property. His case in regard to Ex. A appears to be twofold, first that he can claim a declaration that it is voidable on account of fraud and misrepresentation and secondly that he can ignore it as void for want of consideration and for another reason, which I will mention shortly, and that it is therefore no bar to the partition which he claims. Wallace, J., who heard the suit, dismissed it; and against that decision the plaintiff appeals.

The plaintiff's story in his plaint is that after the death of his only son in August 1929, he was not satisfied with the behaviour of his grandson, the defendant, a young man then of about 18 years; and that he therefore wished for a partition on the following lines: first, that provision should be made for four of the plaintiff's daughters by settling on each of them a small house from the share that was to be allotted to the plaintiff; secondly, that a house in Thambu Chetty Street, and the family house in another street, worth together Rs. 40,000, should be allotted to the plaintiff's share; thirdly, that the family business in brass utensils should be allotted to the defendant; fourthly, that out of the defendant's share two houses worth Rs. 8,000 should be given to the defendant's mother; fifthly, that the jewels in the possession of the various members of the family should be kept by those in whose possession they were; and sixthly, that the remaining property of the family should be kept undivided. The plaintiff goes on in his plaint to al-

lege that he instructed a clerk, Desikachari, who had long been employed in the family business, that that was what he wished to be done. Para. 7 of the plaint is as follows:

"The said Desikachariar said that the defendant was agreeable to this course and thereupon the plaintiff instructed Desikachariar to have a document prepared after considering lawyers to carry out the proposals set forth above. In or about the last week of January 1930 on a Saturday night after 10 p. m. the said Desikachariar came to the plaintiff along with the defendant and one Ramaswami Ayyar, represented that the document had been prepared in accordance with the express intentions of the plaintiff and had been approved by a vakil and further informed the plaintiff that it is better to execute the document at once. On the plaintiff asking him to read the document the said Desikachariar assured the plaintiff that the document contained the terms mentioned above in para. 6 supra. As the plaintiff had implicit confidence in the said Desikachariar and believing in the truth and representations made by the said Desikachariar, in the presence of and to the hearing of the defendant, he signed the document then and there and the defendant also put his signature to the said document."

The plaint goes to state:

"The said Desikachariar was instructed by the plaintiff to keep the document with him."

The story goes on that after about 15 days the plaintiff obtained from Desikachariar what was represented to be a copy of the document which he had executed, and then to his surprise he found that it was not the kind of document which he had intended, but something very different. Ex. A, after setting out that there had been some misunderstandings between the parties, that it would not be proper to remain in that state and that a partition should not be effected between them, provides that the two specified houses should be given to one of the plaintiff's daughters, four shops to another, a house and site to a third and a house and site to a fourth; then that two houses should be given to the defendant's mother for her life, and after her death they should go to her daughters; then that the defendant should get the brass business, which I have mentioned, with its stock and its outstandings and discharge its debts. Next it is provided that the remaining immovable property shall be enjoyed by the plaintiff and the defendant during plaintiff's life and after his death by the plaintiff's wife, if she survives him, and the defendant during all which time none of the parties concerned shall have power to alienate the property, and

after the death of the plaintiff and his wife the property shall go to the defendant absolutely. There is a further provision that out of the income from the immovable property the plaintiff shall be at liberty to take not more than Rupees 200 a month to spend as he likes, and after his death his wife shall be at liberty to take a similar amount. Then it is provided that the defendant shall get all the vessels and movable property of the family and that the jewels shall be taken by those persons in whose use they are. Finally, there is an addition at the end of the document that the plaintiff's daughters shall get the property allotted to them only after the death of the plaintiff and his wife. This, it will be seen, is a very different arrangement from what the plaintiff alleges in his plaint he had told Desikachariar was what he wished. In his written statement the defendant says in para. 5 :

"This defendant states that as per the desire expressed by the parties and with a view to record the agreement and arrangement which has been arrived at prior thereto, Ramaswami Ayyar prepared the document dated 25th January 1930 with legal assistance, and both the plaintiff and defendant executed the said document after reading the same and with full knowledge and understanding of its contents."

In paragraph 11 he says :

"This defendant denies the further allegations in the said paragraph that after 10 p. m. Desikachariar went to the plaintiff with the defendant and Ramaswami Ayyar. On the other hand, the document was prepared and written by Ramaswami Ayyar at the express directions of the plaintiff and the same was executed by the parties at about 8 p. m. as per previous arrangement. The plaintiff first read over the document and executed it and the defendant also did so. Ramaswami Ayyar and Desikachariar attested the execution."

Now it will be seen that the plaintiff has a difficult story to prove, and his success, if he is to succeed, must depend mainly on his own evidence and that of P. W. 3, the son of one of his daughters, who is said to have been present when Ex. A, was executed. Wallace, J., does not believe the plaintiff's story at all. He regards the plaintiff and P. W. 3 as entirely untrustworthy witnesses, and he says in his judgment :

"I am quite satisfied therefore that the plaintiff signed Ex. A with full knowledge of its contents and that his story of what occurred on the night of 25th January 1930, is an elaborate perversion of the truth."

Mr. Viraraghava Ayyar has urged that Wallace, J., was wrong in speaking of

this document as a "family settlement". Perhaps "family settlement" was not exactly an appropriate expression for the transaction embodied in Ex. A, as it cannot be said that there were any disputes about the family property to be settled. But I do not see any difficulty in regarding the transaction as a family arrangement, by which the rights of the executants were modified, a family arrangement in the sense that in England a transaction between a father and his son barring an entail is treated as a family arrangement, in regard to which inadequacy of consideration is not allowed to throw serious doubt upon the good faith of the transaction. According to the plaintiff's own evidence there were reasons why he should wish such a family arrangement to be made. He says, referring to the defendant, "because his evil ways were growing, my apprehension was that I would lose my property also." Then again he says, "Yes" to a question "So that you wanted to safeguard your share as also the defendants?" And again he says, "because he was in evil ways and there was a likelihood of all the money being squandered." Now we may reasonably suppose that the plaintiff took an interest in the welfare of the defendant in spite of what he regarded as the improper behaviour of the defendant towards him. This is not the occasion for attempting to decide the exact legal effect of the different provisions of Ex. A. But it may be noticed that one of its provisions will prevent the defendant from alienating his share of the immovable property of the family while his grandfather and grandmother are alive. That in the circumstances represented by the plaintiff himself in his evidence might well be an object which the plaintiff desired to attain for the defendant's benefit. Then the plaintiff according to his evidence was obviously nervous about the defendant's control of the brass business, in which the defendant was trying to take the whole management to himself. Under the arrangement made in Ex. A, if the defendant unfortunately makes losses in that business, they will fall primarily upon his own share of the family property and in respect of debts incurred after the creditors of the business have notice of the arrangement only upon the defendant's share. That

too might be an object which the plaintiff might wish to attain.

It will be seen that the arrangement makes a provision that the plaintiff's widow shall have an interest in the whole immovable property of the family for her life. That the plaintiff could not arrange except with the consent of the defendant, unless he had effected a partition, when he could do what he liked with his own share. Again the arrangement makes provision for the plaintiff's four daughters to a considerable extent, and that too the plaintiff could not do without a partition, unless the defendant agreed. If the plaintiff did not wish to have a partition and wished to prevent the defendant from having a partition in the defendant's own interest, then the arrangement under Ex. A becomes quite intelligible. I do not think it is possible to say that the terms of Ex. A are so disadvantageous to the plaintiff or so outrageous, as Mr. Viraraghava Ayyar has represented, that he could not possibly have agreed to them, if he had understood them. (After examining the evidence, his Lordship held that the plaintiff's story was untrue and that the plaintiff executed Ex. A with knowledge of its contents and with free consent, then proceeded). But it has been urged by Mr. Viraraghava Ayyar that, even if that be so, Ex. A may be no bar to the plaintiff's present suit. He urges that there was no consideration for the agreement embodied in Ex. A. I have already discussed some of the elements of consideration for that agreement; and it may be added that, if as I should be prepared to find in this case, the plaintiff did not want a partition but on the contrary wanted to prevent a partition, then the defendant's forbearance from his right of partition would itself serve as another element of consideration.

But it has been further urged that an agreement between Hindu co-parceners not to exercise their right of partition is in itself invalid. That appears to be the view of the Bombay High Court. In *Ramalinga v. Virupakshi* (1) it was decided that an agreement between co-parceners never to divide certain property is invalid under the Hindu law as tending to create a perpetuity. That is not the exact question before us. But

1. (1883) 7 Bom 538.

it appears that in that case the learned Judges were of opinion that an agreement between co-parceners not to divide even if not intended to create a perpetuity but only to be effective for a certain period or for their lives, would be invalid, and that I understand is the view still taken in Bombay. The learned Judges say that

"the right to demand a partition is in itself superior as a part of the Hindu public law in the larger sense to the conventions of individuals."

With very great respect I am not able to follow that. As Mr. Krishnaswami Ayyangar for the defendant has urged, the right of partition itself has been an historical development in Hindu law. At different stages the right has varied. At the present day it varies among different classes of Hindus in different parts of the country. Although of course Hindu co-parceners no more than any one else can create perpetuities except under special provisions, I can see no legal obstacle to prevent two co-parceners from agreeing for consideration that for a certain time or until a certain event or for their lives they will not exercise their right to divide. That this is possible is the view held by the High Courts of Calcutta and Allahabad: see *Rajendra Dutt v. Siham Chund* (2), *Srimohan Thakur v. MacGregor* (3), *Krishnendra Nath v. Debendra Nath* (4) and *Rup Singh v. Bhabhuti Singh* (5). There is no direct decision on the question in this Court; but I understand from the judgments in *Ramabhadra Odayar v. Gopalaswami Odayar* (6) that both the learned Judges, who disposed of that case, were of opinion that such an agreement would be valid.

In my opinion therefore both because Ex. A includes an agreement between the plaintiff and the defendant not to divide the immovable property of the family while the plaintiff and his wife are alive and because Ex. A embodies a family arrangement, it is a bar to the plaintiff's suit. In my opinion, this appeal should be dismissed with costs.

Burn, J.—I agree and have nothing to add.

K.S.

Appeal dismissed.

2. (1881) 6 Cal 106.

3. (1905) 28 Cal 769.

4. (1908) 12 C W N 793.

5. A I R 1920 All 341=58 I C 632=42 All 30.

6. A I R 1931 Mad 404=54 Mad 269.

* A. I. R. 1933 Madras 851

Full Bench

MADHAVAN NAIR, JACKSON AND
LAKSHMANA RAO, JJ.Subbaraya Goundan and another —
Appellants.

v.

V. V. R. Virappa Chettiar Bank and
others—Respondents.Appeal No. 107 of 1930, Decided on
5th May 1933.* (a) Civil P.C. (1908), O. 21, R. 90 and 92—
Application by judgment-debtor to set aside
sale dismissed — Judgment-debtor adjud-
icated insolvent on application filed subse-
quent to sale—Judgment debtor, though ad-
judicated insolvent, can appeal from order of
dismissal—A I R 1926 Mad 1214(1), impliedly
overruled.Where an application put in by a judgment-
debtor under O. 21, R. 90 is dismissed and the
judgment-debtor is adjudged an insolvent on an
application filed by a creditor subsequent to the
sale, the judgment-debtor, though adjudged
insolvent, has a right to prefer an appeal against
the order of dismissal of the application under
O. 21, R. 90 : A I R 1921 Mad 402, Foll ; A I R
1929 Bom 202, Ref.; A I R 1926 Mad 556 (F B),
Dist. A I R 1926 Mad 1214 (1), impliedly
overruled.(b) Provincial Insolvency Act (1920), S. 51
—Insolvency petition filed after properties
of judgment-debtor are sold in Court auction
— Such properties do not vest in official
receiver.Where an insolvency petition is filed against a
judgment-debtor after the properties are sold
in Court auction, until the sale is set aside the
properties do not vest in the official receiver.

[P 851 C 1, 2]

K. V. Ramachandra Ayyar — for Ap-
pellants.C. S. Swaminathan for T. S. Ananta-
raman—for Respondents.

Madhavan Nair, J. — The questions
referred to the Full Bench are : (1) has
the judgment-debtor who has been ad-
judicated an insolvent, right to prefer
an appeal against an order dismissing
an application put in by him under
O. 21, R. 90, Civil P. C., in the course
of the execution of the decree passed
against him ? and (2) if such an appeal
is incompetent in its inception, can it be
continued if the official receiver consents
to continue it ? This reference has been
occasioned on account of the conflict
between the decisions in *K. Tati Reddi*
v. Ramachandra Rao (1) and *Palani-*
yandi Chettiar v. Kalyanarama Ayyar
Rao (2). In *K. Tati Reddi v. Ramachandra*
Rao (1) it was held that the insolvency
of a judgment-debtor does not render it
incompetent for him to continue the

proceedings under O. 21, R. 72 by way
of an appeal. In *Palaniyandi Chettiar*
v. Kalyanarama Ayyar (2) it was held
that a party to a suit after adjudication
as an insolvent cannot be deemed to be
a person aggrieved by it and has there-
fore no right to institute an appeal
against the decree in the suit.

The facts of the case under reference
are as follows: In execution of the
decree in O. S. No. 246 of 1926 on the
file of the Subordinate Judge of Coimba-
tore, properties belonging to the judg-
ment-debtor were sold on 6th March
1929 and purchased by the decree-
holders. On 4th April 1929 the judg-
ment-debtor filed an application under
O. 21, R. 90, Civil P. C., to set aside the
sale. On 15th October 1929 he was ad-
judicated an insolvent on an application
filed by a creditor on 26th April 1929.
On 18th October 1929 the judgment-
debtor's application to set aside the sale
was dismissed by the Court of first
instance, but on appeal filed by him on
16th December 1929 the High Court set
aside the sale on 7th October 1931. The
decree-holders then filed a review peti-
tion on the ground that when the judg-
ment-debtor filed the appeal to the High
Court he had been adjudicated an insol-
vent and was therefore not competent
to prefer the appeal. Notice was then
issued to the official receiver and he has
consented to continue the proceedings.

The first question for decision is whe-
ther the appeal by the insolvent to the
High Court was competent or not. On
the facts of the case there is no difficulty
in answering this question. The insol-
vency petition was filed after the pro-
perties were sold in Court auction and
until the sale is set aside the properties
will not vest in the official receiver.
The official receiver has not taken any
steps to set aside the sale; and the assets
having been realised before the date of
the admission of the insolvency petition
he cannot even claim the benefit of the
execution : vide S. 51, Provincial Insol-
vency Act. It follows therefore that the
judgment-debtor whose interests are
affected by the sale cannot only file an
application under O. 21, R. 90, but also
prefer an appeal against the Subordinate
Judge's order. The respondent relies on
O. 22, R. 8, Civil P. C., in support of his
contention that

1. A I R 1921 Mad 402=62 I C 854.

2. A I R 1926 Mad 1214=97 I C 486.

"even when the proceedings had been properly instituted by the insolvent he cannot himself continue them, for if the official receiver refuses or neglects to continue those proceedings the Court may make an order dismissing the suit on the defendant's application."

No doubt this is the view expressed by the learned Judges in *Palaniyandi Chettiar v. Kalyanarama Ayyar* (2), but it is not noticed in that judgment that O. 22, R. 12, Civil P. C., makes R. 8 inapplicable to proceedings in execution of a decree or order. As pointed out in *K. Tati Reddi v. Ramachandra Rao* (1) O. 22, R. 8 applies to an insolvent plaintiff and is confined to suits when the events mentioned therein happen. This decision has not been referred to in *Palaniyandi Chettiar v. Kalyanarama Ayyar* (2). In the latter case the learned Judges relied on the Full Bench decision in *Hari Rao v. Official Assignee, Madras* (3). But in that case the question arose under the Insolvency Act and the decision therefore cannot be considered, as observed in the order of reference, as a direct authority on the position of an insolvent preferring an appeal against an order in execution of a decree passed against him under the Civil Procedure Code. The decision in *K. Tati Reddi v. Ramachandra Rao* (1) has been followed in *Ramachandra v. Shripati*, A. I. R. 1929 Bom. 202. In our opinion the decision in *K. Tati Reddi v. Ramachandra Rao* (1) lays down the correct law. For the reasons given above we would answer the first question referred to the Full Bench in the affirmative. In this view the second question does not arise for decision.

P.R.S./K.S. Question answered.

3. A I R 1926 Mad 556=94 I C 642=49 Mad 461 (FB).

A. I. R. 1933 Madras 852

VENKATASUBBA RAO, J.

(*Thrikkaikat Madathil Mooppu Stanom Kollath*) Raman Thirumumpu—Plaintiff—Appellant.

v.

(*Mullasserri Karnavan*) Karunakara Menon and others — Defendants — Respondents.

Second Appeal No. 1750 of 1928, Decided on 16th November 1932.

(a) Hindu Law—Religious endowment — Manager of temple property can grant perpetual lease in special and unusual circumstances.

Although ordinarily the manager cannot grant a perpetual lease of temple property, he possesses,

in special and unusual circumstances, the power of making such a grant; in other words, the alienation will be upheld, if some imperative necessity is proved. [P 853 C 1]

(b) Hindu Law — Religious endowment—Ancient grant of perpetual lease recognised and treated as valid by subsequent matathipathis—Even though deed does not contain recitals as to necessity, transaction can be presumed to be one for necessity—Deed.

A perpetual lease which was granted several years back by the then manager was recognized and treated as valid by the subsequent matathipathis:

Held: that the presumption as to necessity of the transaction could be permitted, even though the grant did not contain any recital as to necessity: A I R 1932 Mad 762; A I R 1916 P C 110; A I R 1920 P C 64; A I R 1922 P C 163; A I R 1925 Mad 673 and A I R 1926 Mad 692, Ref.

[P 853 C 1, 2]

(c) Deed — Construction—Held that transaction in question resembled more closely a lease and was not mortgage pure and simple.

A deed recited that for a sum of money (the kanam and the puramkadam amounts) the land was demised to the grantee, who may hold it on karankari right without being liable to surrender it. It further mentioned the total pattam to be 389 paras odd, out of which about 106 paras were to be retained by the grantee for interest on the kanam and puramkadam amounts and the balance of about 282 paras was to be paid to the grantor for purapad. The grant further stated that the kanam shall be renewed from time to time on payment of the renewal fee and that the grantee may enjoy the property in perpetuity:

Held: that the transaction in question was by no means a mortgage pure and simple, but resembled more closely a lease. [P 853 C 2]

Advocate-General and C. S. Swaminathan—for Appellant.

K. R. Ramakrishna Ayyar and K. Kuttikrishna Menon—for Respondents.

Judgment.—The grant sought to be set aside in the suit was made by a previous matathipathi in the year 1025, corresponding to 1849-1850. It is evidenced by Ex. A, and it recites that for a sum of 2,470 fanams (the kanam and the puramkadam amounts) the land is demised to the grantee, who may hold it on Karankari right without being liable to surrender it. Ex. A mentions the total pattam to be 389 paras odd, out of which about 106 paras are to be retained by the grantee for interest on the kanam and puramkadam amounts and the balance of about 282 paras is to be paid to the grantor for purapad. The grant goes on to say that the kanam shall be renewed from time to time on payment of the renewal fee and that the grantee may enjoy the property in perpetuity. The property is said to belong to a dawaswom, of which the head for the time

being of the mutt in question is the manager.

The first point that I have to decide is, whether the predecessor of the plaintiff exceeded his powers in making what may be described as a permanent alienation of the property. The authorities lay down that, although ordinarily the manager cannot grant a perpetual lease of temple property, he possesses in special and unusual circumstances the power of making such a grant; in other words, the alienation will be upheld, if some imperative necessity is proved. In the present case, the purpose for which the alienation was made, is not recited in the deed. The defendants allege in their written statement that the grant was made in consideration of the fact that the grantee's husband by exerting his influence got several recalcitrant tenants to recognise the right of the temple to certain properties and that, but for his intervention, the temple would have lost its right to those valuable items. To this effect some evidence was adduced, and the lower Courts were perfectly right in treating it as hearsay; assuming then rightly that there is no positive evidence as to the circumstances in which the grant was made, does it follow that it should be set aside? Both the Judicial Committee and this Court have laid down in several cases as to how the evidence relating to ancient transactions should be treated: *Banga Chandra v. Jagat Kishore* (1), *Venkata Reddi v. Rani Saheba of Wadhwan* (2), *Magniram Sitaram v. Kasturi Bhai Mani Bhai* (3), *Somayya v. Venkayya* (4) and *Ankula Sanyasi v. Ramachandra Rao* (5).

The suit was brought 70 years after the date of the grant, all the persons connected with it having in the meantime died. The transaction was recognised and treated as valid by subsequent matathipathis: in 1869 one of them received renewal fee and passed the receipt, Ex. 3, and in 1901 another matathipathi granted Ex. 4, a receipt, for another sum of renewal fee. The mata-

thipathi, who filed the suit, showed by his conduct in receiving rent for three successive years, that he had no intention of repudiating the transaction. Having regard to the lapse of time, the lower Courts have, from the circumstances to which I have referred, rightly inferred the necessity for the alienation, and I am prepared to accept their finding and uphold the grant. In a recent case *Kumaraswami Mudali v. Narayanaswami* (6), the point has been fully considered whether in the absence of recitals in the grant as to necessity, presumptions are permissible to fill in the details which have been obliterated by time. The conclusion arrived at there was, that the rule enunciated in the judgments of the Judicial Committee equally applies even in the absence of such recitals. That is a direct authority supporting the defendant's case and I am prepared to follow it.

The learned Advocate-General contends that the rulings, to which I have referred, do not apply as the grant is not a lease in perpetuity, but gives the grantee an option to demand a renewal from time to time. This in my opinion makes no difference. The lease may not be strictly in perpetuity, but the grantee by exercising his option may enjoy the property permanently. If there were grounds justifying the permanent lease, those very grounds would also justify a grant containing the option clause. In principle there can be no difference between the two cases. The learned Advocate-General asks, would the Court compel the trustee to renew the lease? The answer is obvious. If the original grant was made for proper necessity, there is no reason why the Court should not compel the observance by the succeeding trustees of the terms in the lease. Lastly, I need not consider the argument relating to the supposed clog on the equity of redemption, for the simple reason that the transaction in question is by no means a mortgage pure and simple, but resembles more closely lease. In the result, the second appeal is dismissed with costs: two sets.

P.R.S./K.S.

Appeal dismissed.

6. A I R 1932 Mad 762=139 I C 766.

1. A I R 1916 P C 110=36 I C 420=43 I A 249=44 Cal 186 (PC).

2. A I R 1920 P C 64=55 I C 538=47 I A 6=43 Mad 541 (PC).

3. A I R 1922 P C 163=66 I C 162=49 I A 54=46 Bom 481 (PC).

4. A I R 1925 Mad 673=86 I C 483.

5. A I R 1926 Mad 692=95 I C 691.

A. I. R. 1933 Madras 854

MADHAVAN NAIR AND JACKSON, JJ.

(Kalavacherla) Bapiraji—Plaintiff—Appellant.

v.

Ramachandra Das Bhavajee—Defendant—Respondent.

Appeal No. 131 of 1927, Decided on 26th January 1933, from decree of Sub-Judge, Ellore, in O. S. No. 80 of 1926.

(a) **Charitable and Religious Trusts Act (1920), Ss. 5 and 6—Non-compliance with order under S. 5 for filing accounts amounts to breach of trust by virtue of S. 6—Suit under S. 92, Civil P. C., is competent without sanction of Advocate-General even by person other than individual who obtains order under S. 6—Civil P. C. (1908), S. 92.**

Where an order under S. 5, Charitable and Religious Trusts Act, is not complied with, there is a breach of trust by virtue of S. 6 and a suit under S. 92, Civil P. C., is competent without the sanction of the Advocate-General. And it is not necessary that the suit should be instituted only by the person who secures the order under S. 5. But the reliefs claimed in the suit must be confined to those which arise out of the failure to produce the accounts and connected with it: *AIR 1930 All 582, Ref.* [P 854 C 2]

(b) **Civil P. C. (1908), S. 92—Some of plaintiffs dropping out of suits—Others can proceed with it.**

Even though some of the plaintiffs in a suit under S. 92 drop out of it, still the remaining plaintiffs can proceed with the suit: *AIR 1925 Mad 244, Rel on.* [P 855 C 1]

P.R. Ganapathi Ayyar and V. Krishna Mohan—for Appellant.

P. Soma Sundaram—for Respondent.

Madhavan Nair, J.—Plaintiff 2 is the appellant. The appeal arises out of a suit instituted by the plaintiffs under S. 92, Civil P. C. Prior to the institution of the suit, plaintiff 1 applied under the provisions of Act 14 of 1920 to the District Court to obtain orders from the Court under Ss. 3 and 4 directing the trustee to furnish accounts and give the necessary information about the trust. The learned District Judge repeatedly gave time to the defendant to produce accounts, but ultimately the order of the Court was not complied with and under S. 6, he passed an order giving permission to institute a suit under S. 92, Civil P. C. After obtaining such permission the other two plaintiffs joined plaintiff 1 and instituted this suit against the trustee. In the course of the trial, plaintiff 1 at whose instance permission was obtained from the District Judge dropped out of the suit and later on plaintiff 3 also abandoned it. So the only person who proceeded with the suit

was plaintiff 2. In the suit, various reliefs were claimed. In para. 12 (a) an inventory was asked for from the defendant. In para. 12 (b) the defendant was sought to be removed and it was also requested that it should be declared that he is not the rightful mahant. In para. 12 (c) a scheme was sought to be framed for the management of the properties and accounts were also asked to be rendered by the defendant trustee. The learned Subordinate Judge dismissed the suit without going into the merits. He held that the plaintiff who obtained permission to institute the suit from the District Court having dropped out of the proceedings it was not competent for the other plaintiffs to proceed with the suit; and he also held that since the reliefs claimed in the suit exceeded and went beyond the particular relief with respect to which sanction was given by the District Judge the suit was incompetent.

In appeal it is argued that the learned Subordinate Judge's decision on both these points is wrong. The first question is whether the suit contemplated by S. 6, Act 14 of 1920, cannot be instituted by persons other than the particular individual who obtained the permission. It is true that under Ss. 3, 4 and 5 the application should be made by a person interested in the trust. But once a breach of trust has been committed by the trustee by his refusal to produce the accounts, then S. 6 says that a suit so far as it is based on such failure may be instituted without the previous sanction of the Advocate-General. The section nowhere says that such a suit should be instituted by the person who made the application under Ss. 3 and 4, Act 14 of 1920. Under S. 92, Civil P. C., the previous sanction of the Advocate-General is required for the institution of a suit contemplated by that section. Under S. 6 once the breach referred to in that section is committed by the disobedience of an order passed by the District Judge, then a suit may be instituted under S. 92, Civil P. C. The necessity for obtaining the sanction of the Advocate-General is thus removed under S. 6; and it does not say anywhere that the suit should be instituted only by the person who secures the order from the District Court, in the circumstances mentioned in the previous sections.

In *Umrao Singh v. Har Prasad*, A.I.R. 1930 All 582, it was held that when the order of the District Judge for filing of accounts under S. 5, Charitable and Religious Trusts Act, has not been complied with, there is a breach of trust by virtue of S. 6 which could be made the basis of a suit under S. 92, Civil P. C. It should however be noted that the reliefs claimed in the suit under S. 92 filed in pursuance of permission obtained under S. 6 must be confined to those which arise out of the failure to produce the accounts and are connected with it. In this suit all the reliefs claimed arise out of the failure to produce accounts except the one regarding the declaration that the defendant is not the rightful mahant. Such a relief has nothing to do with the failure to produce the accounts and is not in any way connected with it. We think all the other reliefs can be based on the defendant's failure to produce the accounts; and the suit cannot therefore be said to be incompetent as asking for reliefs which do not come within the scope of the suit contemplated by S. 6, Act 14 of 1920.

Then it is said that two of the plaintiffs having dropped out, it is not competent for one plaintiff alone to proceed with the suit under S. 92, Civil P. C. This point has already been decided in this Court, in *Gulam Ghouse v. Dost Mohammad Khan* (1), where it was held that a suit under S. 92, Civil P. C., or an appeal arising out of such a suit does not abate on the death of one of the plaintiffs who obtained sanction for instituting the suit. It cannot therefore be said that the present suit is incompetent because there is only one person left to conduct the suit. For the above reasons we hold that the decision of the learned Judge cannot be sustained. We set aside the decision and remand the suit for disposal according to law. The inquiry into the case will be confined as already pointed out to all the reliefs except the one contained in the first part of Cl. (b), para. 12, viz., that it be declared that the defendant is not the rightful mahant. Costs of the appeal will abide the result. We do not interfere with the costs of the lower Court. The court-fee may be refunded.

P.R.S./K.S.

Suit remanded.

1. AIR 1925 Mad 244=85 I C 666.

A. I. R. 1933 Madras 855

CURGENVEN AND SUNDARAM

CHETTY, JJ.

(Kalepalli) Rajitagiripathi—Plaintiff
—Appellant.

v.

(Jannavula) Pedakotayya and others
—Defendants—Respondents.

Appeal No. 234 of 1928, Decided on 11th May 1933, from decree of Dist. Judge, Masulipatam, in O. S. No. 19 of 1927.

Madras Estates Land Act (1 of 1908), S. 112
—Service by affixture without attempting to effect personal service makes sale nullity.

A sale held on a notice of sale served by affixture without any attempt to effect personal service, is as much a nullity as a sale held on no notice: AIR 1931 Mad 724, Foll.; AIR 1924 Mad 431; AIR 1914 P C 129 and 12 Mad 168, (F B), Ref. [P 856 C 1]

T. Ramachandra Rao—for Appellant.
S. Varadachariar and S. V. Venu-
gopalachariar—for Respondents.

Curgenven, J.—The plaintiff, who appeals, was a raiyat of the South Vallur Zamindari, and his holding was sold in 1915 for arrears of rent under S. 111, *et seq* Madras Estates Land Act, bought in by the landholder, and re-granted to defendant 1. He sued in 1927 to recover it, and without taking any evidence, the preliminary issue, whether the suit was within time, was decided against him, and the suit dismissed. The question involved in this issue is this: whether the sale was held with jurisdiction and had therefore, if found irregular, to be set aside, or whether it was held without jurisdiction and was therefore a nullity. In the former cases it is admitted that whichever article of the Limitation Act is applicable—No. 12, 95 or 120—the suit would be out of time. In the latter the plaintiff could ignore the sale, and the suit would be within the twelve years available for recovery of the property. The learned District Judge has proceeded upon the assumption, which is made upon the allegations in the plaint and in the absence of evidence to the contrary, that personal service of notice of the sale was neither made nor attempted upon the plaintiff, but that service by affixture was made, and he has held that, although the sale was irregular or illegal, it was not a nullity. Provision for the service of notice upon the defaulter is contained in S. 112 of the Act. Four copies of the notice are to be sent to the Collector:

"who shall cause service to be effected by delivering a copy to the defaulter or to his authorized agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any within ten miles of the holding, or on some conspicuous part of the holding."

There is no doubt, we think, that if no service is effected at all the sale will be void. That has been held by Ramesam, J., in *Kootoorlingam Pillai v. Sennappa Reddiar* (1). The learned Judge observed:

"In my opinion, notice to the lawful raiyat is such an important condition precedent to the holding of the sale under S. 112 that the want of it must be regarded as making the sale a nullity."

A similar view has been expressed in the case of a sale in execution by a Full Bench of this Court in *Rajagopala Ayyar v. Ramanujachariar* (2) following a decision by the Privy Council in *Raghunath Das v. Sundar Das* (3). Mr. Varadachari would rely upon an earlier Full Bench decision in *Venkata v. Chennagadu* (4) under the Revenue Recovery Act 2 of 1864, which held that failure to issue a notice was not a defect which affected jurisdiction, and that, so long as an arrear was found to exist, if a sale was conducted it was a proceeding under the Act which had to be set aside. Whether or not in view of the more recent decisions this is a still good law so far as the Revenue Recovery Act is concerned, we do not think it necessary to express an opinion. There is enough authority, we think, for the view taken by Ramesam, J., which we propose to adopt.

The question then which this case actually raises is whether service by affixture, where no attempt has been made to effect personal service, stands upon a different footing from no service at all and does not render sale a nullity. The point is bare of authority, and we can only decide it by reference to general principles. In the first place, such a course involves an express breach of the statute, which provides that only if personal service cannot be effected shall service by affixture be resorted to. The

reason for requiring this condition precedent to service by affixture is clear; personal service alone affords a guarantee that the defaulter is apprised of the projected sale, and not until that course has been found impracticable, may the less effectual method of service be adopted. The principle involved is of course that no order should be made against a person to his detriment unless and until he has been afforded an opportunity to appear and show cause against it. It is a principle which is violated by the failure to issue notice, and it seems to us that it is also violated, though perhaps not so flagrantly, by the omission to follow a direction of law which is devised to secure that it is observed. The difference between the two cases is one of degree rather than of kind. In the one case no steps are taken to inform the defaulter, in the other the steps taken are so defective that in a certain number of cases he will not be informed. As an abstract proposition of law we think that in neither case ought a sale so held to be regarded as otherwise than a nullity.

We must accordingly differ from the Court below, and hold that on the materials at present available, i. e., the pleadings, the suit is not shown to be barred. It will of course be open to the defendants to show that the terms of S. 112 with regard to personal service were complied with or that for any other reason appearing from the pleadings the suit is barred. The appeal is allowed, the decree set aside and the suit remanded for further trial and disposal according to law. Costs in this Court will abide the result. The appellant will be entitled to a refund of the court-fee on the memorandum of appeal.

P.R.S./K.S.

Suit remanded.

A. I. R. 1933 Madras 856

PANDALAI, J.

Vellayammal and others—Defendants—Appellants.

v.

N. P. Palaniyandi Ambalam—Plaintiff—Respondent.

Second Appeal No. 1496 of 1928, Decided on 6th January 1933, against decree of Sub-Judge, Madura, in A. S. No. 100 of 1926.

(a) Hindu Law — Alienation by female heirs—Presumptive reversioner confirmi

1. AIR 1931 Mad 724=134 I C 184.

2. AIR 1924 Mad 431=80 I C 92=47 Mad 288 (F B).

3. AIR 1914 P C 129=24 I C 304=41 I A 251=42 Cal 72 (P C).

4. (1889) 12 Mad 168 (F B).

alienation is barred from challenging it after succession opens to him.

It is possible for presumptive reversioner even before the succession opens by a sufficient act of affirmation to do something which disables them from questioning the alienation after they are in titulo : *A I R 1918 P C 196, Rel on.*

[P 857 C 2]

(b) **Hindu Law — Reversioner — Release-deed executed by father on his own behalf and on behalf of minor son—Son cannot question it, where such action is eminently prudent and beneficial.**

Where a father reversioner executed a release-deed on his own behalf and on behalf of his minor son and his action was eminently prudent and beneficial :

Held : that the son could not question it.

[P 858 C 1]

T. L. Venkatarama Iyer — for Appellant.

K. S. Jayarama Ayyar — for Respondents.

Judgment. — This was a suit by a Hindu reversioner to set aside alienations by the female heirs. Of two such alienations which formed the subject-matter of this second appeal, one which affected appellants 1 and 2 has been settled and all that now remains is the alienation which affects the other appellants, viz., appellants 3 and 4, which concerns Item 1 in B, Sch. 19 cents of land. The Court of first instance upheld this alienation and dismissed the suit. In the Court of appeal to which the plaintiff appealed, the learned Judge deals with this property in para. 13. Defendant 6's father bought this property so long ago as 1886 from Vellayammal, mother of the last male-holder, and her daughter, one Thungi. The then reversioners, the last male holder's paternal uncle Palaniyandi and his son, the present plaintiff, then brought suits to set aside the alienation and succeeded. But after that decree the two families, that is of the purchasers and the vendors, who were relations, settled their disputes. The net result of the settlement was that one half of the property sold was restored to the reversioners and the other half consisting of this Item 1 of Sch. B was retained by the purchaser, defendant 6's father. This settlement was effected so far as this property was concerned by two deeds Exs. 2 and 2-a. Ex. 2-a is a sale deed purporting to be executed by Palaniyandi for himself and on behalf of his sons including the present plaintiff. It recites that they have received

Rs. 85 in cash and that the purchaser, defendant 6's father is to enjoy the land as his. Ex. 11 purports to be the deed of release six days later by the same people to the same person and says that the executants have relinquished such rights as they had in the property, that is, 19 cents now in dispute, by reason of the decree which had been previously obtained. All this was long before the succession in favour of the plaintiff opened by the death of Vellayammal who lived on till 1921. This suit was brought in 1923.

It appears to me that the Court of first instance was right and the Court of appeal wrong about the plaintiff's right by this suit to recover this property. Whatever may have been the merits of the original alienation and the title conveyed thereby, the plaintiff must lose on one of two grounds. First, under S. 43, T. P. Act, the plaintiff's father having sold this property by Ex. 2-a, as if it belonged to him and to the plaintiff, at a time when they had admittedly no title thereto, the plaintiff cannot now be heard to set up that fact after acquiring the title as reversioner in 1921.

Secondly, treating the old alienation as still the subject for consideration, the act of the plaintiff's father acting on his own behalf and on behalf of the plaintiff in surrendering whatever rights they had by the decree and in purporting to sell the property to defendant 6's father was as emphatic an affirmation of the transaction as it is possible to imagine. The fact that at that time they were not the actual reversioners but only the presumptive reversioners is not, in my opinion, sufficient to deprive that act of its due force and effect ; because as stated by the Privy Council in *Ranga-swami Goundan v. Nachiappa Goundan* (1), it is possible for presumptive reversioners even before the succession opens by a sufficient act of affirmation to do something which disables them from questioning the alienation after they are in titulo. The learned Judge in appeal does not seem to have either perceived or given any proper answer to these points. But he contents himself with saying that the release deed does

1. *A I R 1918 P C 196=46 I A 72 = 42 Mad. 523 = 50 I C 498 (PC).*

not bind the plaintiff since he cannot be literally said to be claiming under his father. Here he ignores the fact that it was not by the act of the father alone but by the act of the plaintiff himself by his guardian that he is bound. In the circumstances in which these documents were executed there can be little doubt that the acts of the plaintiff's father were eminently prudent and beneficial and the plaintiff cannot now be heard to question them. The appeal, so far as appellants 3 and 4 are concerned, succeeds and the decree of the lower appellate Court, so far as it concerns Item 1 in Sch. B, must be reversed and that of the first Court restored. Appellants 3 and 4 must have their costs both here and in the Court below proportionate to the value of the property concerned in their appeal.

P.R.S /K.S. *Order accordingly.*

A. I. R. 1933 Madras 858

PANDALAI, J.

Ponnuthaye Ammal—Plaintiff — Appellant.

v.

Official Receiver, Coimbatore — Petitioner—Respondent.

Appeal No. 191 of 1930, Decided on 28th April 1933, from order of Dist. Judge, Coimbatore, D/- 8th January 1930.

Provincial Insolvency Act (1921), S. 28 (2) — Suit against two persons for maintenance — One of them adjudicated insolvent — Suit continued as such without impleading Official Receiver — Execution of decree obtained in suit and property sought to be brought to sale — Execution proceedings are invalid as against Official Receiver.

A widow sued her husband's brother and his son for maintenance. Soon after filing the suit, the former was adjudicated insolvent. The plaintiff took time to consider what was to be done under the circumstances; but chose to continue with the suit as such without impleading the Official Receiver and a decree was obtained making future maintenance a charge on certain property. In execution of the decree she tried to bring the property to sale whereupon the Official Receiver intervened and objected:

Held: that under S. 28 (2), as execution was sought without leave of Court in respect of property which had already vested in the Official Receiver, the proceedings were invalid as against the Official Receiver, in so far as he represented the estate of the insolvent, but that otherwise they were valid: 25 *Mad* 406 and *Wood v. Surr*, 19 *Beav* 551, *hcf.*; *A I R* 1927 *P C* 103, *Dist.*

[P 859 C 2]

K. Desikachari—for Appellant.

S. Anantaraman—for Respondent.

Judgment.—This is an appeal by the plaintiff (decree-holder) against the order of the District Judge of Coimbatore declaring on the application of the respondent (the Official Receiver of Coimbatore) that the decree is of no force as against the respondent and that the execution of it by sale of the properties of the insolvent (defendant 1) in the decree cannot proceed.

The facts are simple and undisputed. The appellant is a widow and she sued defendant 1, her husband's brother and defendant 2, son of defendant 1, members of the joint family of her husband, for arrears of maintenance and for future maintenance claiming a charge for the latter on certain family properties specified in the plaint. Four days after the suit was registered, i. e., on 22nd August 1927, defendant was adjudicated insolvent. On 21st November the plaintiff's *vakil* reported that defendant 1 had been adjudicated and asked for time to consider what should be done. On 12th December he submitted that he did not want to add the Official Receiver as a party and elected to proceed with the suit as it stood. On this no one seriously defended the suit and on 15th November 1928 a decree was passed as prayed making the future maintenance a charge on Sch. B property. The respondent (appellant herein) executed her decree and tried to bring the property charged to sale. Then the Official Receiver intervened and objected to the execution on the ground that he ought to have been impleaded and that the insolvent's property had vested in him. The Subordinate Judge rejected this objection and ordered the execution to proceed. The learned District Judge in appeal reversed this order holding that the decree charging the property of the insolvent without impleading the Official Receiver is a nullity.

The order of the lower Court so far as it dismissed the execution petition entirely is obviously wrong. The decree was obtained against two persons, defendant 1, who subsequently was adjudged insolvent, and defendant 2, a minor who was defended by a guardian appointed by the Court and who has not been adjudicated an insolvent. Whatever may be the consequences of not impleading the Official Receiver who represented the estate of defendant 1, it can have no

effect on the decree so far as it is against defendant 2. But the appellant's learned advocate contends that the order is wrong even as against the decree against defendant 1. His contention is that even in a case in which the rights of property of a defendant are in question the insolvency of that defendant does not require that the Official Receiver in whom his property vests should be brought on the record. According to the argument it is immaterial whether he is impleaded or not and it is said that the Official Receiver is bound whether he is added or not. This is opposed to clear authority upon the subject. It may be conceded that this suit in which the plaintiff prayed for a charge for her future maintenance upon Sch. B property is one in which the right to immovable property was directly in question and that therefore the rule of *lis pendens* is within its proper limits applicable thereto. It is therefore said that by virtue of O. 22, R. 10, Civil P. C., the Official Receiver who became the assignee by operation of law of the defendants' property need be impleaded only with the leave of the Court which according to the argument implies that it is optional with the plaintiff to add the receiver or not.

The short answer to this argument is that the Official Receiver was not excluded by the refusal of any leave of the Court in this case. On the contrary the plaintiff after taking time to consider reported that she preferred to continue the suit without the Official Receiver. It therefore is incorrect to call in aid anything which may depend upon leave of the Court being refused. But the idea of the leave of Court has no place at all in this case because the question is whether the respondent (appellant herein) is entitled to say that she shall keep the benefit of the decree against the property of a person which she knew had by operation of law passed to the Official Receiver. On this point the decision in *Puninthavelu Mudaliar v. Bhashyam Ayyangar* (1) is sufficient to show that the appellant's contention is wrong. In that case the plaintiff was a mortgagee but of chattels and the question was what was the effect of the decree obtained by him in the absence of the Official Assignee in whom the property of the defendant had vested. Both the

learned Judges agreed in the view that where the mortgagor becomes bankrupt pending the suit the trustee in bankruptcy is not bound by a decree for foreclosure in his absence. This matter is dealt at some length by Bhashyam Ayyangar, J., at pp. 422 and 423 where he cites *Wood v. Surr* (2) :

"The principle of the decision in *Wood v. Surr* (2) is that the Official Assignee being one appointed in invitum and not a voluntary purchaser, as in the case of a transfer by act of parties or by an involuntary sale, in execution of a decree, the doctrine of *lis pendens* cannot affect him and the party seeking to bind him (the Official Assignee) by the result of the suit, pending which the interest of its subject-matter has devolved on him by operation of law, ought to take proceedings to join him as a party to the suit and obtain the decree against him."

The decision of the Privy Council cited by the learned Judges in *Kalachand Banerji v. Jagannath Marwari* (3) is based on the same principle but is not strictly applicable to this case because in that case the defendant on the record died and in bringing in his legal representative his son was impleaded, but it transpired that the son had become insolvent before the suit and that therefore his father's inheritance, when it fell in, also vested in the Official Receiver. In those circumstances the Privy Council held that the proper party, namely the Official Receiver, was not on the record to represent the estate and therefore the decree need not bind him. In this case the insolvency of the defendant was pending the suit.

The same result, so far as this case is concerned, is arrived at by reference to S. 28 (2), Prov. Insol. Act, which declares that after the order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable under the insolvency shall have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court. In this case if there was no other irregularity execution was sought of the property of the insolvent vested in the Official Receiver without leave of the Court and the petition was liable to be dismissed on that ground alone. For the above reasons the order of the lower Court will be varied by declaring that the decree in

2. (1854) 19 Beav 551.

3. AIR 1927 P C 108=101 I C 442=54 Cal 595=54 I A 190 (PC).

1. (1902) 25 Mad 406=12 M L J 282.

O. S. No. 166 of 1927 and execution proceedings in pursuance of it are invalid as against the Official Receiver in so far as he represents the estate of defendant 1, but otherwise they are valid. The appellant has substantially failed and must pay the costs of the respondent.

P.R.S./K.S.

Order accordingly.

A. I. R. 1933 Madras 860

PANDALAI AND CURGENVEN, JJ.

(Lambu) Krishnavenamma — Plaintiff — Appellant.

v.

(Niriki) Hanumantha Rao and others — Defendants — Respondents.

Appeal No. 30 of 1928, Decided on 24th July 1933, against decree of Sub-Judge, Kurnool, in O. S. No. 28 of 1927.

(a) Evidence Act (1872), S. 90—Ancient document—Certified copy from proper office—Proof of identity of parties and occasion when it was made is sufficient to prove document and its contents.

Where an ancient document produced is a certified copy obtained from the proper office of a statement made to a public officer in the course of his duty and the identity of the parties and the occasion when it was made have been sufficiently proved by the evidence in the case, no other proof of such a document or its contents can be required. [P 861 C 1]

(b) Hindu Law — Surrender — Surrender must be of entire property in possession, enjoyment or control of family — Chance of setting aside alienation by widow does not form part of property.

When it is said that the surrender must of the entire property, it means the entire property then in the possession and enjoyment or control of the family. And the widow making the surrender need not include all properties which she had already alienated to others and which are in their possession. Such cases are only chance of getting these alienations set aside and are not property. [P 861 C 2]

W. Kothandaramiah — for Appellant.

K. Srinivasa Rao — for Respondents.

Pandalai, J. — The appellant was plaintiff 2 in the lower Court. The suit was originally brought by plaintiff 1; a minor who was alleged to have been adopted by the present appellant, who was impleaded as defendant 2. The original plaintiff having died, defendant 2 was transposed as plaintiff 2 and has now become, on the dismissal of the suit the appellant. The suit was brought for the recovery of certain properties which admittedly belonged to the father of the appellant, one Subba Rao. He had a son by name Hanumantha Rao who however predeceased him. Subba Rao was, it appears, for several years before

his death insane and on his death sonless in 1908 the appellant, his daughter, became his heir. On 17th January 1912 she executed Ex. 1 to defendant 1, the deceased predecessor of respondents 1 to 3, releasing all her then rights to defendant 1 described therein as the gnati (reversioner) and agreeing to accept from him a maintenance for her lifetime of Rs. 5 a month. The appellant was apparently content with this arrangement for practically the whole period of 12 years; for she gave up possession and enjoyment of her father's property to defendant 1. On 15th January 1924 she executed an adoption deed in respect of her husband's brother's son, the original plaintiff, a boy aged seven; and on the next day, i.e., 16th January, she purported to execute to him a second surrender of the same properties which she had already surrendered to defendant 1 and this suit was brought on 17th January 1924.

Curiously, in the plaint nothing was mentioned not even by reference, about the first surrender Ex. 1 and all that is said is that on 17th January 1912 defendant 1 got into possession of the properties having paid some money to the appellant (defendant 2). Defendant 1, the only contesting defendant, denied the factum and validity of the plaintiff's adoption and also set up that even if the plaintiff's adoption were valid it would have no effect upon the surrender in his own favour which could not be attached on any ground whatsoever. Issues were framed on both these main heads of the case. It will be seen from the judgment of the learned Judge that he has gone fully into all the issues and on the question of adoption held against its validity. As will appear presently, it is not necessary for us to go into that. As the appellant's learned advocate said in opening the case he would have, in order to succeed, to show that the first surrender Ex. 1 was not binding upon the appellant even if there had been a valid adoption and if he cannot succeed in doing that it would be unnecessary to go into the question of the plaintiff's adoption. The learned advocate argued that the learned Judge's opinion against the appellant upon this matter was not sustainable on three grounds:

Firstly, that defendant 1 is not a reversioner of the appellant's father's

family at all in whose favour alone there could be a surrender; secondly, that the surrender was not of the entire property because it omitted one house which belonged to the estate; and thirdly, that the surrender was vitiated by being brought about by fraud or misrepresentation or by threats of oppressive litigation employed by defendant 1 and a vakil who was helping him, one Venkoba Rao.

We have heard the learned advocate at great length upon these points and have no hesitation in saying that the learned Judge's conclusion on these matters which he has dealt with fully in his judgment is perfectly justified. First, as to whether defendant 1 was a gnati or reversioner of the appellant's father, the matter is put beyond all possibility of doubt by the indisputable documents in the case. So long ago as 1860 a statement was made to the inam Commissioner by Hanumantha Rao, the father of defendant 1 (vide genealogical table at p. 26 of the pleadings) that Subba Rao, then a young man, and his uncle Bhima Rao and his father Raghavendra Rao belonged to one branch of the family and that Gurraja Rao, the deponent's elder brother, the deponent himself and certain others belonged to the other branch of the family. A portion of the statement sets out the genealogical table which is exactly the same as that put forward by defendant 1. The statement relates obviously to the inam to which both the branches of the family were equally entitled of which the appellant's half share is item 2 in the schedule to Ex. 1. The appellant's learned advocate attempted to persuade us that this statement was not sufficiently proved. The document produced is a certified copy obtained from the proper office of a statement made to a public officer in the course of his duty and the identity of the parties and the occasion when it was made have been sufficiently proved by the evidence in the case. No other proof of such a document or its contents can be required, at this distance of time. We consider the objection of the appellant unsustainable. This by itself would have been sufficient to overthrow the appellant's argument on this matter but there are more recent documents to the same effect. (After referring to these

documents, his Lordship held defendant 1 was the nearest reversioner of Subba Rao the last male holder and proceeded). As to the argument that some property was left out of the surrender deed Ex. 1 it is equally unfounded. The property said to have been excluded is a house but it is seen from Ex. 14 that this house had been sold so early as 1908 by Krishtamma the widow of Hanumantha Rao, to a stranger and it has remained with the stranger and his successors in title to this date. It follows that at the time of Ex. 1 the property was not with the family at all.

But it is argued that the property belonged to the family and that the appellant should have questioned the alienation of Krishnammal and that therefore the house was also property which should have been included. We do not think that this argument is sound. No doubt the surrender must be of the entire property. When it is said that the surrender must be of the entire property it means the entire property then in the possession and enjoyment or control of the family. It has been held that even if some property has been left out by inadvertence it may be repaired by a subsequent surrender. It cannot be the case in respect of properties that have been alienated away and are in possession of strangers that a widow surrendering her rights is required to mention all possible causes of action about them at the risk of finding her act invalid. At the date of Ex. 1 all that the appellant had, if she had it, was a chance of getting Krishnammal's sale deed set aside. That is not property nor can the omission of such a right of action be held to diminish from the entirety of the surrender. Besides it is not established that the property belonged to the estate of Subba Rao and the respondent has argued that the property belonged to Hanumantha Rao. However that may be, the appellant's argument fails.

The appellant's third and the last point is that the surrender deed Ex. 1 was brought about as a result of fraud or misrepresentation or threats employed to a helpless widow who was overcome by them. This is perhaps the weakest point in the appellant's case. (After examining the evidence, his Lordship held that the allegations of threat, fraud and misrepresentation are groundless,

and proceeded). If we look at the appellant's conduct it leads to the same result. For practically the whole period of 12 years she was content and took no steps to disown or dispute Ex. 1. Apparently her father-in-law and his brother who had been witnesses in Ex. 1 would not be parties to any such enterprise. Thereupon almost on the last day of the 12th year and obviously to prevent the appellant having herself to go to Court and set aside her own act, some ingenuous mind conceived the idea of getting up an adoption for that purpose. The result was the adoption immediately followed by another surrender deed of the same properties and this suit.

Under these circumstances we have no hesitation in agreeing with the learned Judge that the surrender is not open to attack on any of the grounds set up by the appellant. It is not disputed that unless he can do so the issue on adoption need not be gone into. The appeal is dismissed with costs of respondent 1 (defendant 3). The appellant should pay the court-fee due to Government.

K.S.

*Appeal dismissed.***A. I. R. 1933 Madras 862**

CURGENVEN, J.

Thota Chenna Kesavulu and others—
Petitioners.

v.

*Thota Veeraswami and others—*Opposite Parties.

Civil Revn. Petn. No. 736 of 1931, Decided on 7th December 1932, against order of Dist. Munsif, Tenali, D/- 10th February 1931.

(a) Civil P. C. (1908), Sch. 2, para. 3 (1)—Reference to arbitration through Court—Scope of enquiry is scope of suit—Neither arbitrator can exceed his duties nor Court has jurisdiction to pass decree in terms of award where arbitrator has so exceeded.

Where a dispute is referred to arbitrators through the Court, the scope of their enquiry is the scope of the suit itself as disclosed by the pleadings and they have no jurisdiction to extend it either as regards the subject matter or the persons affected by it. Both the arbitrators who so exceed their duties and the Court itself which nevertheless passes a decree in terms of the award are acting in excess of their jurisdiction: *A I R 1925 P C 293* and *A I R 1926 Mad. 201 Rel on.* [P 864 C 1, 2]

(b) Civil P. C. (1908), Sch. 2, para. 3—Partition suit referred to arbitration—Compromise without Court's sanction consented to by guardians on behalf of minors and accepted by arbitrators—Such guardians

cannot subsequently plead that consent will not affect minor's rights.

Where a partition suit is referred to arbitration and the arbitrators accept a compromise consented to by all the parties and by the guardians on behalf of the minors but without sanction of the Court, the absence of the Court sanction does not render a decree passed on the compromise void, but only voidable at the option of the minor; and no other party can call it in question except the minor on attaining majority or before then through a next friend. Hence the guardians, who had consented to it cannot subsequently plead that their consent will not affect the right of the minors: *A I R 1931 Cal 211* and *29 Cal 167, Ref.* [P 864 C 1]

(c) Civil P. C. (1908), Sch. 2, para 15—All arbitrators not functioning at hearing—Objection not taken and merits of award not affected thereby—Order confirming award is not open to revision.

Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such award is not open to revision on this ground. [P 864 C 2]

P. Satyanarayana Rao—for Petitioners.

G. Lakshman, G. Chandrasekara Sastri, K. Kottayya, V. Krishna Mohan, J. Sambasiva Rao and N. V. Shiva Rao—for Opposite Parties.

Judgment.—This civil revision petition is presented against an order of the District Munsif of Tenali confirming an award passed in O. S. No. 450 of 27 on his file, dismissing the objections of the petitioners, who are defendants 4, 6, 7 and 8, and making the award a decree of the Court. The plaint stated that one Thota Sitaramayya had seven sons of whom the four eldest were respectively defendant 1, plaintiff, and defendants 2 and 3. Defendant 3 died pending suit. The remaining three sons had died at earlier dates, Kotayya the 5th son leaving defendant 4 a minor, Sriramulu the 6th son leaving three minor children, defendants 5 to 7, and Raghavalu the 7th and last son leaving a widow defendant 8. In 1912 Sitaramayya, according to the plaint, made an incomplete or provisional partition. The property we are concerned with consisted of land and outstandings. Of the land he allotted about 20 acres to each of his sons, reserving a small amount of about 5 acres (shown as Sch. A in the plaint) in his own hands. His intention was, that later on any inequalities in this partition should be rectified as far as possible from this Sch. A land and, if any member was then found to possess an excess, that he should pay for it into

a common fund at the rate of Rs. 500 per acre. He kept control of the outstandings until the time of his death in 1919, when the plaint alleges an arrangement according to which Kotayya, the 5th son, and Sriramulu, the 6th son, undertook the management of this property. The suit was filed to obtain a permanent division of the land by the method laid down by Sitaramayya and to secure a partition of the outstandings, an account to be taken of sums alleged to have been appropriated by the two managing brothers during the time of their management.

After issues were framed an application was made and granted to refer the dispute to five arbitrators who in due course passed an award. A number of objections were taken to this award before the lower Court. The main objection pressed in this Revision Petition is that both as regards the division of the land and of the outstandings the arbitrators went beyond the terms of their reference and therefore beyond their jurisdiction.

I will deal first with the question of the outstandings. It is necessary to ascertain what were the nature and extent of the claim with regard to these preferred in the plaint and raised by the issues. The matter concerns the legal liability to account on the part of the 5th and 6th sons, Kotayya and Sriramulu. The contention of the petitioners is that such liability even according to the plaint only arose when upon the death of Sitaramayya they assumed management of the property. The arbitrators on the other hand have gone back into the period of Sitaramayya's lifetime and have taken into consideration a number of instances in which payment of debts was received by these two sons, some of them even going back to the period before the division of 1912. It is objected, and I think rightly, that the arbitrators had no warrant upon the pleadings and the issues framed by the Court to adopt this course; a course which, it may be said in passing, has cast very heavy liabilities upon the minor children of these two deceased sons. The plaint appears to me to show clearly that there was no intention to extend the liabilities in this manner. In para. 4 it is stated that Sitaramayya kept the promissory notes and other

documents as per Sch. B and retained them in his possession. In para. 5 it is stated:

"As regards the B schedule notes and documents he (i. e., Sitaramayya) was collecting the debts, getting renewals of the documents, lending moneys at interest, with the idea of augmenting them and discharging debts with the assistance of Chinna Kotayya, the father of defendant 4, and Sriramulu the father of defendants 5, 6 and 7, who were his educated sons, and had knowledge of accounts and business."

There is not a word in the plaint to suggest that Sitaramayya was not fully competent to keep the control of this business in his own hands or that his sons behaved during his lifetime in any such manner as would render them liable as de facto managers. It is then expressly stated that upon the father's death these two sons, who had been managing these affairs until then and had knowledge of them, should manage the Sch. A and B properties and keep accounts regularly and show them to the others until the properties were partitioned; and that according to this arrangement the two brothers took possession of the notes and documents and were managing them. All that the plaint alleges further is that after their deaths their widows, the mothers of the minor children, had been making attempts to appropriate the money. The issue framed by the Court upon this question is the third, "who managed the joint properties after the death of Sitaramayya"? and it is significant that the issue was framed in this form although the defence set up was that the two eldest sons, defendant 1 and the plaintiff, and not Kotayya and Sriramulu, had been throughout in management on the property. When the case went to the arbitrators they framed their own issues, but this issue was reproduced practically verbatim as the fourth. Notwithstanding that the scope of the enquiry was clearly defined in this manner, the arbitrators proceeded to make enquiry as to the member of the family who had in fact received payment of each outstanding, over a period which extends from 1906 onwards. To take as an instance the debts alleged to have been collected by Kotayya, the father of defendant 4, there are eleven such debts shown as collected by him during Sitaramayya's lifetime, 3 in 1906, 1 in 1908, 4 in 1910, 2 in 1911 and 1 in 1918.

All but one of these relate, it will be seen, to the period before the 1912 partition. There is a twelfth debt shown as collected in 1921. To each sum thus collected interest at 6 per cent has been added from the date of realisation, the whole amount of principal being Rupees 4,852-7-5 with interest amounting to no less than Rs. 7,225-6-3, in all Rupees 11,577-13-8, which has been debited against the minor son of the deceased man. I am not however specially concerned to inquire into the merits of the arbitrators' decision except for the purpose of considering whether this Court will be justified in interfering in revision. It is enough to say that I am quite satisfied that in so far as they have burdened the children of these two deceased brothers with responsibility for acts done by them before their father's death they have gone beyond the due scope of their inquiry. I am wholly unable to follow the learned District Munsif when he says that upon the pleadings it is perfectly clear that the arbitrators were authorised to take into account the management of the property by these two brothers while their father was still alive. It seems to me patent from the terms of the plaint that the plaintiff never contemplated any such course.

It is well enough settled that where a dispute is referred to arbitrators through the Court the scope of their inquiry is the scope of the suit itself as disclosed by the pleadings and that they have no jurisdiction to extend it either as regards the subject-matter or the persons affected by it. The leading case in this country is the Privy Council judgment in *Ram Pratap Ghamria v. Durga Prasad Chamria* (1), a case which related not only to the inclusion by the arbitrators of a person not a party to the suit but also the settlement of certain questions neither raised nor foreshadowed in the plaint. When a reference is made by the Court under the second schedule to the Code of Civil Procedure,

"It is incumbent," their Lordships say, "upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is, their Lordships cannot doubt, an award which is 'otherwise invalid' "

1. A I R 1925 P C 293=92 I C 633=53 I A 1=53 Cal 253 (P C).

and which may accordingly be set aside by the Court under para. 15 of the same schedule."

Nor can there be any doubt that both the arbitrators who so exceed their duties and the Court itself which nevertheless passes a decree in terms of the award are acting in excess of their jurisdiction. This has been held by a Bench of this Court in *Ramaswami Chettiar v. Venkatarama Aiyar* (2), a case which like the present one arose upon an application in revision. Mr. Lakshmanan for the respondents has argued that the proceedings of arbitrators must not be subjected to too strict a test and that it is enough if they have followed the general purport of the pleadings loosely construed. I do not think that the mere application of a lenient standard will suffice here to enable me to find that the arbitrators have acted within their jurisdiction. And it was all the more necessary that they should have scrupulously adhered to the terms of their reference in this case, because they were dealing with the alleged liability of men now dead and represented only by minor children in the guardianship of their mothers. For these reasons I think both that this Court has a right to interfere in revision and that it ought to do so.

With regard to the partition of the land, I have already set out the arrangement which according to the plaint was proposed by Sitaramayya. Here again the arbitrators have not proceeded according to the plaintiff's version of what had to be done, but in lieu of arranging for the payment of Rs. 500 per acre for any excess, they have taken land from some of the defendants and given it to others. Thus 2'30 acres have been taken from defendant 4 and 0'94 acres from defendants 5 to 7. The explanation given for this departure is that all the parties consented to it. If there were no minors involved this would no doubt dispose of the objection, because it was perfectly competent to the parties to compromise upon this matter and for the arbitrators to accept the compromise. It was not however open to them to accept the consent of the guardians of the minors without the sanction of the Court accorded under O. 32, R. 7, Civil P. C. A further point has been raised that the guardians did not in fact really

2. A I R 1926 Mad 201=91 I C 745.

consent but, however suspicious the circumstances may appear, the lower Court has found upon this point that the consent was given and I am bound by that finding. I think there is no doubt that the award upon this point is vitiated by the circumstance that it departs from the pleadings and is not cured by the valid consent of all parties. But I do not think that the very guardians who are found to have given their consent, can now come forward, as they do, and plead that that consent will not affect the rights of the minor defendants. An objection of this character has been considered in *Golenur Bibi v. Abdus Samad* (3). In that case, which was also a case of arbitration, some guardians who entered into agreements subsequently turned round after the award was made and preferred an appeal against it. It is pointed out that the absence of Court sanction does not render a decree passed upon a compromise void, but only voidable at the option of the minor and that no other party can call it in question except the minor, either on attaining majority or before then through a next friend. It is observed that in the Privy Council case in *Ghulam Khan v. Muhammad Hassan* (4), one of the grounds taken against the decree was that the guardian of the minors had agreed to refer without the Court's leave and yet their Lordships firmly put aside the contention that an appeal would lie. I do not think that upon the application of the guardians in revision I ought to set aside this part of the award upon the ground contended for.

The only other point relates to the number of arbitrators who functioned at the hearings. It is true that on many occasions only three of the five arbitrators took part, but no exception was taken to this at the time and the matter is not one, in my view, which should form a basis for revision, no ground being given to suppose that the merits of the award were thereby affected. Under R. 14 (a), Sch. 2, Civil P. C., the Court may remit any matter referred to arbitration to the re-consideration of the same arbitrator or umpire where the award determined any matter not referred to arbitration, unless such matter

can be separated without affecting the determination of the matters referred. The portion of the award which deals with Sch. B is separable from that relating to the land, but the component parts of 'Sch. B itself are not separable. I think therefore that the only course is to refer for re-consideration the portion of the award relating to the outstandings, leaving the remainder as it stands. So far as the order of the lower Court relates to this part of the award, I must hold it is without jurisdiction and set it aside and direct it to pass an order in accordance with law. The respondents will pay the petitioner's costs of this petition.

P.R.S /K.S.

Order accordingly.

A. I. R. 1933 Madras 865

MADHAVAN NAIR, J.

Pyda Ramakrishnayya Garu and another—Plaintiffs—Appellants.

v.

Kuchipudi Naganna and others—Defendants—Respondents.

Civil Revn. Petns. Nos. 921 of 1931 and 231 of 1930, Decided on 30th August 1933, from order of Deputy Collector, Kovvur, D/- 30th January 1931.

Madras Estates Land Act (1 of 1908), Ss. 189 and 192—S. 192 relates only to procedure and does not extend jurisdiction conferred upon Revenue Courts by S. 189—Revenue Court has no jurisdiction to try suit under O. 21, R. 63, Civil P. C.—Civil P. C (1908), O. 21, R. 63.

The section that confers jurisdiction on the Revenue Court to hear suits and applications is S. 189; and suits and applications which a Revenue Court can hear and determine are specified in parts A and B of the schedule. S. 192 has nothing to do with the jurisdiction of a Court to hear and determine applications. It relates to procedure. It does not extend the jurisdiction to hear and determine suits and applications conferred upon the Revenue Court by S. 189. Hence a Revenue Court has no jurisdiction to try a suit under O. 21, R. 63: *AIR* 1928 *Mad* 360 and *AIR* 1932 *Mad* 716, *Rel. on.*; *AIR* 1928 *Mad* 360, *Expl.* [P 866 C 2]

P. Somasundaram—for Appellants.

K. Venkatarama Raju—for Respondents.

Judgment.—This is a petition to revise the order of the Deputy Collector of Kovvur returning the plaint filed by the petitioners in the Revenue Court for presentation before a civil Court having jurisdiction.

The facts are briefly these: In Summary Suit No. 100 of 1926, the petitioners obtained a decree against the

3. *A I R* 1931 *Cal* 211=130 *I C* 209=58 *Cal* 628.

4. (1902) 29 *Cal* 167=29 *I A* 51=6 *C W N* 226=8 *Sar* 154 (P C).

pattadars holding lands under patta No. 125 of the village of Annadevarapeta. A portion of the lands had come into the hands of respondent 1 by purchase on 6th June 1929. In execution of their decree the petitioners attached these lands and then respondent 1 put in a claim petition objecting to the attachment under O. 21, R. 58, Civil P. C. Respondent 1's claim after inquiry was allowed by the Revenue Court on 11th October 1929. Before the expiry of a year from that date the petitioners filed a suit under O. 21, R. 63, Civil P. C., for the establishment of their claim to the property in dispute. This suit was filed before the Revenue Court. Objection was taken that under S. 189, Madras Estates Land Act, the Revenue Court has no jurisdiction to entertain suits of this nature and that the plaint should be presented before a civil Court. This objection was upheld by the Deputy Collector and he returned the plaint for presentation before a civil Court having jurisdiction. The present civil revision petition is to revise this order of the Deputy Collector. The section of the Madras Estates Land Act which gives jurisdiction to the Revenue Court to hear applications and suits is S. 189. Under Cl. (1) of the section:

"A Collector or other Revenue Officer specially authorized under this Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the schedule and no civil Court in the exercise of its original jurisdiction shall take cognisance of any dispute or matter in respect of which such suit or application might be brought or made."

It is conceded that a suit like the present one to establish the right to attach property is not included in Part A of the schedule which specifies the suits triable by the Revenue Court. What is argued on behalf of the petitioners is that S. 189 only lays down a bar on the civil Courts against trying the suits mentioned in Sch. A and does not say that these are the only suits that can be tried by the Revenue Courts. In support of this contention reliance is placed on S. 192 of the Act. Under this section the provisions of the Civil Procedure Code excepting a few are made applicable to proceedings under the Madras Estates Land Act. Under Cl. (a) of the section the provisions of O. 21 excepting a few rules, Rules Nos.

83, 89 and 91, apply to proceedings in execution of rent decrees. It was held in *Venkatarayudu v. Maharaja of Piltapuram* (1), that a claim petition under O. 21, R. 58, Civil P. C., can be entertained in a Revenue Court in proceedings in execution of a rent decree in such Courts when such decree is not in the nature of a mortgage decree but only a money decree: see also *Suryanarayana v. Ramachandrudu* (2). An application under O. 21, R. 58, is not mentioned specifically as one of the applications triable by the Revenue Court in S. 189, Part B of the schedule. Mr. Somasundaram argues by analogy that if a Revenue Court can entertain an application which does not fall within the applications mentioned in Part B of the schedule, it can also hear a suit though that particular suit is not mentioned in Part A of the schedule as a suit triable by the Revenue Court. This argument is based upon a confusion between the scope of S. 189 and S. 192, Estates Land Act, and cannot be accepted. The section that confers jurisdiction on the Revenue Court to hear suits and applications is S. 189; and suits and applications which a Revenue Court can hear and determine are specified in Parts A and B of the schedule. S. 192, Estates Land Act, has nothing to do with the jurisdiction of a Court to hear and determine applications.

It relates to procedure. It lays down what procedure shall be followed by a Revenue Court under the Estates Land Act in hearing and determining suits, applications, etc., which it has jurisdiction to hear and determine. That section does not in any way enlarge the scope of the jurisdiction conferred upon the Revenue Court under S. 189. It simply deals with the procedure to be followed by the Revenue Court and does nothing more. As contemplated by the Estates Land Act, an application under O. 21, R. 58, Civil P. C., is not a substantive application like the applications mentioned in Part B of the schedule but it is only a provision relating to procedure which should be followed when the Revenue Court has to hear and determine suits, appeals or other proceedings under the Act. I do not

1. AIR 1928 Mad 360=106 I C 663=51 Mad 774.

2. AIR 1932 Mad 716=139 I C 452.

think that the decision in *Venkatarayudu v. Maharaja of Pittapuram* (1), can be understood as an authority for holding that by force of S. 192, Estates Land Act, an application not included in the list of applications mentioned in Part B of the schedule is made triable by the Revenue Court. In my opinion that S. 192 does not extend the jurisdiction to hear and determine suits and applications conferred upon the Revenue Court by S. 189, Madras Estates Land Act. This argument should therefore be overruled.

The next argument is that since a suit under O. 21, R. 63, Civil P. C., is only a continuation of a proceeding under O. 21, R. 58, Civil P. C., according to certain decisions, a Revenue Court which can entertain an application under O. 21, R. 58, on general principles may be said to have jurisdiction also to try a suit under O. 21, R. 63. The reply given to the first argument is a sufficient answer to this also. Whatever be the nature of the present suit, since the present suit admittedly is not included in Part A of the schedule as one of the suits triable by the Deputy Collector, the Revenue Court can obviously have no jurisdiction to hear it. It therefore follows that the plaint was rightly returned by the Deputy Collector for presentation to a civil Court having jurisdiction. The civil revision petition is accordingly dismissed with costs.

C. R. P. 231 of 1930. — This petition is to revise the order of the Deputy Collector allowing the objection of respondent 1 to the attachment of the portion of the land under patta No. 125 purchased by him. As the petitioners have a remedy by way of a suit and as the suit has been filed in time, there is no point in proceeding with this petition. This petition is therefore dismissed but without costs.

P.R.S./K.S. *Petitions dismissed.*

* A. I. R. 1933 Madras 867

WALSH, J.

(Chivukula) Venkatanarasimham—Defendant—Appellant.

v.

(Boggavarapu) Subba Rao—Plaintiff—Respondent.

Second Appeal No. 351 of 1929, Decided on 23rd March 1933.

(a) Hindu Law—Debts—Legal necessity—Adults joining in execution—Evidence of circumstances of need for borrowing—Lender making reasonable inquiries—Lender need not see to actual opening.

Where all the adult members of a joint Hindu family join in execution of a deed of transfer, and there are circumstances showing that family may have been in need of borrowing money at the time, and there is evidence that the lender made reasonable inquiries as to necessity of loan, law does not require the lender to satisfy himself that money which he advanced was actually spent for the purposes, and the debt will be binding on the minor members. [P 868 C 2]

*(b) Hindu Law—Debts—Legal necessity—Adult members joining in execution of deed admitting legal necessity—No presumption of legal necessity arises.

There is no presumption of legal necessity arising from all the adult members joining in execution of a deed of transfer and admitting necessity therein. The fact alone cannot supply the evidence of legal necessity when there is no evidence of legal necessity on record: *A I R 1930 All 319, Foll*; *A I R 1925 All 28*; *A I R 1929 All 205*; *8 Bom 602* and *16 I C 411 Ref.*

[P 868 C 2]

P. Somasundaram—for Appellant.

A. Satyanarayana—for Respondent.

Judgment.—The suit was on a hypothecation deed executed by defendants 1, 3 and 4 in favour of the plaintiff. Defendant 1 is the father of defendants 2 to 4. Defendant 2 was a minor at the date of the deed. The trial Court passed a decree and defendant 2 appealed, his contention being that his share was not liable. This contention was dismissed by the learned Subordinate Judge. Hence the second appeal. The deed in question was taken for Rs. 600 to discharge miscellaneous debts incurred for the marriage of defendant 4 and for the expenses of the joint family. Defendant 1 in his written statement admitted that the loan was for the above purposes but examined as D. W. 1 he threw over his written statement and his evidence has been rightly disregarded by both the Courts. The plaintiff himself gave evidence and also examined other witnesses to show the circumstances under which he lent the money and that he made reasonable inquiries. Defendant 1 tried to make out that the marriage was twelve months before the date of Ex. A, but the trial Court found that it took place only one month before the date of Ex. A, and this view has not been dissented from in the confirming judgment of the lower appellate Court. P. W. 1 stated that defendant 1's brother-in-law Venkataramaniah who had been a clerk

under the plaintiff for about 12 years stated that the loan was required by defendants 1, 3 and 4 for the purposes stated. It was sought to be argued that the learned Subordinate Judge decided the question not on proof of proper inquiry as to the necessity for the loan by the plaintiff but on a legal presumption arising from the fact that all the adult male members of the family, i.e., defendants 1, 3 and 4 made this representation to the plaintiff. That I think is not a correct view of the judgment. In para. 3 the learned Subordinate Judge says :

"There is also some evidence that the plaintiffs' clerk who was also the mortgagor's brother-in-law represented to the plaintiffs' son P. W. 1 that there was necessity for the borrowing."

After quoting the law as laid down in *Hanooman Persaud Panday v. Mt. Baboo Munraj Koonweree* (1), he says :

"The present question is whether plaintiff's case will come under the test laid down by their Lordships. There is evidence of P. Ws. 2 and 3 (P. Ws. 2 and 3 here is a mistake for P. Ws. 1 and 2 but that is immaterial) that plaintiffs' son made some inquiry as to the necessity for the loan of the mortgagors, defendants 1, 3 and 4, and that he also satisfied by questioning his brother-in-law Venkataramaniah whether such necessity existed. (It was plaintiffs' son who actually advanced the money.)"

As I said above, the evidence is all on one side because the only evidence called by the defendants is that of defendant 1 which has been rightly rejected by both the Courts as contradicting his written statement. Again in para. 5 before he begins to discuss the presumption arising from the adult members admitting the necessity, the learned Judge states:

"There is some independent inquiry in that their brother-in-law corroborated their statement as to their needs and necessities."

It is therefore not correct to say that the learned Subordinate Judge has decided the case simply on the alleged presumption arising from the adult members admitting necessity. As regards this presumption the case he quotes, *Bhagwan Das v. Allan Khan* (2), is the decision of a single Judge of the Allahabad High Court which has been dissented from by another single Judge of the same Court in *Bhagwat v. Salamat Khan*, A. I. R. 1929 All. 205, and the decision of the latter was approved in appeal by

1. (1854-57) 6 M I A 393=18n WR81=2 Suther 29=1 Sar 552 (P C).

2. AIR 1925 All 28=78 I C 649.

a Bench in *Salamat Khan v. Bhagwat* (3). There remains however *Balvant Santaram v. Bahaji* (4), is also a Bench decision, and there is a remark in *Ramayya v. Perayya* (5) by this Court that :

"the District Judge was at liberty to attach such weight to the recital as he thought fit. It might have been open to him in his discretion to make a presumption in favour of the creditor."

It is not really necessary to go into the question as to whether or not when there is no other evidence this presumption would by itself be evidence and throw the burden on the defendant because even *Salamat Khan v. Bhagwat* (3) only lays down that although the fact that all the adult members of a joint Hindu family joined in the execution of a deed of transfer is sufficient to supply any lacuna that may exist in the evidence of legal necessity, that fact alone cannot supply the evidence of legal necessity when there is no evidence of legal necessity on the record. Here there is certainly evidence, one very strong point being that the marriage had just taken place for which the money had been borrowed. There was also evidence that the lender made reasonable inquiries. The law does not require him to satisfy himself that the money which he advanced was actually spent for the purpose. There was evidence to justify the finding of fact of the lower appellate Court and I cannot interfere in second appeal. The appeal fails and is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

3. AIR 1930 All 379=131 I C 608=52 All 499.

4. (1884) 8 Bom 602.

5. (1912) 16 I C 411.

A. I. R. 1933 Madras 868

PANDALAI, J.

S. Narayana Nadar—Plaintiff—Appellant.

v.

Arunachala Nadar and others—Defendants—Respondents.

Second Appeal No. 385 of 1929, Decided on 10th April 1933, from decree of of Sub Judge, Tinnevely, in A. S. No. 53 of 1928.

Civil P. C. (1908), S. 11—Suit by endorsee of promissory note against maker and endorser—Maker denying execution of note—Endorser admitting receipt of consideration but pleading that he is unnecessary party—Court upholding maker's plea and dismissing suit as against endorser on ground that

there was no cause of action disclosed against him in plaint — Subsequent suit against endorser is not barred by res judicata.

An endorsee of a promissory note sued both the maker of the note and endorser, and sought a decree against both. The maker denied the genuineness of the note and the endorser, while he admitted receipt of consideration from the endorsee (the plaintiff) for the endorsement, pleaded that he was an unnecessary party to the suit and that no decree should be passed against him. The Court found that the note was not executed by the alleged maker, that the endorser received consideration, which fact was admitted by him, but that there was no cause of action against the endorser and dismissed the suit as against both, mentioning that the remedy, if any, of plaintiff against endorser was to file a separate suit. When plaintiff filed a separate suit against the endorser, it was contended that it was barred by res judicata:

Held: that the decision of the Court in the prior suit was wrong but binding on the parties and that as the liability on the endorsement was never heard and decided in that suit, the present suit was not barred by res judicata: *AIR 1925 P C 55, Dist.* [P 869 C 2]

Ch. Raghava Rao, D. Krishnaswami and Ed Israil—for Appellant.

G. A. Chellaiya Nadar—for Respondents.

Judgment.—The plaintiff appeals from a decree dismissing his suit on the preliminary ground that his claim is res judicata by the decision in a previous suit (O. S. No. 574 of 1924) in the Court of the District Munsif of Tenkasi.

That suit was brought by the present plaintiff as endorsee of a promissory note executed by one Lakshmana Nadar—not now a party—to Arunachala Nadar, the present defendant 1, and endorsed by defendant 1 to the plaintiff. He sued both the maker of the note and endorser and sought a decree against both. The maker denied the genuineness of the note and the endorser, while he admitted receipt of Rs. 1,768 from the endorsee (the plaintiff) for the endorsement, pleaded that he was an unnecessary party to the suit and that no decree should be passed against him. The District Munsif found that the note was not executed by the alleged maker, that the present defendant 1, (then defendant 2) the endorser, received consideration, which in fact was admitted by him but that there was no cause of action against the endorser. In para. 16 he dealt with the second issue, which was whether defendant 2 was liable for the claim and said that:

“There is absolutely no cause of action against

defendant 2. In the plaint it is merely stated that in case the money is not recovered from defendant 1, defendant 2 is liable for the same as he transferred the promissory note to the plaintiff. The cause of action against defendant 2 will only arise on the date of the transfer and not on the date of the promissory note. In my opinion the plaint does not disclose any cause of action against defendant 2. The plaintiff's remedy, if any, is only to file a separate suit. I therefore find that defendant 2 is not liable for the claim on the promissory note.”

In short, the District Munsif quite wrongly, of course, held that in that suit on the promissory note the present plaintiff could not sue on the endorsement of a later date but must bring another suit on it. On that ground the plaintiff's suit was entirely dismissed. Both the lower Courts now hold that this decision being on the preliminary point that this plaintiff's claim could not be then heard, does not matter, as the suit was eventually dismissed and therefore irrespective of this ground of dismissal the plaintiff cannot sue again. For this, the remarks of Lord Phillimore in *Fateh Singh v. Jagannath Baksh Singh* (1), are quoted by the District Munsif and other equally inapplicable authorities are quoted by the learned Subordinate Judge. The truth of the matter was that the District Munsif in the former case instead of hearing and deciding the case before him, refused to do so on what he considered to be a preliminary point, that there was no cause of action for the plaintiff to enforce the endorsement in that suit, but he must sue again. However wrong that decision was—undoubtedly it was quite wrong—it is binding between these parties and it is clear that the liability on the endorsement was never heard and decided. That is sufficient to dispose of the ground on which the suit has been dismissed.

The decrees of both the lower Courts are reversed and the suit must be remanded to the District Munsif to be disposed of according to law. The appellant will have refund of the court-fees in this Court and will get his costs in the lower appellate Court and in this Court irrespective of the final result of this suit. The District Munsif will provide for the costs incurred in his Court in the revised decree to be passed.

P.R.S./K.S.

Suit remanded.

1. *AIR 1925 P C 55=91 I C 280=52 I A 100=47 All 158 (P C).*

A. I. R. 1933 Madras 870

PANDALAI, J.

S. P. S. R. Subramania Ayyar—Plaintiff—Appellant.

v.

C. Bomer Cooty Haji — Defendant — Respondent.

Appeal No. 186 of 1931, Decided on 21st April 1933, against order of Sub-Judge, Cochin, D/- 10th December 1930.

Civil P. C. (1908), O. 11, Rr. 14 and 21—Plaintiff's non-compliance with order under O. 11, R. 14 does not warrant dismissal of suit.

The non-compliance with an order under O. 11, R. 14 for the production of certain documents by the plaintiff does not warrant dismissal of suit for want of prosecution under O. 11, R. 21 : *A I R 1924 Mad 582, Foll; A I R 1922 All 235, Ref.* [P 870 C 1]*G. Ramakrishna Ayyar* — for Appellant.*B. Pocker*—for Respondent.

Judgment.—The plaintiff appeals from an order expressly made by the learned Subordinate Judge of Cochin under O. 11, R. 21, Sch. 1, Civil P. C., dismissing his suit for want of prosecution on the ground that the plaintiff had contumaciously refused to produce certain documents which he had been ordered to produce. From the terms of the Judge's order as well as from the previous orders for production which are on the record, there is no doubt that those orders were passed under O. 11, R. 14 and that respondent-defendant 1 applied for orders under that provision. This being so, it would be enough to dispose of this appeal to say that the learned Judge had no authority to dismiss the plaintiff's suit for disobedience of an order under O. 11, R. 14. That was decided so far as this Court is concerned in *Subbayyar v. Ramanathan Chettiar* (1) which followed a decision of the Allahabad High Court in *Lyallpur Sugar Mills Co. Ltd. v. Ram Chandra Gur Sahai Cotton Mills Co. Ltd.* (2). I should have been content to set aside the learned Judge's order on this short ground and send the case back for disposal according to law if it had not been that the learned Judge's order shows that he felt that his orders repeatedly made had been systematically defied and that nothing less than the dismissal of the suit would satisfy the ends of justice. I have made a study of the

1. *A I R 1924 Mad 582=77 I C 766.*2. *A I R 1922 All 235=67 I C 75=44 All 565.*

orders passed and I have come to the conclusion that the plaintiff did not either systematically or otherwise disobey any order to which the penalty attached to O. 11, R. 21 could be attracted. (After carefully setting out the circumstances and facts, his Lordship proceeded.) I have thought it necessary to set out these facts only out of respect to the learned Judge and to the feelings which apparently he had come to entertain that a litigant in his Court deliberately disobeyed the order of the Court and flouted its authority. As I understand the facts, the plaintiff fully complied with and carried out the orders passed on the first two petitions, I. A. Nos. 152 and 252 of 1930. He also partly carried out a part of the order on I. A. No. 334 of 1930 by producing 197 chits which was all he could collect in the time. As to his not producing the other account books, the short answer is that there were no other account books that related to the transactions between the parties, and the plaintiff cannot reasonably be blamed for resisting an order that he should produce note books relating to transactions between the parties, but absolutely unconnected things with which the defendant had nothing to do. I feel that if the learned Judge had understood this he would not have passed the order and he would have recognized that there was nothing really and substantially disobedient in the omission of the plaintiff to produce irrelevant account books. The learned Judge's order is partly due to this. The only other records not produced are the remaining chits, letters, pronotes etc. So far as this disobedience is concerned, in my opinion, it was not real disobedience.

The plaintiff produced 197 chits. How many more he had no one can now say because he did not have time to pick up the rest. It is not permissible to a party to excuse the disobedience of an order to produce documents to take shelter under the view that the order itself is wrong, unless the order is set aside by the superior Court. Every litigant is bound to the best of his power to carry out orders made. That was not the ground on which the plaintiff sought to excuse himself. He did obey the order, and for the documents which were not collected he asked for time

and he also asked for time to come to this Court, both of which were practically refused. It was impossible for the plaintiff to produce at Cochin chits, letters, pronotes, etc., which had passed between the parties during a whole year after picking them up and collecting them at Quilon, a hundred miles away, in four days after the order, and I feel that if the learned Judge had realised the impossibility of carrying out the order which he made he would not have made it. I therefore think that there was no such contumacious disobedience on the part of the plaintiffs as to any part of the order on I. A. No 334 of 1930 as should in any case entail the extreme penalty for a plaintiff litigant, namely, that his suit should be dismissed.

But as I said, the learned Judge's order fails on the preliminary ground that he had no power to make it under the provisions of law under which he purported to act. The learned Judge's order is set aside and the suit will be sent back to be restored to its original number on the file and disposed of according to law as against defendant-respondent 1. The appellant will have his costs of this appeal from defendant-respondent 1.

P.R.S./V.B.

Appeal allowed.

A. I. R. 1933 Madras 871

PANDALAI, J.

Alluri Suranna and others—Defendants—Appellants.

v.

Chedalvadu Subbarayudu and others—Plaintiffs—Respondents.

Second Appeal No. 527 of 1931, Decided on 21st March 1933, against decree of Sub-Judge, Ellore, in A. S. No. 173 of 1929.

(a) **Possession—Possession will be presumed by person having title if property is not capable of actual or effective enjoyment by taking produce.**

If the plaintiff is entitled to immovable property and possession thereof and the property sued for is such that actual or effective enjoyment of it by taking produce is not possible, possession will be presumed to be with the person who has the title : *A I R 1931 Mad 644, Ref.*

[P 872 C 1]

(b) **Hindu Law—All members of joint family parting with their rights to joint family property—Question between alienees is not one between coparceners.**

When all the members of a joint family have parted with their rights in a specific pro-

perty of the family, questions between the alienees of the several members are not questions between coparceners : *34 Mad 269 (F B), Ref.*

[P 872 C 2]

K. Venkatarama Raju—for Appellants.

K. Venkatarama Rao—for Respondents.

Judgment.—Defendant 6, and representatives of the deceased defendants 5, hereinafter referred to as defendants 5 and 6 and persons claiming under them, are the appellants. The suit was brought for partition and separate possession of one-fourth share of a plot of land described as pati site and said to be roughly 11,000 odd square yards in extent, which had been the property of a family of zamindars of which the surviving representatives are defendants 1, 2, 3 and 4, and of whom according to the plaintiff's case defendant 1 was entitled to one-half of the property, defendant 2 to one fourth and defendants 3 and 4 to the other one-fourth. They claimed to have purchased the share of defendants 3 and 4 from their father by a sale deed of 1901. Defendants 5 and 6, who were the principal contesting defendants, contended that defendants 3 and 4 were not entitled to any share of the property at all, but that defendant 1 was entitled to one-half and defendant 2 to the other half and that by two sale deeds of 1915 and 1920 they (appellants-defendants 5 and 6) had become entitled to both the halves and they also pleaded that the plaintiff had not been in possession of his alleged share within 12 years of the suit. The principal issues were the first three, namely:

- “1. Has the plaintiff title to the suit site?
2. Has the plaintiff possession of the suit site within 12 years before the date of the suit? and
3. Is the suit in time?

On issue 1 as to title, both the lower Courts have concurrently found that defendants 3 and 4, the plaintiff's vendors, are entitled to one-fourth share and I have heard nothing from the appellant's learned advocate how this can be attacked. On the question of possession, the District Munsif held that the plaintiff being the purchaser from a co-parcener in an undivided Hindu family was not entitled as such to possession of any share of the alienated property and that in any case the plaintiff had not shown that he was in pos-

session of the share sued for within 12 years of the suit. He dismissed the suit. The learned Judge on appeal was inclined to take the same view as to the nature of the plaintiff's purchase, that it was from a co-parcener in an undivided Hindu family. But he took the view that the plaintiff was entitled to succeed on the ground that the land having been vacant unoccupied site on which no cultivation was done, possession up to within the 12 years' period before the suit must be deemed to have been with the persons who had a title and therefore the plaintiff was entitled to succeed. On this ground he gave the plaintiff a decree as prayed.

In second appeal the principal point argued was one of limitation. The appellant's learned advocate concedes that the article applicable is Art. 142 and that the plaintiff must succeed if he can show title and possession within 12 years before the suit. So far as the question of possession is concerned, it is indisputable that if the plaintiff is entitled to immovable property and possession thereof and the property sued for is such that actual or effective enjoyment of it by taking produce is not possible, possession will be presumed to be with the person who has the title: *Ramanathan Chettiar v. Lakshman Chettiar* (1). The appellants' advocate has attempted to attack both branches of the above conditions. He has attempted in the first instance to show that the plaintiff's right was not to property of which anyone could be in possession but that it was only an equitable right possessed by alienees from co-parceners of a Hindu family who are entitled only to bring a suit for partition and to take such property as is allotted to the alienee. On this point both the lower Courts have contributed to the confusion which has arisen by supposing that there was a case of an undivided family or an alienation by a co-parcener in this case. There is nothing in the plaint or in the written statement which supports the idea that either party considered the plaintiff's purchase as an alienation from a co-parcener.

The plaintiff spoke of the property as jointly in possession of the various sharers. The defendants spoke of its

1. A I R 1931 Mad 644=133 I C 9=54 Mad 622.

possession in divided halves. In either case no question of co-parcenary arose. In any case it is obvious that when all the members of a joint family have parted with their rights in a specific property of the family, questions between the alienees of the several members are not questions between co-parceners: *Iburamsa Rowthan v. Thiruvankataswami Naick* (2). The cases, therefore which hold that alienees from co-parceners have only rights of suit for partition have no application to this case, because it is the case of both the parties that no co-parcener has any subsisting right in the suit property.

The appellants' learned advocate next denied that this property was such as to be incapable of actual enjoyment. That is a question of fact and whether in fact it was incapable of actual enjoyment up till a period within 12 years before the suit was one eminently for the lower appellate Court. It was in evidence that it was only after defendants 5 and 6 bought the property in 1920 that something began to be done upon it in the way of building huts and buildings and that till then it lay vacant or waste. It is open to the lower appellate Court to apply the doctrine of *Ramanathan Chettiar v. Lakshmanan Chettiar* (1), to the case and to infer upon the facts that the plaintiff must be deemed to have been in possession. The second appeal fails and is dismissed with costs.

P.R.S./K.S. *Appeal dismissed.*

2. (1911) 34 Mad 269=7 I C 559 (F B).

A. I. R. 1933 Madras 872

PANDALAI, J.

(Palli) Vittala Hedge—Appellant.

v.

Paniyur Hosamane Sheenappa Shetty—Respondent.

Appeal No. 200 of 1930, Decided on 1st May 1933, from order of Dist. Judge, South Kanara, D/. 10th March 1930.

(a) Civil P. C (1908), S. 39—When Court passes decree and there is decree in appeal therefrom, for all purposes of execution there is only one decree viz., the original decree as amended by appellate Court—It is only this decree that is transferred.

When a Court passes a decree and there is a decree in appeal therefrom and thereafter a petition for execution to the first Court, there is only one decree to be executed, viz. the original decree as amended by the appellate Court. When in such circumstances a petition for transfer of

execution is prayed for to that Court and granted by it, the above decree is the only decree which can be transferred and the transfer cannot be understood as if it were a piecemeal transfer, i. e., a transfer of the original decree and not of the appellate decree. [P 873 C 2]

(b) Limitation Act (1908), Art. 182 — Application otherwise than in accordance with law—Civil P. C. (1908), O. 21, R. 11.

Merely an omission from the execution petitions of the particulars required by Cls. (d) and (g), O. 21, R. 11 (2), Civil P. C., is not sufficient to make them otherwise than in accordance with law. [P 874 C 1]

B. Sitarama Rao—for Appellant.

B. Lakkappa Rai and *K. R. Subramania Iyer*—for Respondent.

Judgment.— The lower Court has dismissed an execution petition by the appellant filed in the Karkal Munsif's Court on 3rd July 1929, to execute his decree made in O. S. No. 875 of 1919 by the Udipi Munsif's Court on the ground of want of jurisdiction and limitation. The learned District Judge was so struck by the irregularities of the execution department in the Subordinate Courts in his district and the careless manner in which that department was being worked by the officers of the Courts as well as by litigants and their advisers that he has passed very strong strictures on what he quite rightly terms the apathy and indifference associated with the execution of civil Court decrees. The justification of these remarks in this execution consists in fifteen applications in execution during a period of five or six years in all of which it seems the particulars required by O. 21, R. 11, Civil P. C., were wrongly entered. The fact of there having been an appeal was ignored with the consequence that the modification effected by that decree was also ignored. In fact the appellate decree deducted about Rs. 30 from the amount awarded by the original decree and reduced it from Rs. 378 to Rs. 347. In these fifteen applications the larger amount was applied for; but no one was hurt because as the learned Judge himself says the judgment-debtor successfully evaded arrest during all the time. The Judge says it is a disgraceful thing that warrants for arrest should be returned unexecuted fifteen times.

At last in Execution Petition No. 411 of 1929 the judgment-debtor was arrested by the Karkal Munsif's Court and then he paid Rs. 300, about half the decree

amount, and raised the objection that in the previous applications the appellate Court decree was not mentioned and a larger amount than was due was prayed for and that he should not be mulcted with the costs of those erroneous petitions. This objection being allowed, that execution petition was dismissed. Then the decree-holder, on 3rd July 1929, filed his last execution petition which gave rise to this appeal, containing correct particulars. The application was again made to the Karkal Munsif's Court, the Court which passed the decree being the Udipi Munsif's Court. The learned Judge has dismissed this petition on two grounds: first that the Karkal Court had no jurisdiction to entertain the petition because the appellate Court's decree was not transferred to that Court but only the original Court's decree; and secondly because the previous applications during a period of four or five years in which only the original Court's decree was mentioned and not the effect of the appeal or the deduction in the decree amount made thereby are not applications for execution in accordance with law and therefore the present petition is time barred.

The learned Judge is wrong on both points. When a Court passes a decree and there is a decree in appeal therefrom and thereafter a petition for execution to the first Court, there is only one decree to be executed, viz. the original decree as amended by the appellate Court. When in such circumstances a petition for transfer of execution is prayed for to that Court and granted by it, as admittedly it was in this case, the above decree is the only decree which can be transferred and the transfer cannot be understood as if it were a piecemeal transfer, i. e., a transfer of the original decree and not of the appellate decree; for the simple reason that there are no two decrees and in the eye of the law there is only one. In accordance with that principle when the Udipi Munsif's Court transferred the execution to the Karkal Munsif's Court and sent the necessary certificates with a copy of the appellate decree which was the governing document which would show the amount due to the decree-holder if read along with the original Court decree, that was a full and complete transfer for all purposes of law. Therefore the point as to the want of jurisdiction fails.

Next as to the previous applications being not in accordance with law, that is founded upon the omission in the earlier applications—there are 15 of them—of any reference to the fact of there being an appeal or of the diminution of the original decree amount in accordance with the appellate judgment. The effect of that was that the particulars (d) and (g) which are required to be contained in every petition for execution by O. 21, R. 11 (2) were erroneous. But that does not mean that the applications themselves were not in accordance with law. As those petitions were erroneous in particulars, if anybody had taken care to detect the error, the decree-holder should have been required to correct the errors and re-present the petition with correct particulars. This not having been done, on account, as the learned Judge says, of the apathy and indifference associated with the execution of civil Court's decrees or of the judgment-debtor's successful evasion of his obligations nothing came of these petitions. They were dismissed. These being the facts, the omission from the previous execution petitions of the particulars required by Cls. (d) and (g) was not sufficient to make them otherwise than in accordance with law. And if they were in accordance with law the present petition was within time.

The order of the lower Court is set aside and the petition will be sent to the original Court to proceed with the execution in due course. It is however open to the first Court in view of what has occurred to disallow the costs incurred by the petitioner on the defective petitions, a sum of Rs. 33-9-0. The appellant will have his costs here and in the Courts below.

P.R.S./V.S.

Order accordingly.

A. I. R. 1933 Madras 874

•WALSH, J.

(*Baghvatham*) Mahadeva Sastrigal—
Defendant—Appellant.

v.

Kariyakara Marulai Reddiar and
others—Plaintiffs—Respondents.

Second Appeal No. 344 of 1929, Decided on 22nd March 1933, against decree of Sub-Judge, Trichinopoly, D/- 8th October 1928.

Practice—New Plea—Limitation—Ground saving limitation not taken in plaint—Plea

cannot be allowed without amendment of plaint.

Without an amendment of the plaint the plaintiff cannot be allowed to take a ground which would save limitation not taken in plaint: 30 Cal 699, *Foll*; 31 Cal 195; 17 M L J 281; AIR 1919 Mad 332; AIR 1933 Mad 395; 10 B L R 346; S I C 81; AIR 1922 Lah 39 and 230, *Ref.* [P 876 C 1]

T. V. Muthukrishna Iyer—for Appellant.

K. V. Krishnaswami Iyer—for Respondents.

Judgment.—Defendant 6 is the appellant in this second appeal. The suit was for recovery of a sum of Rs. 614 alleged to be due on a mortgage, Ex. A, dated 18th February 1910, executed by defendant 1, in favour of plaintiff 1, plaintiff 2's father and defendant 7. Defendants 2 to 5 are the sons of defendant 1. Defendant 6 is a subsequent mortgagee under the mortgage, Ex. 2, dated 4th January 1918. He was the only contesting defendant. He had brought a suit on his mortgage. In that suit in execution he purchased the mortgaged property in Court-auction. His defence in the present suit is that the mortgage Ex. A had been discharged by the mortgage, Ex. 1, dated 28th August 1913, which he had himself paid off when he took his own mortgage, Ex. 2, and that the plaintiff and defendant 1 are colluding in this suit. A question as regards non-joinder of parties was also raised. The suit bond being dated 18th February 1910, and the suit having been brought on 27th August 1925, the claim was prima facie barred by time. Three payments were mentioned in the plaint, not specifically as saving limitation but which, if true, would evidently do so. They were on 10th April 1913, 29th August 1916 and 22nd November 1920. The trial Court found that these alleged payments were untrue and hence limitation was not saved. The suit was therefore dismissed. The lower appellate Court agreed with the trial Court that the alleged payments endorsed in Ex. A were untrue, but it held that limitation was saved by a document, Ex. 1, filed by defendant 6. Agreeing with the trial Court that there was no non-joinder it decreed the plaintiffs' suit and against this defendant 6 has appealed. Three grounds in second appeal are taken. The first is that when the learned Subordinate Judge says

"there is absolutely not even a scintilla of evidence to prove the plea of discharge (that is, discharge of Ex. A),"

he is overlooking the very important evidence afforded by Exs. 1 and 2 which have been expressly relied on in the trial Court's judgment to prove discharge of Ex. A. The second ground is that the Courts below are incorrect in saying that all the necessary parties to the suit have been added. The third ground is as regards the matter of limitation. With regard to the first point I think it is perfectly clear that the learned Subordinate Judge has overlooked in the most extraordinary way evidence which weighed so strongly with the lower Court. He has not even said that he disagrees with its view of that evidence. He simply says that there is not a scintilla of evidence to prove the plea of discharge. Now Ex. 1 narrates that the mortgage is being taken to discharge the mortgage bond, Ex. A, and what is even more important is that in Ex. 2, defendant 1 has added the following as a separate clause:

"I declare that there is no encumbrance whatever other than the one mentioned above."

The encumbrance mentioned above is Ex. 1. Therefore this is a categorical statement that Ex. A has ceased to exist. That Ex. A should have ceased to exist is strongly borne out by Ex. 1. The matter was put to defendant 1 whom the plaintiffs called as their own witness, P. W. ., and he could only say:

"Exhibit 2 was not read out to me. They wanted me to affix my signature and I did so. I do not know the reason for my signing in two places in Ex. 2."

It is extraordinary that in the face of the evidence of Exs. 1 and 2 and of the inability of defendant 1 to give any better explanation of what he himself stated in Ex. 1 than this, the learned Subordinate Judge should say that there is not even a scintilla of evidence to prove the plea of discharge. In my opinion this entirely vitiates his judgment because it is the chief piece of evidence to prove discharge and has not even been considered. I shall take next the question of limitation. Both the trial Court and the lower appellate Court have found that the alleged repayments on Ex. A which would save limitation are untrue. That being so, the suit would be barred. But in appeal for the first time, Ex. 1, a document filed

by defendant 6 for another purpose has been allowed to be relied on to save limitation without any amendment of the plaint. As to how far this could be done, there are no doubt conflicting authorities. But the decisions in this Court appear to be clear that a ground to save limitation which has not been taken in the plaint cannot be taken unless the plaint is amended. *Benode Behary v. Raj Narain* (1), which was confirmed in appeal in *Jogeshwar Roy v. Raj Narain* (2), lays down this principle and the case was followed in this Court in *Jagannadha Row v. Seshayya* (3) and *M. Muthiriyar v. Chinna-kannu Muthiriyar* (4). In a recent case reported in *Palani Chetty v. Sevugan Chetty* (5), Cornish, J., reviewed all the decisions of the other Courts and followed the two Madras cases referred to above and the Calcutta case, dissenting from the view in *Yakub Ibrahim v. Rahimatbai* (6), *Hingu Miah v. Heramba Chandra* (7) and *Parameshri Das v. Fakiria* (8). In *Yakub Ibrahim v. Rahimat Bai* (6), it was held that a ground not taken in the plaint to save limitation, if it is not inconsistent with the plaint, could be taken later. *Parameshri Das v. Fakiria* (8), went further than that and held that an inconsistent ground might be taken. A later case, in *Uttam Chand v. Mt. Thakur Devi* (9), while it holds that *Parameshri Das v. Fakiria* (8) is distinguishable because no ground of limitation at all was stated in the plaint, is in its tenor more in conformity with the view of the High Court.

It is there held that a plaintiff could not be allowed to set up a new acknowledgment in appeal. It is argued for the appellant in this case that if an amendment of the plaint had been allowed it would have been open to him to show that Ex. 1 did not necessarily exclude the possibility of money having been paid for Ex. A before the date of Ex. 1 or of Ex. 1 having been actually signed after the date it professes to

1. (1903) 30 Cal 699=7 C W N 651.

2. (1904) 31 Cal 195=8 C W N 168.

3. (1907) 17 M L J 281.

4. AIR 1919 Mad 332=52 I C 243.

5. AIR 1933 Mad 395=142 I C 193.

6. (1903) 10 Bom L R 346.

7. (1911) 8 I C 81.

8. AIR 1922 Lah 230=60 I C 772=2 Lah 13.

9. AIR 1922 Lah 39=69 I C 419=3 Lah 233.

bear. However that may be, I see no reason to differ from the view consistently taken by this Court so far, that without an amendment of the plaint the plaintiff cannot be allowed to take a ground which would save limitation not taken in the plaint. It may be pointed out that in the present case the plaintiffs would have had the greatest difficulty in reconciling the ground they now take as saving limitation with the plaint because prima facie the effect of Ex. 1 would be to show that Ex. A was entirely paid off at least then and it may be noted that neither defendant 1 nor the plaintiffs took any steps, when defendant 6 proceeded to execute his mortgage Ex. 2 against the property and to buy the land in Court-auction, although according to the plaintiff's case their mortgage on the property still remained undischarged.

As regards the third ground, non-joinder, both the Courts have found as a fact that a custom prevails and has been proved, by which only the eldest member in each family manages the trust and that if there are any minors in one of the families they do not manage the trust and that only the eldest of them manages after he attains majority. That is a finding of fact which I must accept and I therefore consider that both the lower Courts are correct that there is no non-joinder of parties in this case. In the result this second appeal is allowed, the decree of the lower appellate Court is set aside and that of the first Court restored with costs throughout.

P.R.S./V.B. *Appeal allowed.*

A. I. R. 1933 Madras 876

PANDALAI, J.

(*Olakkat*) Moidunni Haji and another—Defendants—Appellants.

v.

Pootheri Illoth Madhavan Nair and another—Plaintiffs—Respondents.

Second Appeals Nos. 1658 and 1714 of 1928, Decided on 16th December 1932, against decrees of Dist. Judge, South Malabar, in A. S. Nos. 781 and 765 of 1925.

(a) **Transfer of Property Act (1882), S. 66—Mortgagor's power to lease mortgaged property is limited by rule that he should not render security insufficient by such act—Onus of proving that security is unimpaired is on lessee—Malabar Law—Kanom.**

The power of a mortgagor to lease mortgaged

property in his possession is limited by the rule that the mortgagor must not by his act render the security insufficient, or do anything that is not necessary for prudent management and enjoyment of the income while he is entitled to it; and the burden of proving that the security is unimpaired by the lease is on the lessee. Hence where a jenmi who has demised his land on kanom tenure and subsequently mortgaged the equity of redemption, renews the kanom for another period of 12 years by taking further advances from the kanom tenants, the renewals are not binding on the mortgagee as the effect of the renewals is to materially diminish the security for the amount advanced by the mortgagee: 39 I C 182; A I R 1928 Pat 372 and 1 P L J 563, Ref. [P 877 C 2]

(b) **Transfer of Property Act (1882), S. 66—Mortgagor's right to lease mortgaged property—Conditions for exercise of such right mentioned.**

In order that a mortgagor may lease the mortgaged property, it is necessary that the mortgagor must be in possession to exercise the right in question, and the lease must be the usual mode of management of the property: *Case law referred.* [P 878 C 2; P 879 C 1]

(c) **Malabar Law—Kanom—Kanom is recognized as anomalous mortgage—Transfer of Property Act (1882), S. 98.**

In modern times kanoms have acquired many of the incidents of mortgages and are recognized as anomalous mortgages: A I R 1921 Mad 243, Ref. [P 879 C 1]

N. A. Krishna Iyer and P. Govinda Menon—for Appellants.

K. P. M. Menon and K. P. Krishna Menon—for Respondents.

Judgment.—Both these appeals raise a common question and may be disposed of together. The jenmi of certain properties which were held on kanom by different tenants under different demises mortgaged the equity of redemption to the respondents by a simple mortgage for Rs. 6,000 by Ex. D, dated 9th December 1915. The appellants are two of these tenants. The appellant in S. A. No. 1658 of 1928 had been holding under a demise, Ex. 7, dated 29th September 1904, for Rs. 400 and the appellant in S. A. No. 1714 of 1928 under a demise Ex. A, dated 1909 for Rs. 500, the respective properties in those cases. Subsequent to the simple mortgage of 1915, the appellant in S. A. No. 1658 of 1928 took a renewed demise, Ex. 8, in 1917 for Rs. 700 on payment of a further advance of Rs. 300 and the appellant in S. A. No. 1714 of 1928 took a renewed demise, Ex. 4, in 1920 for Rs. 800 on payment of a further advance of Rs. 300.

The respondents simple mortgagees brought a suit O. S. No. 28 of 1921 on their mortgage impleading the mortgagor

(jenmi) and the various kanomdars including the present appellants and obtained a decree for sale subject to the encumbrances prior to their own mortgage which were mentioned in Sch. B. It may be noted that the mortgagees had mentioned in the plaint that there were several subsequent encumbrances including the appellants' renewals Exs. 8 and 4 and stated that being subsequent to their mortgage they could not prevail over their mortgage. The appellant in S. A. No. 1658 of 1928 (defendant 55) set up in his written statement his renewal (Ex. 8) and claimed that the sale on the mortgage could only be held subject to those rights. But beyond putting in these written statements none of the defendants including the present appellants pressed the right based on the renewals in that suit. No issue was raised about them and no mention is made of them in the judgment and decree which simply directed that the sale will be held subject to the prior encumbrances only. Nothing was also said about the right of redemption which the subsequent encumbrancers undoubtedly had if they cared to exercise it. It is fair to infer that the subsequent encumbrancers including the appellants did not for obvious reasons care to redeem the respondents' mortgage and did nothing beyond putting in written statements asserting their superior rights to hold the property till the end of their 12 years' terms.

In due course the respondents-mortgagees brought the properties to sale and in 1923 purchased them themselves for about Rs. 5,000 out of a total decree amount of about Rs. 18,000. The balance of the decree amount, which I am informed amounts now to Rs. 11,000, has not been realised. The present appeals arise from suits brought by the mortgagees purchasers (respondents) to redeem the kanoms. The dispute is that the respondents contend that they are only bound to redeem the kanoms prior to their mortgage subject to which alone they became the purchasers. The appellants contend that though the additional amounts charged on the properties by the subsequent renewals Exs. 8 and 4 (Rs. 300 in each case) may not be binding on the respondents as prior mortgagees yet the renewed kanoms are not mortgages, but leases by the mort-

gagor which are valid against the prior mortgagees as they are the usual and accustomed mode of enjoyment of property in Malabar, and that as these leases subsist for a period of 12 years in each case from the date of renewal which had not expired on the date of the suit, they are not liable to be evicted. Both the lower Courts rejected the appellants' contentions and ordered redemption. Hence these appeals.

On the main question which was elaborately argued whether and to what extent a mortgagor's leases are binding on a prior mortgagee, there appears to be no Madras decision. S. 66, T. P. Act, and the decisions of other Courts were referred to. Before I come to that I might mention two other points in view of which that question would seem not so important in the present appeals as it was supposed to be during the argument. In the first place whether the mortgagor's power of leasing the property in his possession be referred to S. 66, T. P. Act, or to the principles which have been referred to in the decisions, the most important of which is *Madan Mohan Singh v. Raj Kishori Kumari* (1), and are now enacted in the new S. 65-A (which does not apply to these cases) introduced by Act 20 of 1929, the power is limited by the rule that the mortgagor must not by his act render the security insufficient or do anything that is not necessary for prudent management and enjoyment of the income while he is entitled to it; and the burden of proving that the security is unimpaired by the lease is on the lessee: *Madan Mohan Singh v. Raj Kishori Kumari* (1); *Beni Prasad v. Gangao Singh* (2) and *Anand Ram Marwari v. Dhanpat Singh* (3) at p. 570. The mortgaged property concerned in these cases was the equity of redemption subject to prior encumbrances. Seeing that only a fraction of the mortgage money then due was realised by sale in 1923, it seems fairly clear that the security was already hardly sufficient at the time of the renewals in 1917 and 1920 and that the effect of the renewals Exs. 8 and 4, which expired in 1929 and 1932, must have been to materially diminish what was already hardly sufficient. If for no other reason,

1. (1917) 39 I C 182.

2. A I R 1928 Pat 372=110 I C 287=7 Pat 349.

3. (1916) 1 Pat L J 563=38 I C 37.

these renewals cannot be held to be binding on the mortgagees.

Secondly the renewals, as they are now put forward, were not merely renewals, but purported to charge the properties with fresh substantial advances. It was in consideration of these advances that the mortgagor granted fresh terms for 12 years from 1917 and 1920. It is admitted that these fresh advances, which are nothing less than subsequent mortgages, cannot avail against the prior mortgagees-respondents. The contracts contained in Exs. 8 and 4 being entire, the appellants, when they ask that the new terms must be upheld against the mortgagees, though the fresh advances for which they were given cannot be upheld, are asking that new contracts should be made for them. This is clearly untenable. If Exs. 8 and 4 cannot be upheld as to the consideration as against the respondents it is impossible to uphold the extension of terms granted for that consideration and which are an integral part of the contract.

On the general question of the power of a mortgagor in possession to lease the mortgaged property so as to bind the mortgagee there is a considerable body of judicial authority in favour of it before the enactment of S. 65-A. Some decisions had tried to modify the English law to suit Indian conditions. According to English law a lessee from the mortgagor in possession after an English mortgagee has but a precarious possession and is liable to be evicted by the mortgagee. In their search for an Indian standard, other decisions applied S. 66, T. P. Act, as the right measure of that power. Others adopted the standard of what is necessary for the prudent management of the property without impairing the security. The result of these various lines of thought was not always uniform. While in some cases leases for short terms were set aside as improper, in other cases permanent leases were upheld. It was in these circumstances that S. 65-A has been enacted which provides statutory tests whereby such leases may be judged. It has no application to this case as the mortgage and kanoms here are of an earlier date. Coming to the cases themselves: in *Madan Mohan Singh v. Raj Kishori Kumari* (1), Mukerjee, J., said:

"It cannot however be maintained as was

pointed out by Lord Justice Romer in *Reynolds v. Ashby* (4) that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true possession thus is that the mortgagor in possession may take a lease conformable to usage in the ordinary course of management; for instance he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

He added:

"If there are any defendants who have obtained settlement from the mortgagor after the mortgage but before the commencement of the mortgage suit, they can resist the claim of the plaintiff only if they establish that the leases in their favour were granted on the usual terms in the ordinary course of management; such a plea is established—and it must not be overlooked that the burden of proof in the matter is upon them—will furnish a complete answer to the plaintiff's claim."

This opinion has been since followed in *Anand Ram Marwari v. Dhanpati Singh* (3), *Beni Prasad v. Gangoo Singh* (2), *M. P. M. S. Firm v. Ko Pyu* (5), and would appear to have been the basis of the limitations found in S. 65-A. On the other hand in *Tana Peena Chuna v. Mammakkantakath* (6), a case of an English mortgage, where a lease for three years was upheld and *Natho Singh v. Lachu Singh* (7), where a permanent lease was upheld on the ground that the whole mortgage-debt was satisfied by the sale, and in *Dasain Sadhu v. Mt. Ramdulari Kuer* (8), where a permanent lease was upheld, the test applied was S. 66, T. P. Act. The case in *Kiran Chandra v. Dutt & Co.* (9) was a lease pendente lite which is obviously invalid against the mortgagee's right under the decree; and in the cases in *Macleod v. Kissan* (10) and *Maungtulal Bagarla v. Upendra Mohan Pal* (11) the mortgages were English mortgages. From the above it is seen that (1) the mortgagor must be in possession to exercise the right in question, and (2) the lease must

4. (1909) 1 K B 87.

5. A I R 1932 Rang 113=138 I C 213=10 Rang 210.

6. (1916) 34 I C 24.

7. A I R 1928 Pat 238=107 I C 156.

8. A I R 1931 Pat 210=133 I C 169=10 Pat 332.

9. A I R 1925 Cal 251=85 I C 522.

10. (1906) 30 Bom 250=6 Bom L R 995.

11. A I R 1930 Cal 335=125 I C 661=57 Cal 82.

be the usual mode of management of the property. There are difficulties in the appellants' way on each of these points. The mortgagor was not even on the date of the mortgage in physical possession or enjoyment of the land, because the properties were already subject to prior kanoms. In fact the mortgage was and could only be of the equity of redemption subject to these kanoms and the only thing which the mortgagor could be in possession or enjoyment of was the rents due to the owner of the equity of redemption. The mortgagor was not even entitled to possession of the lands till the prior kanoms expired and when they expired he did not acquire possession as he never redeemed the prior kanoms by payment of the kanom amounts and improvements then due. What he did do was, while the property was still in the possession of his prior kanom tenants whom he could have redeemed but did not as it would involve expense, to grant them further terms of 12 years' enjoyment on receipt of further advances. I doubt very much whether the powers of a mortgagor in possession to lease would include transactions of this class. There may of course be a mortgage of rents and afterwards a lease of these rents by the mortgagor in possession of them. But that is not this case which is a mortgage of the properties themselves, i.e., of the whole interest of the mortgagor subject to prior interests.

Another difficulty is that the appellants ought to have proved that giving renewals is the accustomed mode of management of lands in Malabar. No such evidence has been given. Kanoms are no doubt common but by no means the most common or popular mode of management of property. In fact people who want merely to manage their property would give it out on yearly leases. (*verumpactam*). At any rate in modern times kanoms have acquired many of the incidents of mortgages and are recognised as anomalous mortgages, *Kanna Kurup v. Sankara Varma Rajah* (12). The difficulties in recovering possession of property once it is given in kanom have progressively increased to such an extent that it is doubtful whether anyone would willingly now

give his property on kanom as a prudent act of management or would renew it except in cases where he was unable to pay the amounts of kanom and compensation for improvements. Without wishing to generalise on this aspect of the case too strongly, I think it is sufficient to say that the appellants have not proved that the renewals Exs. 8 and 4, were, even if they can be considered as leases and not anomalous mortgages, acts of prudent management by an owner who had already mortgaged his property to the hilt. I have already given grounds for my opinion that these documents materially diminished the security which was already insufficient and that they are mortgage transactions from which the terms of years cannot be separated or divided off in order to carve out 'valid' leases out of invalid mortgages.

The respondents' advocate raised a contention that the question of the validity of Exs. 8 and 4 is *res judicata* by the fact that in the mortgage suit the appellants did not whereas they might and ought to have raised it. In my opinion that is not a valid contention. The question in these appeals is whether Exs. 8 and 4 can be upheld as leases, and if so, whether they would bind the purchasers-respondents. The question in the mortgage suit was whether there was any answer to the plaintiffs' (respondents') mortgage. The question what rights the purchasers in the mortgage suit would get and whether they would be able to claim vacant possession as against Exs. 8 and 4 did not arise in that suit. I reject this contention. The appeals are dismissed with costs. Time for redemption extended to 16th March 1933.

P.R.S./K.S.

Appeals dismissed.

* A. I. R. 1933 Madras 879

MADHAVAN NAIR AND JACKSON, JJ.

Daso Polai—Plaintiff—Appellant.

v.

Narayana Patro and others—Defendants—Respondents.

Appeal No. 314 of 1927, Decided on 29th March 1933, against decree of Dist. Judge, Ganjam, D/- 15th January 1927.

* (a) Civil P. C. (1908), O. 21, Rr. 62 and 66—Under R. 62 Court is satisfied of existence of mortgage and under R. 66 the purchaser buys property with notice of mort-

gage—Hence such purchaser is not precluded from challenging validity of mortgage.

The Code makes a clear distinction between a case where the property is sold subject to a mortgage as under O. 21, R. 62 and a case in which the notice of an alleged encumbrance is given in the proclamation of sale as under O. 21, R. 66. In the former case, the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the mortgage. In the latter case, the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve, in other words, the executing Court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage. [P 881 C 1]

* (b) **Transfer of Property Act (1882), S. 67—A obtained decree against B—B had mortgaged his property to C—A attached B's properties—Under Civil P. C., O. 21, R. 58, C preferred a claim petition stating that he had purchased property mortgaged to him from B—C's claim was dismissed and the order becoming conclusive under O. 21, R. 63, C brought present suit on his mortgage and contended that his claim petition having been dismissed the mortgage revived under law—Held that A who had purchased the mortgage-property under his decree could challenge validity of mortgage though he had notice of it under O. 21, R. 66—Held also that order under O. 21, R. 61 was not order in rem and hence mortgage in favour of C did not revive—Held further that the mortgage had become extinguished in sale—Civil P. C. (1908), O. 21, Rr. 61, 63 and 66—Transfer of Property Act (1882), S. 101.**

A obtained a money decree against B who had executed a mortgage deed in favour of C on 1st August 1913. A gave a list of encumbrances in his execution petition for attachment and sale of B's properties. There was a note at the end of this petition which ran: "These properties ought to be sold after issue of sale proclamation subject to the mortgage deed dated 1st August 1913 in favour of C." The sale was fixed for 12th July 1920 on which date C put in an application wherein he stated that the mortgage-bond of 1913 had been fully discharged by means of a sale deed dated 10th September 1919 under which he became the absolute owner of the property. This claim was dismissed and the property was purchased by A. As C did not institute a suit the order made against him became conclusive under O. 21, R. 63. C then instituted the present suit against A and B to recover the money under the mortgage bond of 1913, and contended that since as a result of the claim petition his sale deed became ineffectual and inoperative it should be held that the original mortgage revived. A challenged the validity of mortgage-bond of 1913:

Held: that A was not precluded from questioning the validity of the suit mortgage.

Held also: that C should not be allowed to invoke equity on his side and that the sale-deed in spite of the order under O. 21, R. 61, which became conclusive under R. 63 did not become ineffectual for all purposes in law, that C could not plead that the order under O. 21, R. 61 when it became conclusive under R. 63 operated

as an order in rem and so rendered void the sale deed upon which C had based his claim when he moved the Court under O. 21, R. 53. The order precluded him from proceeding upon the same cause of action against the attaching decree-holder or against the auction-purchaser whose title proceeded from the same attachment and sale, but otherwise it did not affect the validity of the sale-deed; in other words, the mortgage was not revived by operation of this order: *AIR 1928 Mad 1201 and 39 All 186, Ref.*

Held further: that the suit mortgage could not be enforced inasmuch as it had become extinguished by the sale of property in favour of C for which it formed the consideration.

[P 881 C 1, 2; P 882 C 1]

Advocate-General and B. Jagannadha Das—for Appellant.

C. S. Venkatachariar and K. R. Rama Ayyar—for Respondents.

Madhavan Nair, J.—The plaintiff is the appellant. The appeal arises out of a suit instituted by the plaintiff for Rs. 21,000 due on a registered mortgage bond dated 1st August 1913. The sum secured by the mortgage was Rs. 5,000 and the debt was payable in seven years. The mortgagors are defendants 1 to 4. The circumstances relating to the suit are these: In O. S. No. 59 of 1919 on the file of the Court of the Subordinate Judge of Berhampore one Benu Nahko, the late father of defendants 5 and 6 and the grandfather of defendants 7 and 8, obtained a money decree against the plaintiff's mortgagors, defendants 1 to 4, on 18th October 1919. In E. P. No. 150 of 1919 the decree-holder asked for attachment and sale of the suit property. In Ex. A, the schedule attached to this E.P., the decree-holder gave a list of five encumbrances said to be existing on the property. There is a note at the end of Ex. A which runs as follows:

"These properties ought to be sold after issue of sale proclamation subject to the mortgage deed dated 1st August 1913 and executed in favour of Daso ollay (the present plaintiff) for Rs. 3,000—this is admittedly a mistake for Rs. 5,000. Except as regards item 2 specified in the certificate of the Registrar, that is the mortgage-deed for Rs. 3000, the remaining items 3, 4, 5 and 6 were executed fraudulently and without any consideration whatever."

A similar note appears at the end of the bidder's list also—see Ex. A-1. The sale of the property was fixed for 12th July 1920 on which date the plaintiff put in a claim petition, E. A. No. 81 of 1920 (Ex. 2), in which he stated that the suit mortgage bond of 1913 had been fully discharged by means of a registered sale deed, Ex. 1, dated 10th Sep-

tember 1919 for Rs. 8,000 under which he became the absolute owner of the property and that he has been in possession and enjoyment of the same ever since the sale: see para 3 of Ex. 2. This claim petition was dismissed on 12th July 1920 because it was filed too late. On the same day, the property was purchased by Bennu Nahko, the decree-holder in O. S. No. 59 of 1919. Ex. 3, is the sale certificate issued to him. The plaintiff did not institute a suit to establish his right to the property within a year from the date of the order, and so the order made against him became conclusive under O. 21, R. 63, Civil P. C. In 1923, Bennu Nahko the decree-holder purchaser of the suit property, filed O. S. No. 131 of 1923 in the Berhampore District Munsif's Court for recovery of mesne profits of the lands purchased by him in Court auction. In this suit the plaintiff was the 10th defendant and he resisted it on the ground that some of the lands purchased by Bennu Nahko were his property by virtue of the sale deed Ex. 1. The learned District Munsif held that inasmuch as the plaintiff's claim based on the sale was dismissed and he did not bring a suit within a year to set aside the order, he lost his right under the sale deed and was debarred from claiming the property any longer, Ex. 4. The finding was upheld on appeal by the learned Subordinate Judge, Ex. 5. Having lost his rights under the sale deed by his own default, the plaintiff instituted the present suit on 14th October 1926 to recover the money due under the mortgage bond dated 1st August 1913.

The plaintiff's argument is two fold. He argues first that the dismissal of his claim petition does not affect the suit mortgage and that, since the property was purchased by the decree-holder himself subject to the mortgage, what he purchased was only the equity of redemption and that therefore the contesting defendants are estopped from questioning the plaintiff's right as mortgagee under the suit mortgage. Next, he argues that, since as a result of the claim petition his sale deed became ineffectual and inoperative, the Court should hold that the original mortgage to which the property was subject revived as a matter of law and that in

equity he is entitled to sue on the same. The defendants argue (1) that though the property was sold subject to the mortgage the Court did not as a matter of fact decide whether the mortgage subsisted or not, and that therefore the Court-purchaser of the properties and those who claim under him are not estopped from questioning its validity; and (2) that in law and also, as will appear from the contentions of the plaintiff himself, the suit mortgage became merged in and completely extinguished by the sale deed, Ex. 1 which was valid when it was made, and that therefore the plaintiff cannot invoke any equity at all in support of his contention that the suit mortgage should be enforced. The learned District Judge overruled the contentions of the plaintiff and dismissed the suit. Dealing with the first contention of the plaintiff, it does not appear in the present case that the Court made an order that the property should be sold subject to the suit mortgage. Under O. 21, R. 62, Civil P. C.

"Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession and thinks fit to continue the attachment, it may do so subject to such mortgage or charge."

There is nothing on the record to show that the executing Court decided whether the suit mortgage subsisted or not and ordered attachment and sale subject to the mortgage as required under this provision. Under O. 21, R. 66:

"Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made and the proclamation shall contain amongst other things the encumbrances to which the property is liable."

The Code makes a clear distinction between a case where the property is sold subject to a mortgage as under O. 21, R. 62 and a case in which the notice of an alleged encumbrance is given in the proclamation of sale as under O. 21, R. 66. In the former case the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the mortgage. In the latter case the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve; in other words, the executing Court does not decide whether the mortgage subsists or not

and the purchaser is not precluded from questioning the validity of the mortgage. In our opinion, the present case falls within the latter class and we are confirmed in this opinion by a comparison of the proclamation of sale with Form No. 56 given in the Civil Rules of Practice. We think that by the note appearing in the sale proclamation the decree-holder intended to give notice of the suit mortgage which he thought was prima facie valid and he gave also notice of other encumbrances which in his view were invalid. He is therefore not precluded from questioning the validity of the suit mortgage. The so called admissions of the decree-holder to the effect that the property has been sold subject to the suit mortgage, which are merely statements in the proclamation of sale and the bidders' list, cannot be made a ground for saying that the purchaser is liable under the mortgage unless it is proved by the plaintiff that the mortgage continued to exist in spite of the sale.

The next argument of the learned Advocate-General is that the sale deed proving unavailing as a result of the order passed in claim proceedings, the mortgagee-purchaser (the plaintiff) may in equity be allowed to fall back on his mortgage. This argument cannot be accepted for two reasons. In the first place the facts of the case show that the plaintiff should not be allowed to invoke equity on his side, and secondly that the sale deed in spite of the order under O. 21, R. 61, which became conclusive under R. 63, does not become ineffective for all purposes in law.

Ever since the sale in question the plaintiff has always been relying on the sale deed in support of his claim to the property. In his claim petition under O. 21, R. 58 (Ex. 2), he stated with reference to the sale that he purchased the property under a registered sale deed, that it is supported by consideration and has been effected in partial discharge of the debt due to him under the registered mortgage bond dated 1st August 1913 (that is the suit bond) for Rs. 5,000 (see para 3). Thus his case has been that the mortgage is discharged and that it has been supplanted by the sale. In the present suit also his attitude is the same. This is made clear in para 4 of the plaint. If the plaintiff had pleaded in the suit adopting the previous

averments of the defendants that the sale was fraudulent and without consideration, and if that plea had been accepted, it might be possible to find that the sale was a nullity which could not extinguish the mortgage. But he has always preferred to rest his case on the sale calling it a valid one. There is no case of estoppel here as in *Chidudu v. Sheo Mangal Singh* (1). In that case the contesting defendants maintained that the two mortgage deeds, which were executed after the suit mortgage, were not binding on them; and then their Lordships observed that it does not appear to them "to be consistent with equity or good conscience"; that they having successfully maintained that the two deeds were not binding should now claim the benefit of the transactions. The present claim of the plaintiff is in the teeth of his case in the claim petition as well as in the plaint. In our opinion the plaintiff cannot also plead that the order under O. 21, R. 61, Civil P. C., when it became conclusive under R. 63 operated as an order in remand and so rendered void the sale deed upon which the plaintiff had based his claim when he moved the Court under O. 21, R. 58. The order precluded the plaintiff from proceeding upon the same cause of action against the attaching decree-holder or against the auction-purchaser whose title proceeded from the same attachment and sale, but otherwise it does not affect the validity of the sale deed; in other words, the mortgage is not revived by operation of this order.

In this connection we may refer to the decisions in *Rajah of Ramnad v. Subramaniam Chettiar* (2) and *Chidudu v. Sheo Mangal Singh* (1) relied on by the learned Advocate-General in support of his contention. In both these cases the subsequent transactions, the settlement deed in *Rajah of Ramnad v. Subramaniam Chettiar* (2) and the two mortgage deeds in *Chidudu v. Sheo Mangal Singh* (1), executed after the suit mortgages were found invalid and not binding on the parties executing them and then the Courts held that the plaintiffs were in equity entitled to fall back upon the prior mortgages. The same cannot be said with reference to the present case. The sale deed was a valid one when it

1. (1917) 39 All 186=39 I C 585.

2. A I R 1928 Mad 1201=116 I C 827=52 Mad 465.

was executed and in spite of the conclusiveness of the order under O. 21, R. 63, as we have already pointed above, it has not become absolutely void. There is therefore no reason why the plaintiff should be allowed to fall back upon the previous mortgage. In our opinion the suit mortgage which formed the consideration for the sale deed was extinguished when the sale was effected. Under S. 101, T. P. Act, where the owner of a charge or other encumbrance on immovable property is or becomes absolutely entitled to that property the charge or the encumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit. The effect of the execution of the sale deed must therefore be taken to be the extinguishment of the suit mortgage unless there is an express or implied intention to keep the encumbrance alive. No such intention has been pleaded in this case, nor can it be found on the facts. We must therefore hold rejecting the arguments of the appellant that the suit mortgage in this case cannot be enforced inasmuch as it has become extinguished by the sale of the property in favour of the plaintiff for which it formed the consideration. We have already shown that the sale deed has not been rendered void in the way contended for by the appellants. While no doubt there is good authority for Courts in equity allowing a party when one remedy has failed to take whatever other remedy lies ready to hand, Courts can hardly go so far as to allow a party to revive a dead remedy merely because that best suits his convenience. Before the plaintiff can invoke equity in his favour he must show that there is a remedy available to him on which he can rely. This is precisely what he has been unable to do in this case. For the above reasons we must hold that the appeal fails. It is dismissed with costs.

P.R.S./V.S.

Appeal dismissed.

* A. I. R. 1933 Madras 883

WALSH, J.

Sundarathammal and another—Petitioners.

v.

Paramaswami Asari and others — Opposite Parties.

Civil Petn. No. 1100 of 1930, Decided on 23rd August 1933, from order of Dist. Munsif, Madura, D/- 16th January 1930.

* (a) Civil P. C. (1908), O. 33, R. 5—Hindu widow applying to file suit in forma pauperis — Before rejecting her application Court should take into consideration that she will neither be able to borrow money nor sell her property.

Where an application is made by a Hindu widow to allow her to file a suit in forma pauperis, no doubt if she is in possession of sufficiently valuable estate left by her husband her application should be rejected. But before doing so the Court should take into consideration that her possession is only that of a person with a life interest on which it is almost impossible to borrow any money. The argument that to save the estate necessary expenses may be incurred even by selling part of the property is of no avail, for there is always the difficulty of finding a purchaser who will be willing to buy the property under a title of this sort which the reversioners would be sure to attack: *A I R 1933 Mad 242, Dist.*

[P 884 C 2]

(b) Civil P. C. (1908), O. 33, R. 1 — Estate not pauper — Yet person representing such estate may file suit as pauper.

Where a suit is filed on behalf of the estate and the estate is not a pauper, the person representing such an estate may claim to be allowed to file a suit in forma pauperis; this he can do even if he is a trustee of that estate: *7 Mad 390, Foll.*

[P 885 C 1]

(c) Civil P. C. (1908), O. 33, R. 5—Pauper application dismissed—Suit is still pending until plaint is dismissed—If court-fee is paid limitation will count from presentation of pauper application.

Though the pauper application be dismissed, the plaint remains still pending until it is actually dismissed and if the court-fees are paid, limitation will count from the date of the presentation of the petition which will be regarded as the date of plaint.

[P 885 C 1]

(d) Practice—It is customary to allow some time to pay court-fees when pauper application is dismissed — Civil P. C. (1908), O. 33, R. 5.

On a pauper application being dismissed, the person so applying cannot claim that time must be granted for giving necessary court-fees. But it is certainly customary to allow some time to pay the court-fees when a pauper application is dismissed.

[P 885 C 1]

*R. Gopalaswami Ayyangar—for Petitioners.**K. Swaminatha Ayyar—for Opposite Parties.*

Judgment.—The petitioners before me are the two widows of one Sundaram Asari who died in 1922. By a will he

left instructions that the widows should pay off the debts in Sch. E to the will by the outstandings due in Sch. D. In this matter the two sons of his two elder brothers were to assist them. Receipts were to be granted in the names of both the widows and the surplus invested in their names. He also contemplated that with this surplus, lands should be purchased in the names of both the widows in which they should have a life interest in equal shares. The house and ground shown in Sch. A was similarly to be enjoyed by them in equal shares as a life interest. Widow No. 1 was to have Sch. B vessels and jewels and widow No. 2 Sch. C vessels and jewels, but again without power of alienation. Till the immovable properties proposed to be purchased by the balance of outstandings were purchased, the widows were to realise in equal shares the interest from the surplus and use it for their maintenance.

The will in fact put the widows in no better position than they would have been in without it. They simply got a life interest in deceased's property and nothing more. They sought permission to file a suit in forma pauperis on a mortgage executed in 1916 to their deceased husband. An enquiry into their pauperism was held. The Crown did not oppose, but the defendants objected and the claim was disallowed. Against the order the widows have preferred this revision petition. Petitioner 1 was the only witness examined on either side. As regards the collection of outstandings the will mentions outstandings of Rs. 3,650 (Sch. D) and debts of Rs. 1,215 (Sch. E). Assuming that both were collected and paid out in full, the surplus would be Rs. 2,435. The only immovable property purchased after the death of Sundaram Asari is a portion of house under Ex. 1 for Rs. 1,000.

Petitioner 1 has explained this purchase thus. There was a partition between her husband and his brothers and her husband had also purchased the share of his elder brother so that he was entitled to two shares. At the time of his death however he was in possession of only one share, the other share having been sold for a debt under a court-auction sale and being in the possession of third parties. On his death the widows resided in the share still

possessed by their husband at his death, and subsequently they re-purchased the other share of the house under Ex. 1. The learned District Munsif found that the two shares are worth Rs. 2,000 on petitioner 1's own evidence.

I have perused the sale-deed Ex. 1 and it is clear that the whole purchase price consists of two debts due directly to the deceased Sundaram Asari so that none of it represents savings from the income of the estate made by the widows. As regards utensils and jewels petitioner 1 was left such articles to the value of Rs. 345 and petitioner 2 to the value of Rs. 424, but petitioner 1 has sworn that they have had to sell those articles to maintain themselves and are now paupers. There is no evidence contra. It will be noticed that even the sale of these jewels and utensils was beyond the power of the widows under the will. The learned District Munsif refused to allow the pauper application: (1) because the petitioners are in possession of sufficiently valuable estate left by Sundaram Asari; (2) the suit is filed on behalf of the estate and the estate is not a pauper.

With regard to ground (1) the possession is only that of persons with a life interest on which it would be almost impossible to borrow any money. It is argued for respondents that to save the estate necessary expenses may be incurred even by selling part of the property. I feel doubtful if any purchaser could be found to buy property under a title of this sort which the reversioners would be sure to attack. *Rajagopala Gramani v. Baggiammal* (1), is quoted for respondents in this connexion, but that was a question whether the Court could not sanction an advance out of an estate for the benefit of the minor under its extraordinary powers. That is a very different matter from widows alienating immovable property in which they have only a life interest in order to raise funds to recover a debt due to their deceased husband's estate. It is not, to my mind, so much a question whether they have this power in the abstract, but whether in the concrete circumstances of this case they could succeed in raising anything substantial by exercising it.

On the second point that they represent the estate which is not a pauper, *In re Bill* (2) is quoted for the petitioners. It was there held that the administrator of the estate of a deceased person can apply to sue in forma pauperis under the provision of Ch. 26, Civil P. C., 1882. It was held that the English rule in the matter did not apply in India and that the Procedure Code does not exclude persons holding a fiduciary character from suing in forma pauperis. No later decision to the contrary has been shown me and I must follow this ruling, so that the lower Court's second ground for refusal is wrong. Although the finding of pauperism is one of fact, I think the lower Court had no real evidence to come to the conclusion it did. The uncontradicted evidence of petitioner 1 shows that the widows are paupers and they can plead this even if they sue as trustees of an estate which is not a pauper. It was urged in the alternative before me that the lower Court should at least have given them time to pay the court-fees. *Stuart Skinner v. William Orde* (3) and *Thangathammal v. Iravathaswara Iyer* (4) are quoted in this connexion. Neither of these decisions seems to go so far as saying that time must be granted, but it does appear from them that though the pauper application be dismissed, the plaint is still pending until it is actually dismissed and that if the court-fees are paid, limitation will count from the date of the presentation of the petition which will be regarded as the date of the plaint. It is certainly customary to allow some time to pay the court-fees when a pauper application is dismissed. However the matter does not really arise in the view which I take of the main question. In the result I allow the petition with costs and the petitioners will be allowed to file the suit in forma pauperis.

P.R.S./V.S. *Petition allowed.*

2. (1884) 7 Mad 390.

3. (1900) 2 All 241=6 I A 126=3 Suther 627=4 Sar 31 (FC).

4. (1915) 28 I C 504.

A. I. R. 1933 Madras 885

SUNDARAM CHETTY AND WALSH, JJ.
Sree Chand Sowcar—Plaintiff—Appellant.

v.

T. Kasi Chetty and others—Defendants—Respondents.

Appeal No. 17 of 1930, Decided on 9th August 1933.

(a) Succession Act (10 of 1865), Ss. 98 and 106—Property bequeathed to two persons for life and remainder absolutely to specified class of persons—Latter take vested remainder on date of testator's death—Distinction between vested and contingent interest pointed out.

Ordinarily distinction between vested and contingent interests consists in the nature of the event or condition upon which the donee should take the property. If the interest created in favour of a person should take effect on the happening of the event which must happen, it is a vested interest, but if it is to take effect on the happening of a specified uncertain event which may or may not happen, the interest is a contingent one. [P 886 C 2]

A testator bequeathed his property to two persons for life and the remainder absolutely in favour of a specified class of persons on the termination of the life estates:

Held: that on the death of the testator, the properties became vested in that class and that the mere fact that it was not entitled to immediate possession did not make it a contingent bequest: *A I R* 1920 Cal 691; 4 Cal 304; 28 Cal 621 and 38 Cal 468, *Ref.* [P 887 C 1, 2]

(b) Succession Act (10 of 1865), S. 98—S. 98 contemplates cases of deferred possession.

Section 98 seems to contemplate cases of deferred possession and not deferred vesting. [P 887 C 1]

Ramaswamy Ayyar and M. N. Doraiswami Iyengar—for Appellants.

V. V. Srinivasa Iyengar, T. K. Srinivasathathachariar and T. Krishnaswami Iyer—for Respondents.

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff (appellant) for the recovery of a certain sum of money alleged to be due on a mortgage bond executed by defendant 1 for Rs. 1,000 on 15th November 1924. Defendant 2 is a subsequent purchaser of the mortgaged property from defendant 1. Various contentions were raised by these defendants in respect of which issues were also framed, but the learned Judge in the Court below wanted to dispose of the suit on what he calls two preliminary points, one of which he decided definitely against the plaintiff. On the strength of that finding, the suit was dismissed. Hence this appeal. The mortgaged property belonged to

defendant 1's grandfather Srinivasa Chettiar. Defendant 1's right to that property is derived from the will Ex. 1 executed by the said Srinivasa Chettiar in 1904. The contention of defendant 2 is that according to the terms of that will it should be taken that the mortgaged property had not vested in defendant 1 on the date of the suit mortgage and consequently the mortgage sued on is invalid. The lower Court upheld this contention and dismissed the suit.

This question depends upon a proper construction of the terms of the will, Ex. 1. Under this will, the testator appointed three persons as executors for the purpose of carrying out the directions contained in the will. The present defendant 1, who was then a child of 4 or 5 months was to be under the protection of his mother and paternal grandmother who were both appointed under the will as the guardians of his person. The testator had a son named Ramaswami Chetti who was aged about 20 years, but he was practically disinherited on account of his improper conduct. Para. 13 of the will is important for the purposes of the present case. It provides that for a period of three years subsequent to the death of the testator the executors should manage the properties as directed in the will and after the expiry of that period they should deliver to defendant 1's guardians all the movable and immovable properties which should be taken possession of and managed by those two guardians till the end of their lifetime without any power of alienation by sale or mortgage, but after their lifetime the testator's son's descendants should take those properties absolutely and enjoy them from generation to generation. The effect of the aforesaid terms of the will appears to be this. After the expiry of a term of three years from the date of the testator's death during which the executors should be in possession and management, the two ladies who were appointed as defendant 1's guardians were to enjoy the properties for their lives without powers of alienation.

In other words, a life estate was bequeathed to them with an absolute gift over of the remainder to the descendants of the testator's son. The absolute gift of the remainder is to a specified class of persons of whom defendant 1 is cer-

tainly one. The question for consideration is whether the gift of the remainder absolutely in favour of a specified class of persons on the termination of the life estate should be deemed to be a vested interest or only a contingent interest. The ordinary distinction between vested and contingent interests consists in the nature of the event or condition upon which the donee should take the property. If the interest created in favour of a person should take effect on the happening of an event which must happen, it is a vested interest, but if it is to take effect on the happening of a specified uncertain event which may or may not happen the interest is a contingent one. Applying this test there is no doubt about the nature of the interest created in favour of the class of persons of whom defendant 1 is one, which should take effect on the termination of the lifetime of the two ladies (an event which must happen). It seems to me that defendant 1 as a member of the class alive on the date of the testator's death had a vested remainder in the property in question, but possession alone is postponed to a future date. It is shown in this case that the survivor of the aforesaid two women, viz., defendant 1's mother, died on 17th February 1926, whereas, the suit mortgage bond was executed by defendant 1 on 15th November 1924. The learned Judge observes that till her death in February 1926, defendant 1 had no right to the estate and had no transferable interest therein, as he was merely an expectant heir. No authority has been cited by him in support of this conclusion. On the other hand, as I would presently show, the trend of the authorities is clearly against that view.

Taking S. 106, Succession Act (Act 10 of 1865), which was in force when the will, Ex. 1, came into existence, there can hardly be any doubt that the properties bequeathed to a specified class of persons, of whom defendant 1 is one, became vested in that class on the date of the testator's death and would even pass to the representatives of any of that class if he should die subsequent to the testator's death and before the time prescribed for taking possession. The mere fact that a legatee is not entitled to immediate possession of the thing bequeathed does not make it a contin-

gent bequest. There is nothing in the terms of the will to indicate any contrary intention on the part of the testator, so as to make the interest of the legatee a contingent one. If the terms of Ex. I should be construed in the light of S. 106 aforementioned, defendant 1 must be deemed to have had a vested interest in the mortgaged property even before the death of his mother.

Some stress was, however, laid by Mr. Srinivasa Ayyangar, the learned advocate for the respondents, on the wording of S. 98 of the said Act, in order to show that defendant 1 had no vested interest in the property on the date of the mortgage. On a careful comparison of S. 98 with S. 106, it is clear that the title to the property bequeathed to a class of persons, as in the present case, certainly vests in such of the persons of that class who are actually alive at the testator's death. It is because of such legal vesting of the title even the representatives of any of them who have died since the death of the testator get a share in the property when the time arrives for their taking possession and getting a distribution of the estate effected. S. 98 seems to contemplate cases of deferred possession and not deferred vesting. It is however argued on behalf of the respondents, that the words in the exception to S. 98, viz.,

"but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator"

should be taken to mean that the vesting of the property itself takes place only on the date to which possession is postponed. But we find in S. 106 that in the case of an exactly similar bequest the legacy must be taken to have become vested in interest even from the testator's death despite the fact that possession is postponed. If the contention of Mr. Srinivasa Ayyangar should prevail, we would be driven to hold that what is declared in S. 106 as to the time of vesting is negatived in S. 98. Such an inconsistency cannot ordinarily be imputed to the legislature.

One of the decisions relied on by Mr. Ramaswamy Ayyar for the appellant is reported in *Mathuranath Biswas v. Mon-*

mohini Dasya (1). It is the decision of a single Judge of the Calcutta High Court. In that case, the testator by his will provided that his widow would remain in possession of the property during her life and that on her death his sons would get the property in equal shares. On a construction of that will the learned Judge held that in view of S. 106, Succession Act, the sons obtained a vested interest in the property on the testator's death and therefore in the event of one of the sons predeceasing the widow his interest would pass to his heirs. This is exactly on all fours with the present case. The contention of Mr. Srinivasa Ayyangar in respect of S. 98 is also opposed to the view taken by Pontifex, J., in the decision in *Masoyk v. Ferguson* (2), at p. 313, wherein that learned Judge remarks that S. 98 applies only to vested interests. In a case dealt with by the Privy Council in *Harris v. Brown* (3), there were directions in the will to the effect that the residuary estate which was bequeathed in equal shares to a certain class of persons should remain in the hands of the executor who should make over the share of each on his attaining 21 years. Their Lordships held that these words merely pointed to the postponement of possession of shares which had already been vested. On pp. 634 and 635 their Lordships go on to say:

"The learned Judges appear to find in the appointment of an executor and guardian to the minors with a direction to make over the property to them on their attaining majority something contrary to an intention that the gift should vest in the object at once. It is new to their Lordships to hear that these ordinary directions have any effect in suspending the ownership of the property and it seems to them that such a ruling is calculated to disturb settled principles."

This, I consider, is an emphatic pronouncement against the correctness of the contention put forward on behalf of the respondents. The same view is taken by the Privy Council in a later case reported in *Bhagapati Barmanya v. Kali Charan Singh* (4). For all the foregoing reason, I must hold that defendant 1 had a vested interest in the mortgaged property on the date of the suit mortgage and was not merely an expectant

1. A I R 1920 Cal 691=57 I C 747.

2. (1879) 4 Cal 304.

3. (1901) 28 Cal 621=28 I A 159=8 Sar 92 (FC).

4. (1911) 38 Cal 469=10 I C 641=38 I A 54 (PC).

heir as observed by the lower Court. It cannot be said that he had no sort of title to the property on that date. As the plaintiff's suit was dismissed on an erroneous finding on a preliminary point, the decree of the lower Court has to be set aside and the suit remanded to that Court for restoration to file and disposal according to law after determining the other issues arising in the case. The respondents should pay the appellant's costs of this appeal. The costs of the suit will abide the result. The court-fee paid on the memorandum of appeal will be refunded to the appellant.

Walsh, J.—I agree.

P.R.S./K.S.

Suit remanded.

A. I. R. 1933 Madras 888 (1)

WALSH, J.

(*Thakoor*) *Ramachander Lalji (Firm)* and others—Petitioners.

v.

M. Narasimhalu Chetty & Co.—Opposite Parties.

Civil Revn. Petn. No. 956 of 1930, Decided on 18th August 1933, from order of Sm. C. C. Judge, Madras, D/- 4th December 1929.

Civil P. C. (1908), S. 144—Suit instituted against dead person—Decree passed—If money is paid under such decree Court should allow restitution—Civil P. C. (1908), S. 151.

Where the decree is admittedly a nullity, the suit having been instituted against a dead man and the Court having levied execution when there was no decree has inherent power to rectify its own mistake under S. 151, Civil P. C. and to allow restitution of money paid in execution. [P 888 C 1]

K. P. Sarvothama Rao—for Petitioners.

S. Rama Swami Iyyengar and *Srinivasa Varadachari*—for Respondents.

Judgment.—I see no reason why the Court should refuse restitution. The decree was admittedly a nullity, the suit having been instituted against a dead man. The Civil Procedure Rules are not applicable against dead persons as remarked in *Debi Baksh Singh v. Habib Shah* (1). The Court having levied execution when there was no decree has inherent power to rectify its own mistake under S. 151, Civil P. C.: vide also remarks in *Sudalaimuthu v. Sudalai. muthu*, A. I. R. 1925 Mad. 365. I do not propose to go into the academic

question whether the petitioners can get a decree which is a nullity set aside or not because the only real question is whether he can get restitution of money paid in execution of what was not a decree. I have no doubt that he can. The order will be that the money wrongfully paid to the respondents by the petitioners must be refunded with interest at 6 per cent per annum from date of collection, viz., 21st January 1928, till date of restitution. Petitioners will be allowed costs of this petition.

P.R.S./V.S.

Petition allowed.

A. I. R. 1933 Madras 888 (2)

WALSH, J.

Santhanakrishna Chetty—Accused—Petitioner.

Criminal Revn. Case No. 886 of 1932, and Criminal Revn. Petn. No. 824 of 1932, Decided on 24th April 1933, from order of Subdivisional Magistrate, Man-nargudi.

(a) Criminal Trial—Accused's confession if it is the only evidence against him must be taken as whole.

Where the confession of the accused is the only evidence against him, it must be taken as a whole and nothing can be read into it which is not contained there: 39 Cal 855 and A I R 1931 All 1 (FB), Ref. [P 889 C 2]

(b) Land Customs Act (19 of 1924), S. 7 (1) (c)—Onus is on prosecution to prove that goods were taken by land from foreign territory to British territory at a time when they were dutiable.

For a conviction under S. 7 (1) (c), the onus is on the prosecution to prove that the goods were taken by land from foreign territory to British territory at a time when such goods are dutiable. [P 889 C 2]

(c) Land Customs Act (19 of 1924), S. 7—Carrying non-dutiable goods without permit—Offence is to be dealt with by customs officer and not by complaint to Magistrate.

Where a person carries non-dutiable goods from foreign territory to British territory without a permit, the offence, if any, would be one to be dealt with only by the Land Customs Officer himself under S. 7 and would not constitute an offence for which a complaint could be made to a Magistrate. [P 890 C 1]

K. S. Jayarama Ayyar and *K. V. Srinivasa Ayyar*—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The petitioner (accused) was convicted of an offence under S. 7 (1) (c), Land Customs Act, for having with him 82 blocks of silver weighing about 15,000 tolas smuggled from Karaikal in French territory without a permit. The motor car in which this accused and another (who has been acquitted) were travelling,

was stopped by the Land Customs Inspector (P. W. 1) at the level crossing gate near Needamangalam on the Needamangalam-Tanjore road at about 12.30 a.m. in the early morning of 3rd September 1932. The accused was also wearing some silk clothes but the latter were found to be his personal wearing apparel. He was not convicted with regard to them. The accused appealed with regard to this conviction as to smuggling silver and the conviction was confirmed. This revision petition is put in against that conviction. Certain admitted facts may be noted. It is not the case for the prosecution that this silver had come direct that night from Karaikal. The Customs Inspector, P. W. 1, says :

"If they had passed the Chowk, the silver bars having been in the car would have been detected. The accused could not have brought the silver bars through the Chowk."

The case for the prosecution is that they were brought from Thittacherry which is in British territory, but that the accused had previously purchased them in Karaikal and had arranged somehow for them to be brought to Thittacherry from which place he was conveying them in his motor car. P.W. 1 says :

"I believed the accused when he stated that he got the silver bars at Thittacherry."

It is also to be noted that silver became dutiable only in April 1930. So the conviction was based on the confession which the accused made at the time to the Customs House Officer. The latter says that he prepared the statement by putting questions, getting answers, and recording the same and that he has not recorded the questions. It is clear from the manner in which the confession is made that a good deal of it must have been in reply to specific questions. The material part of the confession runs as follows:

"At 5 p.m. on 2nd September 1932 I left Karaikal and went to Thittacherri via Velangudi. While I was going via Chowki there was nothing in the car I went to Thittacherry. One Muhammedan gave 82 silver bars contained in seven bags. Taking them I started from Thittacherri at 8 p.m."

Then he narrates how he was stopped by the Customs Inspector at the level crossing. He proceeds :

"I do not know who that Muhammadan is that gave me. I do not know anything about his house and address. Nor do I know how the Muhammadan took these silver bars from Karaikal, I brought them for sale. At Karaikal I purchased for Rs. 40-8-0. I took them and started

for Trichinopoly. I did not pay duty for these silver bars. I do not know how that Muhammadan brought them to Thittacherry from Karaikal."

His confession being the only evidence against the accused, it must be taken as a whole and nothing can be read into it which is not contained there : *Sikka Bewa v. Emperor* (1), *Emperor v. Bal-mukund* (2). There is no statement as to when he purchased this silver at Karaikal. His statements in Ex. B on the above point are clearly in answer to questions. P. W. 1 admits that he did not ask the accused on what date he purchased silver for Rs. 40-8-0 nor how many years or months ago they were purchased. He did not make inquiries at Karaikal as to the price of silver prevailing at the time that this silver was seized. The onus of proof in these cases rests on the prosecution and it is therefore for the prosecution to show that this silver was taken by land from French territory into British territory at a time when silver was dutiable. As noted in the appellate Court's judgment there are two gaps in the prosecution with regard to this. Assuming that the accused purchased silver at Karaikal after it became dutiable it might possibly have been carried from Karaikal by sea to Nagore and thence conveyed to Thittacherry. The learned Subdivisional Magistrate meets this by saying :

"Neither in his statement nor in the defence evidence was there any suggestion that the silver was conveyed by sea. This is a question of fact which could be properly proved only by the statement of the accused or the evidence of his witnesses."

But the case of the accused is that he did not know how the Muhammedan from whom he got the bars brought them to Thittacherry. Under these circumstances it was not for him to specify the route but for the prosecution to prove it. But an even more important matter is the date of the purchase. This is dealt with by the learned Subdivisional Magistrate in para. 7 where he says :

"Another point made by the accused's vakil is that the silver first became dutiable under the Finance Act of 1930 from April 1930 (and not as wrongly stated by P. W. 1 from October 1931) and that if the silver pieces had been purchased before that date the appellant's act of removing them would not be against the law. But it is to be observed that under S. 5 (1), Land Customs Act, a permit has to be taken for the passage of all goods whether dutiable or not from foreign

1. (1912) 39 Cal 855=13 Cr L J 195=14 I C 195.
2. AIR 1931 All 1=129 I C 258=32 Cr L J 362.=52 All 1011 (FB).

territory into British; and as the appellant had no such permit for the silver, he was liable to the penalties imposed by law."

In this argument he has overlooked the effect of the amendment to S. 7. No doubt under S. 5 (1) and (2) a person desiring to pass any goods whether dutiable or not by land out of or into any foreign territory has to apply in writing for a permit. Under S. 5 (3) any land customs officer may require a person in charge of any goods which such officer has reason to believe to have been imported, or to be about to be exported by land from, or to, any foreign territory to produce the permit; any such goods which are dutiable and which are unaccompanied by a permit or do not correspond with the specification contained in the permit shall be detained and shall be liable to confiscation. The old S. 7 (a) and (c) then proceeds to say :

"Any person who (a) in any case in which the permit referred to in S. 5 is required, passes or attempts to pass any goods by land out of or into any foreign territory through any land customs station without such permit or (c) aid in so passing or conveying any goods, or, knowing that any goods have been so passed or conveyed, keeps or conceals such goods or permits or procures them to be kept concealed shall be liable to a penalty not exceeding, where the goods are not dutiable, fifty or, where the goods or any of them are dutiable, one thousand rupees, and any dutiable goods in respect of which the offence has been committed shall be liable to confiscation."

By the amended Act it is only in the case of dutiable goods or of any goods in respect of which a notification under S. 19, Sea Customs Act, 1878, prohibiting the bringing or taking by land of such goods into British India or any specified part thereof, has been issued, passed by land out of any foreign territory that a complaint in respect of an offence under sub-S. (1) can be made to a Magistrate having jurisdiction that an offence under sub-S. (1) has been committed in respect of such goods when the customs officer considers that the penalty provided in that sub-section is inadequate. Therefore assuming that for non-dutiable goods the accused had no permit the offence, if any, would be one to be dealt with only by the Land Customs Officer himself under S. 7 and would not constitute an offence for which a complaint could be made to a Magistrate.

For the Crown Mr. Bewes has pointed out some suspicious circumstances against the accused. P. W. 1 says that the ac-

cused said to him "This is the second time. Please excuse me" and offered him Rs. 500 to do so. With regard to this it may be noted that even in Ex. B which is a careful confession made at the time the accused is said to have stated "this is the first time." It is suggested for the petitioner that the accused might have offered this money because he was liable to a fine by the Customs Officer for taking dutiable goods without a permit. It is pointed out for the Crown that he was travelling with these silver bars in the middle of the night. Suspicion however would not amount to proof and in this case there is no proof that the accused purchased silver at Karaikal and kept or concealed such goods knowing them to have been passed or conveyed by land into British India as dutiable goods mentioned in the amended section. That being so, it is unnecessary to discuss the further question as to whether the confession is admissible or not. The conviction must be set aside. The bail bond will be cancelled. The order of confiscation passed by the Magistrate is also set aside, and the fine if paid will be refunded.

P.R.S./K.S.

Conviction set aside.

*** * A. I. R. 1933 Madras 390**
Full Bench

RAMESAM, ANANTAKRISHNA AYYAR
AND CORNISH, JJ.

(Thavva) Rangasayi and others—Petitioners.

v.

(Thavva) Nagarathnamma — Opposite Party.

Civil Revn. Petn. No. 790 of 1931, Decided on 19th January 1933, from order of Sub-Judge, Ellore, D/- 20th April 1931.

* * (a) **Hindu Law—Partition—Suit on behalf of minor—Death of plaintiff—Suit does not abate—Legal representative can continue suit—Severance of status takes place from filing of suit for partition on showing that suit was for benefit of minor—Civil P. C. (1908), O. 22, Rr. 3 and 4 and O. 32, Rr. 6 and 7 : 41 Mad 442=42 I C 860=AIR 1918 Mad 379 and AIR 1930 Mad 486, Overruled.**

Per Full Bench.—A suit by minor for partition does not abate if he dies before the Court has found that the partition is for his benefit, but on his death it is open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor. In such case the severance would be effected from the date of the suit conditional on the Court

being able to find that the suit when filed was for the benefit of the minor, and the legal representative can bring himself on the record and ask for the decision of such an issue: *AIR 1930 Mad 486 and 41 Mad 442=42 I C 860=AIR 1918 Mad 379. Overruled.* [P 903 C 1,2]

(b) Partition—Suit for, does not die with person.

Per *Anantakrishna Ayyar, J.*—A suit for partition is not a personal action which dies with the person—*Actio personalis moritur cum persona.* [P 907 C 2]

(c) Minor — Benefit — It is not confined merely to personal benefit but extends to that of his mother, widow, etc.—Hindu law, Partition, Minor.

Per *Anantakrishna Ayyar, J.* — Question of benefit for the minor may not be confined to considerations purely and solely personal to the minor only. Considerations concerning the minor's own mother or widow or daughter in relation to the minor, may have to be kept in view. [P 908 C 2]

(d) Civil P. C. (1908), O. 32, Rr. 6 and 7—Court has to see that next friends act bona fide for interest of minor and not for their personal benefit—Minor.

Per *Anantakrishna Ayyar, J.*—The general principle of law is that an infant litigant becomes a ward of the Court and the Court has got the right and also the duty to see that next friends act properly and bona fide in the interests of minors, and that no suits are instituted or carried on by next friends for their own benefit only irrespective of the benefit of the minors. [P 911 C 2]

S. Varadachari for *B. T. M. Raghavachari*—for Petitioners.

G. Lakshmananna, G. Chandrasekhara Sastri and *T. S. Narasinga Rao*—for Opposite Party.

Order of Reference

Venkatasubba Rao, J.—The learned Subordinate Judge follows the decision of *Jackson, J.*, in *Akkanna v. Srirangaraja Bhattar* (1), and the question shortly resolves itself into this: Does the view of *Jackson, J.*, receive support from some rulings at least of this Court, or, is it, while being opposed to *Chelimi Chetti v. Subbamma* (2), from which *Jackson, J.*, differs, also at variance with the later authorities, as contended for by *Mr. Varadachari*? *Chelimi Chetti v. Subbamma* (2), deals with two points and the confusion has arisen by their not having been kept distinct. As I shall show presently, the first point alone has received the support of the later cases; but those cases have not, with the doubtful exception of *Rama Rao v. Hanumantha Rao* (3), dealt with the second

point, with which alone we are now concerned. I am not therefore prepared to hold that *Jackson, J.*, was wrong in not having considered himself bound, while sitting as a single Judge, by the authority of *Chelimi Chetti v. Subbamma* (2).

The facts may be briefly stated: *Sobhanadri*, the plaintiff's father, died on 16th May 1929. The plaintiff was then an infant and his mother, on his behalf, filed the present suit for partition in October 1929, impleading as defendants, the plaintiff's paternal uncle (defendant 1), the latter's son (defendant 2) and the plaintiff's step-mother (defendant 3). While the suit was pending and before a preliminary decree was passed, the plaintiff died on 21st March 1931. The question is, did the suit abate on the plaintiff's death, as contended for by the defendants, or, was the mother entitled to be brought on the record as the plaintiff's representative? The learned Subordinate Judge allowing the mother's petition, brought her on the record and raised an issue in the suit to the following effect: Was the suit instituted in the interests of the minor and if he had survived, would a decree for partition have been passed with effect from the date of the plaint? It is this order that is questioned before us by *Mr. Varadachari*, the defendant's learned counsel.

The law relating to unilateral declarations was for the first time clearly laid down by the Judicial Committee in *Suraj Narain v. Iqbal Narain* (4). Then the question arose, whether the filing of a suit for partition amounted to a definite and unambiguous indication of intention to separate. This was answered in the affirmative by a Full Bench of the Madras High Court in *Soundararajan v. Arunachalam* (5), and later by the Judicial Committee in *Girja Bai v. Sadashiv Dhundiraj* (6). The facts of *Soundararajan v. Arunachalam* (5), are interesting, although it is an open question, whether the learned Judges that took part in it were or were not aware of the fact that the plaintiff in that case was a minor. *Jack-*

1. *AIR 1930 Mad 486=123 I C 806.*

2. *AIR 1918 Mad 379=41 Mad 442=42 I C 860.*

3. *AIR 1930 Mad 326=52 Mad 856=121 I C 837.*

4. (1913) 35 All 80=40 I A 40=16 O C 129=18 I C 30 (P C).

5. (1916) 39 Mad 159=33 I C 858.

6. *AIR 1916 P C 104=43 I A 151=43 Cal 1031=12 N L R 113=37 I C 321 (P C).*

son, J., in the case already cited seems inclined to the view that they could not have overlooked that fact. For my purpose, it is not necessary to make any such assumption. In that case, the sole defendant died pending the suit and the minor plaintiff claimed that he became entitled to the entire estate in the joint family property. It was held that he became separated in status by his having filed the partition suit and on that ground his contention was negatived and the mother, and defendant's personal representative, was brought on the record, as having succeeded to her son's divided interest. If the fact of the plaintiff's minority had been specially adverted to and considered in the judgment, this authority would have been decisive in favour of the present respondent. Another remark which I wish to make on this case is, that the defendant's death occurred before the passing of any preliminary decree. Passing on to the other case to which I have referred, *Girja Bai v. Sadashiv Dhundiraj* (6), its importance lies in the fact, that in spite of the plaintiff's death pending the suit, it was held that his status became one of severance. His widow was brought on the record as his heir and a preliminary decree was passed in her favour directing partition. There is another Privy Council case belonging to this group, *Kawal Nain v. Budh Singh* (7), which shows that the fact the partition suit is dismissed does not affect the rule, that by the filing of the suit, the plaintiff becomes divided. Their Lordships observe:

"A decree may be necessary for working out the result of the severance and for allotting definite share, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

Thus, in the case of an adult plaintiff, the claim in the plaint amounts to an intimation to his co-sharers of his unequivocal desire for separation and this rule is not affected either by the fact that the suit is later dismissed or that pending the action the plaintiff dies: although the Judicial Committee has further held in *Palani Ammal v. Muthu Venkatachala Moniagar* (8) that where

the plaintiff has withdrawn from the suit before the trial, the filing of the plaint does not necessarily result in his severance. So much then as to the law when the plaintiff happens to be an adult; but if the suit has been brought on behalf of an infant, in what respect does his position differ? It must now be taken as settled, that the filing of the plaint does not ipso facto bring about his severance. It is this part of the decision in *Chelimi Chetti v. Subbamma* (2), that has been affirmed by the later rulings. But the case goes further and holds, that on the death of the minor plaintiff pending the suit, his legal representatives are not entitled to continue the action. The latter cases, in my opinion, recognize the distinction. True, by the mere filing of the plaint the plaintiff's status does not become one of separation; but when, at a later stage, a preliminary decree is passed, the minor plaintiff becomes divided in interest and the division dates back from the institution of the suit. In *Chelimi Chetti v. Subbamma* (2) this distinction was not borne in mind and the extreme position was contended for, namely, that a minor plaintiff became divided in status the moment a suit for partition was filed on his behalf. It was this contention that was rejected and; if I may say so with respect, properly. But why should the Court not proceed with the trial and pass a preliminary decree, if it is satisfied that the suit as originally laid was for the benefit of the minor? In *Krishnaswami Thevan v. Karuppa Thevan* (9), Spencer, J., while affirming *Chelimi Chetti v. Subbamma* (2) in so far as it holds that the filing of a suit does not ipso facto bring about the minor plaintiff's severance, goes on to observe:

"But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement: vide *Rai Charan v. Biswanath* (10). Therefore, in my judgment, the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its

7. AIR 1917 P C 39=40 I C 286=44 I A 159=39 All 496 (P C).

8. AIR 1925 P C 49=87 I C 333=52 I A 83=48 Mad 254 (P C).

9. AIR 1925 Mad 717=88 I C 424=48 Mad 465.

10. AIR 1915 Cal 103=26 I C 410.

decree take effect from the date of the institution of the suit": see p. 468 of 43 *Mad.*

This, in my opinion, does not amount to an approval of the second part of the rule laid down in *Chelimi Chetti v. Subbamma* (2). On the contrary, as is pointed out in the judgment of Coutts Trotter, C. J. and Sundaram Chetti, J., in the later case of *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), (the names of the Judges are given wrongly in the report). *Krishnaswami Thevan v. Karuppa Thevan* (9) far from affirming in toto *Chelimi Chetti v. Subbamma* (2) distinguishes the last-mentioned case. I may usefully quote the following passage from the judgment:

"If such a suit proceeds to the state of a decree in the plaintiff's favour on the Court finding that the partition would conduce to the best interests of the minor, the further question is whether the severance of the joint status takes place only from the date of the preliminary decree or from the date of the plaint. On this question there is the direct authority of a recent decision of a Bench of this High Court reported in *Krishnaswami Thevan v. Pulu Karuppa Thevan* (9). It has been held in that case, distinguishing the decision in *Chelimi Chetti v. Subbamma* (2) that a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint": see p. 370 of 50 *Mad.*

Again in the same judgment, the following observation was made:

"As to what would be the result if in such a suit the Court had passed a preliminary decree for partition, there was no necessity to decide in that case,"

i. e. in *Chelimi Chetti v. Subbamma* (2): see pp. 871 and 872 of 50 *Mad.* Let us now turn to the facts of *Krishnaswami Thevan v. Karuppa Thevan* (9). The minor's suit for partition against his father was filed on 31st January 1919. Another son was born to the father in May or June 1920. Conception must have taken place about August 1919, after the filing of the plaint. The question arose, was the plaintiff's share diminished by the subsequent birth of the son? The answer depended upon, whether or not the suit had the effect of creating a division in status from the date of the plaint. The learned Judges held that the minor plaintiff became divided in interest from the date of the plaint and that his share did not suffer diminution. The point to note is, and that is very important, that it was subsequent to the birth of the second son

that the preliminary decree was passed. Having passed it, the Court held that the partition dated back from the institution of the suit. Supposing the event that happened did not have the effect of diminishing but increasing the minor plaintiff's share would the Court have come to a different conclusion? The judgment itself furnishes the answer. Spencer, J., observes in the passage already quoted:

"But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement: vide *Rai Charan v. Biswanath* (10)."

This principle is affirmed by Coutts-Trotter, C. J. and Sundaram Chetti, J., in the subsequent case of *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), where they lay down:

"Though the inquiry has necessarily to be made by the Court subsequent to the filing of the plaint 'it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion.' It seems to us therefore that the principle of the decision in *Krishnaswami Thevan v. Pulu Karuppa Thevan* (9), has to be applied to the present case."

These cases seem, in my opinion, to be clear authorities for the principle that the death of a minor plaintiff pending his suit, does not render it any the less incumbent on the Court to decide, if so invited, whether or not the action when originally brought, was for the benefit of the minor. It is true that generally on a proper case being made out, the Court in a partition suit adverts to the circumstances as they existed on the date of the decree. But it must be remembered that this is an exception to the general rule so clearly laid down in the two decisions to which I have referred "that every suit has to be tried on the cause of action as it existed at the date of its commencement." Moreover when the minor plaintiff dies before the time arrives for the passing of the decree it would be idle to apply the test, would it be for the benefit of the deceased minor or not to pass a decree? There is thus no scope for the exception coming into effect and the general rule must prevail; in other words, the Court should address itself to the question—Would it have been for the minor's benefit, had he lived, to decree a partition in his suit "on the cause of action

as it existed at the date of its commencement." This position is quite sound in principle, as it does not lead to but on the contrary avoids, the inconvenience and the hardship referred to in *Chelimi Chetti v. Subbamma* (2). If in the event it turns out that the suit was improperly brought and the Court straightaway dismisses it, where is the question of any officious next friend being enabled to file a vexatious suit? The principle to which I have adverted contains within itself the necessary safeguard. To take an illustration, if the plaint alleges that the minor's uncle has been grossly ill-treating him and wasting the property, and that allegation is subsequently made good, why should the uncle be benefited by the fact that the minor died pending his suit? In that case, I see no hardship in his infant widow succeeding to his estate; on the contrary it seems to me eminently just. If however it turns out that the suit was in its inception vexatious, the Court refuses to decree a partition, and the uncle whose conduct according to this hypothesis, if free from blame, succeeds to the minor's share. Further, to treat a right to partition as a mere personal right is, in my opinion, wrong. If in the ordinary course, the minor's personal representative can get a benefit, I fail to see why the Courts, by importing a fiction, should hold that the state of jointness continues.

Ganapathy v. Subramanyam Chetty (12) throws no light on the point under discussion. Plaintiff 1 in that case filed the suit for partition on behalf of himself and his minor sons, plaintiffs 2 and 3. On plaintiff 1's death pending the suit, plaintiff 2, who had attained majority, elected to continue the suit not only on his own behalf but professed to do so also on behalf of his minor brother, plaintiff 3. But the latter's mother applied to be made his guardian and, stating that the partition was not in his interests, got him transposed as defendant 31. The only question that arose was—Was it or was it not open to plaintiff 3 to withdraw from the suit?—and the question was answered in the affirmative. It was held that the mere filing of the plaint by the father on behalf of his minor sons, did not neces-

12. AIR 1929 Mad 738=122 I C 167=52 Mad 845.

sarily effect a severance in status as regards the minors and that as plaintiff 3 must be deemed to have continued joint with the defendants, a decree should be given to the major plaintiff 2 alone for his share in the property. This case, as I have said, has no bearing upon the matter in hand. *Rama Rao v. Hanumantha Rao* (3), (a decision of Ramesam and Jackson, JJ.) supports Mr. Varadachari to the extent that it impliedly affirms the decision in *Chelimi Chetti v. Subbamma* (2). There again the only point raised seems to be whether by the mere filing of the plaint a minor becomes severed from the family. Granting that he does not, the further point was not argued, that notwithstanding the minor's death, the Court would or would not allow the case to proceed to trial "on the cause of action as it existed at the date of its commencement." Apart from this, the value of this ruling as an authority is impaired by the fact that not only the judgment contains no discussion but that one of the learned Judges who was a party to it (Jackson, J.) came to the very opposite conclusion in the case referred to already *Akkanna v. Srirangaraja Bhatar* (1) some time later. Although I may not agree with all the reasons given by him in his judgment I agree, as I have said, with that conclusion. There remain only two cases to be dealt with, one of the Allahabad and the other of the Patna High Courts. *Lalta Prasad v. Sri Maha Deoji Birajman Temple* (13), (relied on by the petitioners) merely affirms the uncontested proposition that the institution of a partition suit on behalf of a minor does not ipso facto effect a separation of the family. The point decided is thus stated in the judgment of Mears, C. J.:

"It has been argued before us that a minor, so represented by a next friend, can, by the very institution of a suit, effect the same immediate legal consequence as would admittedly follow from a suit brought by a man sui juris. We cannot agree with that contention at all."

That this and no more is the effect of this ruling is recognized both in *Krishnaswami Thevan v. Karuppa Thevan* (9) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11). In *Krishna Lal Jha v. Nandeshwar* (14) (relied on

13. AIR 1920 All 116=58 I C 667=42 All 461 (FB).

14. AIR 1918 Pat 91=44 I C 146=4 Pat LJ 38.

by the respondent), the minor plaintiff was held to have become divided from the filing of the plaint and his share did not suffer diminution by the birth of another son to the plaintiff's father, whose conception took place after the institution of the suit but before the passing of the preliminary decree. This case is referred to in the judgment of Spencer, J., in *Krishnaswami Thevan v. Karuppa Thevan* (9). I have therefore come to the conclusion that the view taken by the lower Court is not only right in principle but is consistent with the decision binding upon it. But as my learned brother is taking a different view and as the point raised is of considerable importance I refer the following questions to a Full Bench:

(1) Does a suit by a minor for partition abate if he dies before the Court has found that partition is for his benefit.

(2) Or is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor.

Reilly, J.—I regret that with the very greatest respect I am unable to agree with the judgment just pronounced by my learned brother. The plaintiff, a member of a Hindu joint family, sued as a minor with his mother as next friend for partition. At the date of the plaint he was under two years old. Before he was four, and before any decree was made in suit, he died. His mother applied to be brought on record as his heiress and legal representative and so to be allowed to prosecute the suit for her own benefit. The learned Subordinate Judge has allowed that in spite of the defendant's objection that with the death of the minor plaintiff the suit abated; this petition is against the Subordinate Judge's order. It has not been disputed before us that in a suit by a minor member of a Hindu joint family for partition the Court cannot make a decree for the plaintiff unless it is found that that would be for his benefit. That rule has been established in a number of cases and was approved by the Privy Council in *Bachoo v. Mankore Bai* (15). The result of that is that the filing of a suit for partition by a minor through his next friend is not such a declaration of intention to divide by a co-parcener as

itself effects a division in status and that this is an exception to the rule in *Suraj Narain's case* (4), *Girja Bai's case* (6) and *Kawal Nain's case* (7). A minor on whose behalf such a plaint is filed remains undivided in status in spite of the plaint, and, if the Court never finds that partition would be to his benefit, his status as a member of a joint family remains undisturbed. If he dies before the Court has reached a decision that partition would be to his benefit, he dies undivided. That being so at the moment he dies undivided in status the rule of survivorship comes into play, and his suit for partition dies with him. If that is so—and I think it is a necessary consequence of the rule—that his plaint alone does not effect a division in status but that it must be supplemented and supported by a finding of the Court that partition is for his benefit—it is sufficient for the decision of this case. But I may add that I have no doubt that in such a partition suit, if the stage is reached at which the Judge has to decide whether partition is to the benefit of the minor, what he has to ask himself is whether at that date partition will be to the minor's benefit, not whether it would have been to the minor's benefit at the date of the plaint. Partition suits are not always disposed of very promptly. On the contrary they are often pending for long periods. Between the date when the plaint is filed and the date of the Court's finding regarding benefit to the minor circumstances have often changed materially through the birth or death of other members of the family or from other causes. I do not think it can be seriously contended that, if by the time the question is tried the Judge finds that in consequence of the death of other parties or for other reasons it would be clearly detrimental to the minor's interests to make a decree for partition, he is bound to do so because it can be shown that had the circumstances at the time of the plaint remained unchanged, a partition would have been of benefit to the minor. That to my mind would be a travesty of the rule that the Judge must do what in his opinion is for the benefit of the minor, whose interests are in this way entrusted to him. And on the contrary if it happens that the Judge comes to

the conclusion that at the time it was filed the plaintiff was not in the minor's interest, but that circumstances have so changed that it is clearly to his benefit that partition be made, I can see nothing in the rule to suggest that the Judge must dismiss a suit, which as it turns out eventually, is to the minor's benefit, and drive him to the expense of another suit.

As I understand the matter, what the Judge has to ask himself is what is to the minor's benefit, so far as he can see at the time when he makes his decision. To interpret the rule in any other way would often be to compel the Judge knowingly to do harm to a minor under a rule intended, as is not disputed, for the minor's benefit. If the minor plaintiff dies before the Court has reached a finding that partition will be for his benefit, it can never afterwards be found that partition will be for his benefit in this world. On that consideration also it appears to me clear that, if the minor plaintiff dies at that stage, his suit must abate. Those appear to me to be logical consequences of the rule that a minor member of a Hindu joint family does not become divided in status by suing for partition unless something further happens, viz., the Court finds that partition is to his benefit.

My interpretation of the rule and its consequences is, I think, well supported by authority in this Court. In 1917 in *Chelimi Chetti v. Subbamma* (2), as the head-note of the report shows, Abdur Rahim and Oldfield, JJ., decided two propositions—firstly, that the institution of a suit for partition on behalf of a minor does not itself effect severance of status for the reason that it is for the Court to decide whether partition will be beneficial to the minor, and secondly, that, if a minor plaintiff dies while such a suit is pending (i. e., before a preliminary decree has been made) his legal representative is not entitled to continue the suit, the reason obviously being that the minor has died undivided. The first proposition is the result of the discussion in the judgment: the second was the actual decision in the case, for which the first proposition was the basis. That decision clearly covers the present case. It has stood for 15 years, and it has never been overruled. On the contrary the first proposition—which is merely a

re-statement of the old rule in a minor's suit as being still in force in spite of the Privy Council's rulings in regard to unilateral declarations of intention to divide from *Suraj Narain's* case (4) onwards—has been repeatedly approved in this Court. In *Krishnaswami Thevan v. Karuppa Thevan* (9) both Spencer and Devadoss, JJ., explicitly approved of that proposition, though they came to the conclusion that if the Court eventually finds that a partition will be for the benefit of the minor, the division in status will relate back to the date of the plaintiff, and the partition will be worked out accordingly. And there is no doubt, I think, that they accepted also the second proposition in *Chelimi Chetti v. Subbamma* (2), as a consequence of the first. Devadoss, J., referred explicitly to the decision in that case "that the cause of action did not survive to the mother" and after discussing a contention that that decision was wrong concluded by saying:

"There is no reason to doubt the soundness of the decision in *Chelimi Chetti v. Subbamma* (2)."

He also said:

"Till the Court determines the question whether a partition should be effected in favour of a minor the joint status of the minor with other members of the family is not in any way severed,"

from which it follows that, if the minor plaintiff dies before the determination is reached, he dies an undivided member of his family and the rule of survivorship applies. In *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), Coutts-Trotter, C. J., and Sundaram Chetti, J., accepted as correct the proposition in *Chelimi Chetti v. Subbamma* (2):

"that the mere filing of a plaintiff on behalf of a minor would not ipso facto effect a severance of the joint family status, for in such a suit it is for the Court to determine whether the partition asked for will be beneficial to the minor."

which in its implication that, if the minor dies before the Court has so determined he dies undivided, is sufficient for the present case. They also quoted with apparent approval *Lalta Prasad v. Sri Maha Deoji Birajman Temple* (13), in which a minor on whose behalf a suit for partition had been filed was treated as still undivided in spite of the suit and by the decision got the benefit of the rule of survivorship. They went on to say:

"If such a suit proceeds to the stage of a decree in the plaintiff's favour the further question is whether the severance of the joint status takes place only from the date of the preliminary decree or from the date of the plaint ;"

and it was that further question which they set out to decide, arriving at the same conclusion as in *Krishnaswami Thevan v. Karuppa Thevan* (9) which they pointed out was not in conflict with *Chelimi Chetti v. Subbamma* (2). In regard to the question whether the Court should consider the benefit to the minor as on the date of its decision or as on the date of the plaint it is true that they said

"it is the state of affairs that existed on the date of the suit which determines the exercise of the Court's discretion."

That with respect I venture to suggest is not in accordance with the principle that benefit to the minor is to determine the Court's decision, and, as will be seen, it is not in accord with a later case, where the question had to be decided. But the learned Judges were, as they explain, merely considering what was the question to be answered if the stage of answering it was reached. They said nothing whatever to throw doubt on the proposition that, until it is decided that partition is to the benefit of the minor (in respect of whatever date the benefit is to be considered) he remains in spite of his plaint undivided in status. On the contrary their quotation of *Chelimi Chetti v. Subbamma* (2) and *Lalta Prasad v. Sri Maha Deoji Birajman Temple* (13) shows that they accepted it. In *Ganapathy v. Subramanyam Chetty* (12), Phillips and Madhavan Nayar, JJ., applied the first proposition in *Chelimi Chetti v. Subbamma* (2) that the filing of a suit for partition on behalf of a minor does not effect for him a division in status from the other members of his joint family until a preliminary decree has been made and applied also the consequential proposition that until the stage has been reached the minor remains undivided in status. And they decided the question of benefit to the minor and disposed of the suit accordingly, not by the test of what would have been beneficial to him at the date of the plaint, but of what would be beneficial to him at the date of the preliminary decree. In another partition

suit *Rama Rao v. Hanumantha Rao* (3), Ramesam and Jackson, JJ., said :

"Plaintiff 2, being a minor, is incapable of exercising the intention to separate himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided: but until the decree is passed, one cannot say that the minor's interests are divided from the rest of the family."

And they went on to decide that, as the minor plaintiff 2 died before a preliminary decree had been made, his share passed by survivorship to his father, defendant 1 in the suit. The learned Judges adopted the first proposition in *Chelimi Chetti v. Subbamma* (2) though they did not mention that case, and they rested their decision on its consequence that, as the minor died before the Court had found partition to be for his benefit, he died undivided in status. That decision again covers the present case, as according to it the minor plaintiff in this case, when he died before the Court had found partition to be for his benefit, died undivided in status, and therefore his suit must abate. In *Lalta Prasad v. Sri Maha Deoji Birajman Temple* (13) a Bench of three Judges agreed with the first proposition in *Chelimi Chetti v. Subbamma* (2) and applied it as a ground for deciding that, when a minor's partition suit abated on the death of the only defendant, the minor was undivided in status and took that defendant's share by survivorship. On the other hand in *Krishna Lal Jha v. Nandeshwar* (14) a Bench of two Judges decided that a minor's plaint in a partition suit itself effected a division in status. With respect I may mention that in the judgment there is no discussion of the question ; *Chelimi Chetti v. Subbamma* (2) is not noticed ; and there is nothing to suggest that the learned Judges remembered that the Privy Council had approved the rule that it is for the Court to consider whether partition is for the benefit of a minor and to grant or refuse partition accordingly. And I may add that from the decision of the Patna High Court the learned Judges who took part in *Krishnaswami Thevan v. Karuppa Thevan* (9), dissented.

On these decisions I think it is clear that there is overwhelming authority in this Court that a minor's plaint for partition does not itself make him divided in status, but that, if he dies before

the Court has decided that partition is for his benefit, he dies undivided from his family. That the minor remains undivided after his suit for partition has been filed until the Court finds that partition is for his benefit was accepted as correct in *Krishnaswami Thevan v. Karuppa Thevan* (9) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11) and was the basis of the decision in *Chelimi Chetti v. Subbamma* (2), *Ganapathy v. Subramanyam Chetty* (12) and *Rama Rao v. Hanumantha Rao* (3) as well as in *Lalta Prasad v. Sri Maha Deoji Birajman Temple* (13). In the present case *Chelimi Chetti v. Subbamma* (2) was cited before the learned Subordinate Judge; but he refused to follow it and preferred to follow a later decision of a single Judge of this Court, who had not followed *Chelimi Chetti v. Subbamma* (2) but had made an order opposed to it. I do not understand on what principle the Subordinate Judge acted. The decision of the single Judge is that of Jackson, J., in *Akkanna v. Sridhararaja Bhattar* (1) and the order which the learned Judge made is not only in conflict with the other cases of this Court which I have mentioned: it is in conflict with his own decision with Ramesam, J., in *Rama Rao v. Hanumantha Rao* (3) which he appears to have overlooked. Jackson, J., does not hold himself bound by *Chelimi Chetti v. Subbamma* (2) because

"at least by implication its authority is considerably shaken by other rulings."

The first of such rulings to which he refers is the opinion of the Full Bench in *Soundararajan v. Arunachalam* (5). That case was an earlier case than *Chelimi Chetti v. Subbamma* (2) and the opinion of the Full Bench was considered and interpreted in *Chelimi Chetti v. Subbamma* (2). With great respect I do not understand what is meant in the circumstances by saying that the authority of *Chelimi Chetti v. Subbamma* (2) is shaken by *Soundararajan v. Arunachalam* (5). There is certainly, as Jackson, J., has pointed out, a remarkable feature in *Soundararajan v. Arunachalam* (5). The question before the Full Bench was:

"Whether a member of a Hindu joint family becomes separated from the other members by the fact of suing them for partition."

The referring Judges felt a doubt whether the recent ruling of the Privy Coun-

cil in *Suraj Narain's* case (4) applied to a plaintiff for partition. The answer of the Full Bench was in effect that it did apply, an answer about which apart from the opinion of the Full Bench later decisions of the Privy Council have left no doubt. But it happened that in *Soundararajan v. Arunachalam* (5) the plaintiff suing for partition was a minor. Nevertheless that was not held to take him out of the general rule adopted by the Full Bench, and eventually the case was decided on the view that by his plaintiff for partition he became divided in status from its date, as if the fact that he was a minor did not affect the question. It is certainly a very curious thing that the general rule was applied to a minor's plaintiff in that way. But there is nothing in the opinions or in the arguments in that case as reported to show that any contention was based on the fact that the plaintiff was that of a minor. Attention appears to have been confined to the question what is the effect of a coparcener's plaintiff for partition in its general form without drawing any distinction between a minor and a major plaintiff. But, if that case had not been interpreted in later cases, I think it would have been right to say that the Judges who referred the case and who eventually decided it—and it may be remarked that both of them were members of the Full Bench—must have been aware that the plaintiff was a minor and yet they applied the ruling of the Full Bench to him and so created a precedent. However that aspect of *Soundararajan v. Arunachalam* (5) was noticed and considered in *Chelimi Chetti v. Subbamma* (2).

The opinion of the Full Bench was quoted before Abdur Rahim and Oldfield, JJ., but they interpreted it as not applying to a minor's plaintiff on the ground that no question of the effect of a minor's plaintiff was raised before the Full Bench. In *Krishnaswami Thevan v. Karuppa Thevan* (9) both learned Judges referred to *Soundararajan v. Arunachalam* (5) and both accepted the interpretation of it in *Chelimi Chetti v. Subbamma* (2) as correct. It was referred to again in *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11) and there, as also in *Ganapathy v. Subramanyam Chetty* (12) and *Rama Rao v. Hanumantha Rao* (3), the learned

Judges who accepted the first proposition in *Chelimi Chetti v. Subbamma* (2) must have known that in accepting that proposition they were also accepting the interpretation of *Soundararajan v. Arunachalam* (5) adopted in *Chelimi Chetti v. Subbamma* (2). When the opinion of a Full Bench of this Court has been interpreted by a Bench of two Judges of this Court, a Judge of this Court sitting alone, as I understand the matter, is as much bound by that interpretation as he would be by the interpretation of a pronouncement of the Privy Council or of a provision, of a statute adopted by a Bench. In the present instance, as I have shown, the interpretation of the opinion of the Full Bench in *Soundararajan v. Arunachalam* (5), viz., that it does not apply to a minor's suit for partition, and the view that in spite of the opinion of the Full Bench a minor does not become divided in status from the members of his family by the filing of a plaint for partition on his behalf but nevertheless remains undivided until the Court has found that partition is for his benefit have been adopted, as my learned brother recognizes, by Bench after Bench of this Court.

If a Judge sitting alone is really of opinion that a matter so well settled requires re-consideration, the usual course is, I believe, to refer the case before him to a Bench with such observations as he may think necessary; and the Bench, if its members agree with him may refer the matter to a Full Bench, though, when there is a long line of decisions, it is in my opinion extremely undesirable that they should do so save in exceptional cases. Jackson, J., also regards *Krishnaswami Thevan v. Karuppa Thevan* (9) as throwing doubt on *Chelimi Chetti v. Subbamma* (2). The learned Judges who decided *Krishnaswami Thevan v. Karuppa Thevan* (9) did not regard their decision as inconsistent with *Chelimi Chetti v. Subbamma* (2) nor did the learned Judges who decided *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11). On the contrary, as I have mentioned, both in *Krishnaswami Thevan v. Karuppa Thevan* (9) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), the decision in *Chelimi Chetti v. Subbamma* (2) was accepted as correct. Jackson, J., has also mentioned *Krishna Lal Jha*

v. Nandeshwar (14). But, as he has noticed, not only is that decision in conflict with *Chelimi Chetti v. Subbamma* (2) but in *Krishnaswami Thevan v. Karuppa Thevan* (9) dissent from it has been definitely expressed. His conclusion appears to be that the answer to the question whether, when a minor suing for partition (or a minor defendant claiming partition) dies before the Court has found that partition is for his benefit, he dies divided or undivided in status is not clear, and he left it to be debated in the suit. With the greatest respect, in my opinion, the answer is quite clear in principle, when we adopt, as we must adopt, the rule approved by the Privy Council that a minor can get partition by suit only after the Court has found that it is to his benefit, and is quite clear on the authority of a number of decisions of this Court, in one of which Jackson, J., himself joined.

My learned brother agrees with me that the first proposition in *Chelimi Chetti v. Subbamma* (2) the proposition which Jackson, J., doubts, viz., that the institution of a suit for partition on behalf of a minor does not itself effect severance of status, is now incontestable. If that is so, the minor remains undivided in status even after the plaint is filed until something further happens, i. e., until the Court has found that partition is to his benefit. If he dies before that has been found, he dies undivided in status and the law of survivorship comes into operation. If the first proposition is accepted, as I understand that my learned brother accepts it, with the very greatest respect I do not see how the next step in the argument can be avoided, viz., that the minor plaintiff remains undivided in status even after the plaint has been filed. If he dies while undivided, no further question arises: the rule of survivorship comes into play. To attack that rule directly would be hopeless. When a member of a joint family, whether a major or a minor, dies and at the moment of his death he is undivided in status, his share goes to his coparceners by survivorship. At the moment he died the minor plaintiff in this case was undivided: no one can deny that unless the first proposition in *Chelimi Chetti v. Subbamma* (2) which my learned brother

recognizes as correct and well established, is overruled, as Jackson, J., would like to overrule it: if nothing more happened, for instance if no one took any further interest in the suit, by the rule survivorship the minor's share must go to his coparceners.

But it is suggested that *ex post facto* by an inquiry into what would have been to the benefit of this unfortunate infant if he had lived, which he did not, and had not died, which he did, the fact that he died a joint member of his family may be properly converted into a fiction that he died divided in status. And this is to be done by a Court which has to act with a single eye to the minor's benefit. Under the guise of a rule intended for the benefit of the minor plaintiff to embark after his death on a hypothetical inquiry, which no longer can have any relation to existing facts, and to do this, not for the benefit of the minor, who is beyond all human benefit, but for the benefit of his heirs, in respect of whom the Court has no special duty or responsibility, appears to me a very artificial way of evading the law of survivorship. As I have indicated, in my opinion there is no doubt how the Subordinate Judge should have disposed of the application before him. But, as I am unfortunate enough to be in disagreement from my learned brother and as the learned advocates on both sides have requested that the matter be referred to a Full Bench, I agree that the questions proposed by my learned brother be so referred.

Opinions.

Ramesam, J.—The facts out of which this revision petition arises are as follows: O. S. No. 36 of 1930 was filed for partition in the Subordinate Judge's Court of Ellere on behalf of an infant plaintiff by his mother as next friend. Defendant 1 is an uncle of the plaintiff; defendant 2 is his son and defendant 3 is the plaintiff's half-brother. The plaintiff, his deceased father and the defendants were members of a joint family. The plaintiff's father died 16th May 1929, and the suit was instituted on 29th October 1929, on the allegation that the defendants were misappropriating the plaintiff's share in the family properties and that they refused to deliver the plaintiff's share though demanded and turned him and

his mother out of the family house in September 1929. While the suit was pending the plaintiff died on 21st March 1931. His mother then applied to be brought on record as legal representative. The Subordinate Judge passed an order directing that the plaintiff's mother be brought on record as legal representative. He also directed that an issue be framed in the suit as to whether the suit was instituted in the interests of the minor and whether, had he survived, a decree for partition with effect from the date of the plaint at the latest ought to have been passed. Against this order the defendants filed this revision petition. The revision petition originally came on for arguments before our brothers Venkatasubba Rao and Reilly, JJ., who differed and referred the following questions to a Full Bench:

"1. Does a suit by a minor for partition abate if he dies before the Court has found that partition is for his benefit?

2. Is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor?"

So far as an adult plaintiff is concerned, it is now established law that the filing of a suit for partition amounts to a definite and unambiguous intention to separate: vide *Suraj Narain v. Iqbal Narain* (4). A member of a joint family can separate from the family even prior to a suit provided he declares a definite and unambiguous intention to separate and communicates it to the other members of the family: vide *Girja Bai v. Sadashiv Dhundiraj* (6). The question now arises how far are these principles to be applied to the case of a minor. If it can be said that a suit for partition can always be filed on behalf of a minor and there are no limitations as to the granting of a decree in such a suit, no difficulty arises. But while a suit on behalf of a minor can be filed by any person as next friend, Courts have laid down that in the case of a suit for partition the suit ought not to be decreed unless it is for the benefit of the minor. The reason for such a limitation imposed by the Courts is not that there cannot be a partition between a minor and the other members of the family, but it is possible that the suit may not be for his benefit. When it is remembered that any person can sue on behalf of a minor as a next friend it is easy to ima-

gine cases where the partition is not for his benefit. If the property is not being properly managed or if his rights are denied, it is obvious that he should have a partition: vide *Kamakshi Ammal v. Chidambara Reddi* (16). But where the property is being well managed and the minor is well looked after there is no need of a suit for partition and it is possible that a meddlesome next friend without keeping in his mind the minor's interest may file a suit for partition on account of some misunderstanding of his own with the members of the family or some other motive. It is to avoid such a contingency that the rule has been observed by the Courts. In *Nallappa Reddi v. Balammal* (17), a private partition in which the minor was represented by a proper guardian was held to be binding: see also *Chanvirappa v. Dannava* (18).

From the facts of the Privy Council decision in *Balkrishen Das v. Ram Narain Sahu* (19), it appears that two of the parties to the ikrarnama in that case were minors represented by their guardian. It was held that the ikrarnama was binding on the minors. An adult member can separate from the family even if there are minors by communicating his intention to the other adult members and in the case of minors to some person properly representing them. The question therefore that arises before us is what is the effect of such a rule of practice conceived in the interests of minors? When it is said that the Court does not grant a decree for partition in favour of a minor unless it is shown to be required for his benefit, is it merely a limitation on the passing of the decree or on the maintainability of the suit? If until the Court actually applies its mind to the facts and passes a decree directing a partition the minor cannot be said to be separated from the family, how is it that there can be a private partition even without the machinery of the Court? If a guardian representing the minor can obtain a partition on his behalf or in other words if he can assert the right for a division on behalf of the minor outside the Court

why can he not assert such a right by the filing of a plaint? In *Soundararajan v. Arunachalam* (5), the suit was filed on behalf of an illegitimate son for partition. The Subordinate Judge dismissed the suit on the ground that his paternity was not proved. On appeal the High Court found on the facts that it was proved and referred to a Full Bench the question of the quantum of his share. During the pendency of the appeal the defendant (the legitimate son) died. At this stage it was contended on behalf of the minor that he was entitled to the whole property. It was held that he was not. It was also held by the Full Bench that he was entitled only to the share to which he was entitled at the time of the filing of the plaint. It was suggested both before the Division Bench and before us that the fact that the plaintiff was a minor was overlooked by the Judges and the counsel in the case and that that decision should not be regarded as an authority. The actual judgments make no reference to the fact of the plaintiff being a minor.

But for this the suggestion could not be made. Jackson, J., in *Akkanna v. Srirangaraja Bhattar* (1), thought that the learned Judges could not have overlooked the fact. I am inclined to agree with Jackson J.'s view. I cannot imagine that the very eminent Judges who dealt with the case and the eminent advocates (Messrs. A. Krishnaswami Ayyar and S. Srinivasa Ayyangar) that appeared in it could have overlooked such a fact. In my opinion that decision is authority for saying that a suit having been filed on behalf of a minor plaintiff there being obvious differences in the family, the plaintiff being the illegitimate son and the defendant the legitimate son and there being no question as to the desirability of a partition, the plaintiff became separated by the filing of the plaint. However, that is not the point referred to the Full Bench and as the point was not discussed, it is desirable to consider the point apart from the weight of that decision. In *Chelimi Chetti v. Subbamma* (2), the Court upheld the view now contended for by the defendants. At p. 444 of 41 *Mad.* it is observed:

"That prima facie implies that the member who exercises such discretion must be of an age

16. (1866) 3 M H C R 94.

17. (1865) 2 M H C R 182.

18. (1895) 19 Bom 593.

19. (1903) 30 Cal 738=30 I A 139=8 Sar 489 (PC).

capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him."

This rather suggests that if the minor is of an age capable of exercising discretion, then there may be severance. But that is not consistent with the cases. The cases show that the volition indicating a desire for separation and an unambiguous intention to separate cannot be expressed by the minor himself but must be exercised on his behalf by some other person—by a guardian in a private partition and by a next friend in the filing of a plaint. At p. 445 of 41 *Mad.* it is observed :

"This clearly does not amount to anything more than this: that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance."

This sentence clearly shows that it is not the minor's volition but the next friend's volition that matters. But the learned Judges further proceed to say :

"What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division."

If in the case of a minor the option cannot be exercised by him but should be done by somebody else on his behalf, why should not the exercise of that option on his behalf effect a severance as in the case of an adult? The learned Judges say :

"In the case of a minor the law gives the Court the power to say whether there should be a division or not, etc."

As I said, this is a rule conceived in the interests of minors. It does not mean that the exercise of the discretion is totally inoperative until the Court records its finding. In such a case it seems to me that the proper way of describing the situation is that the exercise of the option on behalf of the minor effects a severance conditional on the Court finding that it was for the benefit of the minor. In *Krishnaswami Thevan v. Pulukaruppa Thevan* (9) it was held that there was a division of status from the date of the plaint. There the suit was on behalf of a minor plaintiff, and his prayer was described as a conditional request that, provided that the Court sees fit, it may declare the status

of the minor divided as from the date of the plaint. But it was added :

"It is true that there can be no division of status unless the Court sees fit to decree it."

This case is not conclusive either way. In *Sriranga Thathachariar v. Srinivasa-Thathachariar* (11), Coutts Trotter, C. J. observed:

"When the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition."

No doubt the preceding part of the sentence assumes that a severance in the status of the family could not be effected by the individual volition of the minor's next friend; still the latter part of the sentence seems to indicate that the decree operates only as "guinea stamp" whereas the essential factor is the volition exercised on behalf of the minor. However this decision too is not conclusive. In *Rama Rao v. Hanumantha Rao* (3) in which I delivered the judgment this point did not arise and our observations were made with reference to the actual contentions in the case. The major plaintiff in that case claimed a two-thirds share on the ground that the share of his brother (the minor plaintiff) came to him by survivorship. Merely saying that the minor plaintiff was also divided from the rest of the family was not enough for the major plaintiff. The major plaintiff had to show not only that the minor plaintiff was separated from his father but remained joint with the major plaintiff. With reference to this claim the actual observations were made. I observed in that case:

"Plaintiff 2, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him."

I there indicated my opinion that the next friend exercised the volition on behalf of the minor. Then I said:

"If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided; but until the decree is passed one cannot say that the minor's interests are divided from the rest of the family."

All that I said in this sentence was that until the decree was passed one is not in a position to assert that the minor's interests are divided. I did not say that the minor's interests are divided only from the date of the decree. The decree gives us information enabling us to say that the minor has become

divided. In my opinion there is nothing in the judgment against the contention of the legal representative in this case. In *Krishnamurthy Pillai v. Surendramurti Pillai* (20), I observed at p. 569 (of 55 Mad)

"In the present case, neither the father nor the Official Assignee has any power to deal with the son's share after 11th February 1927."

From the facts at p. 560 (of 55 Mad) it appears that that was the date of the suit filed on behalf of the minor son. This seems to indicate that there is a severance of the son's interest by the filing of the plaint. However the matter was not discussed. It seems to me that the decision of the case depends upon whether the essential act on behalf of the minor is the volition of the guardian expressed on his behalf or whether it is the discretion exercised by the Court. This can be tested in the following way:—Suppose a suit for partition was filed on behalf of a minor of 17. By the time the case comes on for trial the minor attains majority and he continues the suit. In such a case is a finding by the Court necessary that the suit when filed was for the benefit of the minor? If in such a suit one defendant dies prior to the plaintiff attaining majority can the minor's share be augmented by that death or would it be limited to his own share? Now, if it is the Court's judgment that effects the severance in such a suit the Court has still to give a finding that when the suit was filed it was conceived for his benefit. If it was not conceived for his benefit though in the events that happened the suit proceeds the severance was not effected from the date of the plaint and the plaintiff would get the benefit of survivorship on account of the death of the defendant. But if the suit was well conceived at the date it was filed, then the plaintiff becomes completely separated on the date of the plaint. I do not think that in practice in such a suit any Court addresses itself to the question whether the suit was for the benefit of the minor. Or again suppose in such a suit when the case comes on for trial there was still three months for the plaintiff to attain majority. There is an issue in the case whether the filing of the suit was for the benefit of the minor. From the point

of view of common sense the most obvious course would be to avoid the trial of that issue and adjourn the case for the remaining three months.

Again let us take the case of a suit filed on behalf of a minor by a next friend and while the suit was pending the next friend retires from the case or dies and no other person comes forward to continue the suit as next friend. In such a case the suit cannot be dismissed. The strictly logical course in such a case is if no other next friend can be found to wait until the minor attains majority and then proceed with the suit or not according to the wishes of the quondam minor. Again, if a suit is filed by a father for himself and his minor son for partition is it necessary to decide the issue that the partition is beneficial to the minor? In such cases, except in special circumstances, the son follows the father. Both became divided from the filing of the plaint. The opposite view involves the anomaly that in the same suit, while the father became divided from the date of the plaint, the son becomes divided after the Court records a finding that the suit is beneficial to the minor. In such a case, the father and son are together severed from the rest of the family from the date of the plaint. These instances show that the object of the issue whether the suit was for the benefit of the minor is really to remove the obstacle in the passing of the decree. It is no objection to the maintainability of the suit. In the instances I have given the suits are perfectly maintainable. The condition is somewhat analogous to the production of a succession certificate before the decree is passed. In my opinion therefore in all such cases the severance is effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor. If so the legal representative can bring himself on record and ask for the decision of such an issue in the trial of the suit which is to be continued at his instance. It is unnecessary to refer to the other decisions of the single Judges cited before us. In my opinion the view of Venkatasubba Rao, J., is correct and I accordingly answer the questions referred to us.

Anantakrishna Ayyar, J. — I agree. Sobhanadhri and defendant 1 were undivided brothers. Defendant 3 is the son

of Sobhanadhri by his first wife and the minor plaintiff is the son of Sobhanadhri by his second wife. Defendant 2 is the son of defendant 1. After the death of Sobhanadhri, the minor plaintiff, through his next friend, his mother, instituted O. S. No. 36 of 1930 on the file of the Subordinate Judge's Court of Ellore for partition of the joint family properties of the parties. The plaint contained certain allegations with a view to show that it was for the clear benefit of the minor that partition should be decreed. The plaint also stated that prior to suit in September 1929 the plaintiff's next friend declared to the defendants that it was in the interests of the plaintiff to separate, and asked the defendants to partition the family properties, which the defendants declined to do. The defendants filed written statements denying the allegations in the plaint and contending that it was not in the interests of the plaintiff to separate from the defendants. After issues were framed, the plaintiff died on 21st March 1931 before the suit came on for trial. The plaintiff's mother filed I. A. No. 352 of 1931 praying that she might be brought on record as legal representative of the deceased plaintiff with a view to continue the suit. Her application was opposed by the defendants. The learned Subordinate Judge by his order dated 20th April 1930 observed that:

"If the present case be proceeded with it was quite possible that the Court may hold, if the suit be tried in the circumstances as they stood on and prior to the date of the plaint that the suit was beneficial to the minor plaintiff; that had the plaintiff survived, the decree for partition would have been passed, and that therefore the plaintiff must be considered to have become separated in status at least from the date of the plaint. If such a finding is possible, the petitioner must, I think be brought on record. I allow the petition; an issue will however be framed in the suit as to whether the suit was instituted in the interests of the minor and whether had he survived a decree for partition with effect from the date of the plaint at the least would have been passed."

Against that order, defendants 1, 2 and 3 preferred a civil revision petition to the High Court. When the civil revision petition came on before me for final disposal, having regard to the importance of the question, I referred the revision petition to a Bench for disposal. The learned Judges who ultimately heard the revision petition differed in their opinion, with the result that the follow-

ing two questions have been referred to the decision of a Full Bench:

1. Does a suit by a minor for partition abate if he dies before the Court had found that partition is for his benefit? 2. Is it open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor?

Before proceeding to discuss the question, I must state that the decision of the Full Bench in *Soundararajan v. Arunachalam* (5) (Sir John Wallis, C. J., Sadasiva Ayyar and Seshagiri Ayyar, JJ.) seems in effect to answer the exact questions now referred to us. The Full Bench held that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. It was brought to our notice that, as a matter of fact, the plaintiff was a minor in that case, and that as that fact is clear, it must be taken that the Full Bench answered the question with reference to a minor plaintiff suing for partition. Though very able counsel argued that case, the opinions of the learned Judges given in answer to the Full Bench reference do not specifically refer to the fact that the plaintiff was a minor. If the answer given by the Full Bench in *Soundararajan v. Arunachalam* (5) should be taken to be given with reference to the facts appearing in that case, where the plaintiff was a minor, then, it goes without saying that, that decision *prima facie* binds the present Full Bench. However as we have heard elaborate arguments from learned counsel in this case, I proceed to consider the arguments advanced before us, and to state what in my opinion should be the answers to the two questions referred to us. This question came directly for decision in *Chelimi Chetti v. Subbamma* (2) and the learned Judges decided that:

"where a minor plaintiff dies during the pendency of the suit, his legal representatives are not entitled to continue the suit."

The correctness of this decision has been questioned before us. It has been held by the Privy Council that partition in the case of an adult coparcener in a joint Hindu Mitakshara family is the severance of joint status, that it is a matter of individual volition, and that a definite and unequivocal indication of his intention by a member of such a joint family to separate himself from the

family constitutes a partition in status; and, whether the others assent to it or not, there is in law an immediate severance of the joint status of such a member. There are various ways by which such intention may be evinced: *Suraj Narain v. Iqbal Narain* (4) and *Girja Bai v. Sadashiv Dhundiraj* (6). Such a notice given by a coparcener may be withdrawn with the consent of all coparceners. The institution of a suit for partition against all the other coparceners would also be evidence of an expression of such an intention and would work division in status in the case of an adult plaintiff: *Kedar Nath v. Ratan Singh* (21) and *Palani Ammal v. Muthu Venkatachala Moniagar* (8). The result of withdrawal of such a plaint is thus expressed by the Privy Council at p. 258 of 48 *Mad* of *Palani Ammal v. Muthu Venkatachala Moniagar* (8):

"The fact that any member of a joint family property has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedar Nath v. Ratan Singh* (21) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint even if withdrawn, would unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai v. Sadashiv Dhundiraj* (6) and *Kawal Nain v. Budh Singh* (7).]"

Again, if the suit of an adult coparcener—plaintiff—for partition is decreed, the date of his severance from the joint family will, if nothing else be proved, be treated as the date when the suit was instituted. The question we have now to consider relates to a suit filed on behalf of a minor plaintiff when the minor died before any decree was passed in the suit. As observed by the Privy Council at p. 257 of 48 *Mad* of *Palani Ammal v. Muthu Venkatachala Moniagar* (8):

"that the coparceners in a joint Hindu family can by agreement amongst themselves separate and cease to be a joint family, and on separation they are entitled to partition the joint family properties is now well-established law."

It is rarely that a joint Hindu family consists only of adult coparceners without any minors. But it has been held

that a valid partition could be made outside Court by the members of a joint family though some were minors at the time. In *Balkishen Das v. Ram Narain Sahu* (19) the Privy Council observed as follows:

"The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding upon the coparceners who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might on attaining his majority, by proper proceedings, set it aside so far as regards himself. Some evidence was given to show that the mothers of the two minors were acting under the control and influence of Ramjiban. But as against this it may be pointed out that in the proceedings for a certificate which led to the execution of the *ikrarnama* they seem to have been acting independently of, and even adversely to, Ramjiban. For he can hardly be thought to have prompted a petition which contained an allegation that he was ready to waste the property of the minors. It should also be said that the partition on the face of it was not unfair; and in fact the shares allotted to the minors were at least as large as and perhaps larger than they were strictly entitled to."

It is open to the adult coparceners to express their intention to separate from the others, and even though some coparceners were minors, such intention to separate may be communicated to the mothers or other natural guardians of the minors. A partition effected by the adult coparceners with the mothers or other natural guardians of the minor coparceners representing the minors would be a valid partition, and would be binding upon the minors. No doubt it would be open to the minors when they come of age to take steps to have such a partition modified if their proper shares of the joint family property had not been secured to them; but they cannot impugn the partition on the simple ground that it ought not have been entered into when they are minors. It is a right of the adult members including the kartha or the manager, to claim partition with a view to have their shares separated. The result in such a case would be that the minor also is separated from the other members and

21. (1910) 32 All 415=7 I C 648=37 I A 161=13 O C 332 (P C).

his share ascertained and taken charge of by his mother or other natural guardian. The kartha or the manager of the whole family, when he himself is claiming separation from the minor, could not represent the minor's interests in such a partition.

The practice in such cases is to have the minor's interest represented by the minor's mother or other near relation interested in the minor whose interests are not adverse to the minor. Such a practice has been approved by the Privy Council in the case reported as *Balkishen Das v. Ram Narain* (19) and a partition arrangement in which the minors were represented by their mothers was held by the Privy Council to be binding on the minors in the absence of fraud, etc., when the proper shares of the minors were allotted and delivered to their mothers. It has been considered, or felt in practice, that as the kartha or the manager who desires partition is the legal guardian of the minors of the joint family no partition outside Court could be effected for want of legal guardians for the minors. As already remarked the minors' mothers or other natural guardians have been held entitled to represent the minors on such occasions. The Privy Council has held in *Gharibullah v. Khalak Singh* (22) that a guardian of the property of an infant cannot properly be appointed under the Guardians and Wards Act in respect of the infant's interests in the property of an undivided Mitakshara family, such interest not being individual property and therefore not property with which a guardian if appointed would have anything to do. This circumstance has not been allowed to stand in the way of the mother of the minor representing the minor in partition arrangements made outside Court among members of a joint Hindu family. Thus, it will be noted that it is open to an adult coparcener to become divided by the communication of his unilateral intention to separate from the other members of the joint family; that the kartha or the manager could do so, so far as he is concerned by communicating his intention to do so to the minor coparcener's mother: that a partition among coparceners would be valid though some coparceners are minors

if they were represented by their mothers and the arrangement be proper and bona fide; and that it is not correct to say that partition among members of a joint Hindu family could be effected only by proceedings taken in Court.

The decision of the Privy Council in *Balkishan Das v. Ram Narain Sahu* (19) is clear that a partition arrangement could be entered into among members of a joint Hindu family though some of the coparceners were minors. That the Privy Council has only recognised a long standing practice existing in the country is clear from reported decisions. In *Nallappa Reddi v. Balammal* (17) the minor's father died in 1835, leaving a minor three years old. The minor's mother entered into a partition with the paternal uncle of the minor in 1837. It was held there being no proof of fraud or that undue advantage was taken of the plaintiff's minority, that the division was valid and binding upon the plaintiff. In *Chanvirappa v. Danara* (18) the partition took place in 1872, the plaintiff being represented by his mother and natural guardian. The Court held that the partition made by the mother as the guardian of her minor son was valid but that the minor on coming of age will have a right to set aside the division if it can be shown to be illegal or fraudulent or even if it was made in such an informal manner that there are no means of testing its validity: see also *Ramamurthi v. Ramamma* (23). This principle has been extended to cases arising under Marumakkathayam Law in force in Malabar where partition could not be had unless agreed to by all the members of the tarwad; but a partition arrived at when some members were minors, but were represented by their mothers, was upheld as binding on the minors, unless fraud or serious prejudice be shown: *Naraini Kutti Amma v. Achuthan Kutti Nayar* (24) in which case the partition would be re-opened so far as the minors are concerned, so that they may be awarded the proper share which should have been set apart for them: *V. Chirudevi v. V. Tarwad Karnavan* (25).

It is unnecessary to multiply instances found in law reports of private arrange-

22. (1903) 25 All 407=30 I A 165=8 Sar 483 (P C).

23. (1916) 33 I C 961.

24. AIR 1919 Mad 573=42 Mad 292=51 I C 10.

25. (1917) 34 I C 818.

ments of partition in joint Hindu families made outside Court when some of the co-parceners were minors represented by their mothers or other natural guardians. Further, in the case of an adult co-parcener the filing of a suit for partition by such a co-parcener has been held to bring about severance in status, and also that the decree in such a suit works out severance as from the date of the plaint. It is not necessary now to consider the effect of withdrawal of such a plaint. That being the law in the case of adult co-parceners, what grounds are there to come to a different conclusion in the case of a minor co-parcener, when the Court is satisfied that partition is for the benefit of the minor.

We have seen that a minor's mother may accept a communication from the adult co-parceners expressing their intention to separate from the minor. The question arises whether she could not on behalf of the minor co-parcener communicate a similar intention on behalf of the minor to separate from the adult co-parceners, if it is proved to be for the benefit of the minor so to separate. Even in a proper case, when a minor's mother as his guardian expressed on behalf of the minor the intention to separate, and communicated the same to the other co-parceners, it may happen that her request may not be granted by the other co-parceners, and she may, as the next friend of her minor son, have to institute a suit for partition. No doubt, any person (not necessarily a mother, or in fact any relation at all of the minor) may institute a suit on behalf of a minor, as his next friend. A suit for partition may be similarly instituted by a stranger as next friend of a minor. Such a stranger might have, prior to suit, expressed such intention to the other co-parceners. Is the minor necessarily to be bound by such acts and is the Court helpless in the matter? On the other hand, if the said acts be proved to be beneficial to the minor, is it, or not, open to the Court to give necessary relief to the plaintiff in such cases? These are relevant considerations that arise in such cases.

It has been laid down by a series of decisions that a suit on behalf of a minor co-parcener for partition will lie if the interests of the minor are likely to be prejudiced by the property being left in

the hands of the other co-parceners: see *Kamakshi Ammal v. Chidambara Reddi* (16), *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), *Thangam Pillai v. Suppa Pillai* (26), *Palani Gavandan v. Kasi Gavandan* (27), *Bachoo v. Khushal Das* (28), *Bhola Nath v. Ghasi Ram* (29), *Shadagopa Nayudu v. Tirumala-swami Nayudu* (30) and *Mahadev Balvant v. Lakshman Balvant* (31). In fact, the Privy Council decision in *Bachoo v. Mankore Bai* (15) is decisive on the point. The Court could not pass a decree for partition in a suit for partition brought on behalf of a minor co-parcener unless it finds that the partition is for the benefit of the minor, as advancing his interests or protecting them from danger. It is clear that a decree for partition could not be passed unless the Court records a finding to the above effect. But is there any further peculiarity in a suit for partition instituted on behalf of a minor? This becomes important in cases like the present when the minor happens to die before a decree is passed in his favour in the suit.

The present is not a case of a personal action which is said to die with the person—*actio personalis moritur cum persona*. Nobody has contended before us that the present suit comes within the above principle. Right of partition is a right relating to property. Prima facie such a suit, if properly instituted, should not abate, but on plaintiff's death his legal representatives should be in a position to carry on the litigation. The very same question which will have to be decided in the suit itself, namely, whether partition is for the benefit of the minor—will also decide whether his interests were passed by survivorship to the other co-parceners or have passed to his (minor's) heir, widow, daughter or mother, as the case may be. I am not able to see any insuperable obstacle or anything illegal in holding that the suit does not abate in such circumstances. The minor may die after the suit is dismissed after full trial and when an appeal on his behalf is pending, one of the questions raised in appeal being that the finding arrived at by the trial Court

26. (1889) 12 Mad 401.

27. AIR 1919 Mad 275=50 I C 552.

28. (1902) 4 Bom L R 883.

29. (1907) 29 All 373=1907 A W N 86.

30. (1915) 30 I C 272.

31. (1895) 19 Bom 99.

on the evidence that the suit was not for the benefit of the minor is erroneous. It is open to the appellate Court to come to a different conclusion on the evidence on that question.

It has been decided in *Krishnaswami Thevan v. Karuppa Thevan* (9), *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11) and *Ganapathy v. Subramaniam* (12) that if a decree is ultimately passed in favour of a minor for partition, the status of division is created as from the date of the plaint, with reference to the quantum of the minor's share, and the date from which accounts should be taken, etc. If persons other than strictly legal guardians can represent a minor co-parcener in a partition arrangement outside Court, and if no legal guardian could, under the Guardians and Wards Act be appointed with reference to the minor's share in the joint family property it would be anomalous if the minor's mother or other natural guardian could not act on behalf of the minor in proper cases, in the matter of expressing intention to separate from the other co-parceners, and in demanding partition and also—if necessary—in instituting a suit for partition (if the same should become necessary) to enforce the just rights of the minor, I am assuming that proper circumstances exist for demanding such partition. It is clear that the kartha or the other legal guardians of the minor would not take any steps in the matter as their interests would be adverse to those of the minor, and, according to the hypothesis, they are acting to the prejudice of the minor.

In fact, it is their acts that are complained against, and it is from their wrongful acts that the minor is sought to be protected. I am not forgetting that any stranger could institute a suit for partition on behalf of the minor as his next friend, and such a person might have demanded partition outside Court and might have communicated to the other co-parceners the intention to separate, on behalf of the minor. Is the minor necessarily to be bound by such acts of strangers? The answer seems to be that the Court has got control of the suit and the proceedings; and if it should find that the suit was instituted owing to malice or bad faith by the next friend to wreak his vengeance against the adult

co-parceners and out of pure private spite, the Court has got the remedies in its own hands. Question of benefit for the minor may not be confined to considerations purely and solely personal to the minor only. Considerations concerning the minor's own mother or widow or daughter in relation to the minor may have to be kept in view.

The question is a rather novel one in which Hindu law texts afford no help. Some English decisions are cited in *Kamakshi Ammal v. Chidambara Reddi* (16), and also in Halsbury's Laws of England, Vol. 17, pp. 134-135, which show that the Courts have got power to control proceedings and to prevent vexatious suits from being proceeded with, and if necessary to proceedings to be stayed. I am anxious not to say anything about the merits of the suit. It will depend upon the evidence and circumstances of each case. I am only now concerned to note that Courts have full powers in the matter to see that no injustice is done. The decision in *Chelimi Chetti v. Subbamma* (2) directly holds that the death of a minor prior to decree causes such a suit to abate. The learned Judges are, if I may say so, quite right in stating that it depends upon the (volition) discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be individual separation. But when they proceed to infer from the same that

"the member who exercises such discretion must be of an age capable of exercising discretion in law,"

I think they have not paid due regard to the circumstances already mentioned by me with reference to such a discretion (volition) of a minor being exercised on the minor's behalf by the minor's mother or possibly by other natural guardians of the minors when partition is effected outside Court between the members of a joint Hindu family. If such a thing could be done on behalf of the the minor by his mother etc., outside Court when partition is effected by private arrangement, I do not see sufficient reason for holding that such a thing could not be done in a proper case on behalf of the minor when a suit for partition on behalf of the minor becomes necessary. No doubt a partition by a private arrangement out-

side Court could be impugned by the minor when coming of age on particular grounds, and it is open to him to file a suit with a view to get his proper share.

But when a suit for partition on behalf of a minor is instituted, the Court takes care to examine the circumstances with a view to satisfy itself whether it is beneficial to the minor. Obviously it is inconvenient, if not against sound legal principles also to have a decree for partition passed on behalf of a minor made the subject of complaint in a subsequent suit, when no fraud in the conduct of the suit is alleged but all that is complained of is that the petition is not in the interests of the minor. To avoid such inconvenience the Court before passing the decree examines the circumstances with a view to find out whether the partition claimed is to the benefit of the minor. But to hold that should the minor die before decree, the Court has no jurisdiction to examine the question and that the suit should be taken to have abated, would be to give undue prominence to a subsidiary matter, and allow subsidiary considerations to overlord and govern substantial rights. I think it is possible to give effect to the subsidiary incidental matters and at the same time to give effect to substantial rights if we were to hold that it is open to the guardian of a minor to exercise the discretion or volition on behalf of a minor in such a case prior to suit when proper circumstances exist to justify such an exercise and also to institute a suit on behalf of the minor for partition. Neither the exercise of such discretion, nor the institution of the suit, nor both combined, could bring about severance in status of the minor, unless the Court was satisfied, that having regard to the circumstances, partition was to the benefit of the minor. But when the Court comes to such a conclusion, it would seem to follow that severance in status should be deemed to have taken place at least on the institution of the suit.

I say "at least," because, logically, it would seem to follow in a proper case, that the severance should be deemed to have taken place when the discretion or volition was exercised on behalf of the minor and the necessary communications made to the other co-parceners

prior to the institution of the suit. I may repeat that I am quite alive to the circumstance that it is open to any stranger to institute such a suit as the next friend of the minor; but in the view above stated, I do not think that there need on that account be any cause for alarm, seeing that the Court would take that circumstance also into account in coming to its conclusion whether the suit was for the benefit of the minor or not. The minor might have attained age of discretion in the sense that his opinion might have to be taken by the Court to be the result of intelligent discussion by him in his own mind of the pros and cons of the question. But the next friend might be the mother of the minor, and the partition might have been demanded against the step-brothers or other relations of the minor who are acting prejudicially to the minor. In all cases, it is necessary that the reasons alleged in the plaint and the whole of the circumstances of the case should be considered by the Court. The Court can also in proper cases stay the suit as frivolous or vexatious if brought by a next friend merely to satisfy his own personal grudge against the defendants. These relate to considerations of matters of evidence. In considering the principle of law applicable, we should not forget that the ultimate approval or imprimatur is by the Court. If regard be had to all the considerations, the suggestion of, "great hardship and inconvenience if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate," should not be taken to be conclusive of the question. I respectfully agree that the logical result would be that even a notice given by such a person on behalf of a minor to the other members of a family would be effectual in working a severance of the joint status, provided the Court finds in the suit for partition that it was to the benefit of the minor. On the other hand, it needs no effort to imagine a case (not uncommon in practice) where a suit on behalf of a minor plaintiff is instituted by his mother, the defendant being the minor's step-brother. It is possible that the step-brothers find it impossible to get on together peacefully — the step-mother also finding it impossible to get on with

the defendant—the step-son. Again the minor plaintiff might have been married before suit. In the circumstances the minor, so far as he could exercise his discretion in the matter, and his mother and near relations might well have come to the conclusion that partition is the only solution to put an end to misery and bring peace to the parties. Even if the minor should die before decree in such cases, it is possible that the Court might come to the conclusion that in all the circumstances, it was for the benefit of the minor to have partition. I doubt whether one is confined to considerations purely personal to the minor—minor's personal comforts or inconvenience—though that would naturally be a very material consideration.

I only remark that considerations in relation to the minor's wife, minor's daughter, minor's mother, etc., may not be quite irrelevant. Again, a Hindu father might have left minor sons by different wives. The minors and their mothers might not have been able to get on peacefully at all. In such cases, if the respective mothers could arrange for a valid partition outside Court, why should they be helpless if litigation is found necessary. While I agree with the learned Judges that it must be left to the Court to decide whether there should be partition or not, I find myself unable to agree with their reasoning that the death of the minor has the result of causing the suit to abate. It has been held in several cases by this Court that when once the Court comes to a conclusion on the evidence that the suit is for the benefit of the minor, then, the decree that is passed works out a severance of the status from the date of the plaint: see *Krishnaswami Thevan v. Karuppa Thevan* (9). There the question arose with reference to the quantum of share to which the minor plaintiff was entitled when there were subsequent births of co-parceners in the family after the date of the plaint. The learned Judges—Spencer and Devadoss, JJ.—held that,

“a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint.”

Logically, I think that it must be said that the decision of the learned Judges in *Krishnaswami Thevan v. Karuppa Thevan* (9), is not consistent

with principle of the decision in *Chelimi Chetti v. Subbamma* (2). It is not from the date of the Court's finding that the suit is for the benefit of the minor that severance is to be worked out, but from the date of the plaint at least. I respectfully agree with the considerations mentioned by the learned Judges which induced them to hold that the date of severance should not be from the date of the decision by the Court. If this view be accepted, then, the real basis for the decision in *Chelimi Chetti v. Subbamma* (2) would have been greatly shaken. In the next case, *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11), decided by Sir Murray Coutts Trotter, C. J., and Sundaram Chetti, J., (not Srinivasa Ayyangar, J.) when a question arose as to the exact date of severance of status in a case where the Court passes a decree for partition, with a view to fix the date from which accounts had to be taken, the learned Judges held at p. 872 of 50 *Mad.* as follows:

“Accepting the principle that in a suit for partition brought by the minor it is for the Court to determine whether the partition would be advantageous to the minor or not, and that a severance in the status of the family could not be effected by the individual volition of the minor's guardian or next friend, still, when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the inquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion.”

The principle of the decision in *Krishnaswami Thevan v. Karuppa Thevan* (9), was therefore followed by the learned Judges in *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11). This also, in my view, is against the real principle of the decision in *Chelimi Chetti v. Subbamma* (2). In *Rama Rao v. Hanumantha Rao* (3), Ramesam and Jackson, JJ., held at p. 859 of 52 *Mad.* as follows:

“The 2nd plaintiff, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor

has become divided; but until the decree is passed, one cannot say that the minor's interests are divided from the rest of the family."

It was held by the Calcutta High Court in the case reported as *Raicharan v. Biswanath* (10), and by the Privy Council in the case reported as *Palani Ammal v. Muthu Venkatachala Moniagar* (8), that if a suit for partition is decreed, the date of severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. It however seems to be logical to hold that severance should be considered to have taken place, if a decree for partition is passed, ordinarily from the date of the expression of the discretion or volition on behalf of the minor and communication thereof to the other coparceners before suit, in the absence of other circumstances. Instances of the Court staying suits instituted on behalf of the minor when the same was considered purely vexatious, are mentioned in *Kamakshi Ammal v. Chidambara Reddi* (16) citing *Da Costa v. Da Costa* (32), *For v. Suwerkrop* (33) and *Sale v. Sale* (34). This is ordinarily a sufficient safeguard to prevent vexatious suits. There is also jurisdiction in Courts to direct the next friend personally to pay the costs of the proceedings.

It may perhaps be useful to bear in mind the exact nature of the jurisdiction possessed by Courts with reference to suits and proceedings instituted on behalf of minors. While any person who is not himself incapable of instituting proceedings and who is not connected with the defendant or otherwise interested adversely to the infant may file a suit on behalf of an infant as next friend, preference will be given to the father or mother or guardian or some other of the relatives or connexions of the infant or their nominee. The next friend is an officer of the Court appointed to look after the interests of the infant and has the conduct of the proceedings in his hands. Upon the application of the defendant, or of a next friend of the infant appointed for the purpose, the Court can, if it thinks fit, direct an inquiry whether the proceedings are for the benefit of the infant and, if it appears that they are not, can

deal with the proceedings as it thinks fit. See pp. 134 and 135 of Halsbury's Laws of England, Vol. 17, S. 312. Bhashyam Ayyangar, J., made similar observations in *Doraiswami Pillai v. Thungaswami Pillai* (35) that "a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of the Court; and no act could be done affecting the property of the minor unless under the express or implied direction of the Court itself: see also the observations of Scott, J., in *Karmali Rahimbhoy v. Rahimbhoy Habibhoy* (36), and Story's Equity Jurisprudence, S. 1353."

Having regard to the provisions of O. 32, Rr. 6 and 7, among others, of the Civil Procedure Code relating to receipt, by next friend or guardian of a minor, of money or other movable property on behalf of the minor, and relating to an agreement or compromise by next friend or guardian of the suit, it is not generally deemed necessary for the Court to interfere with acts of next friends and guardians ad litem of minors at every stage of the suit in ordinary cases. The general principle of law is, as stated above, that an infant litigant becomes a ward of the Court and the Court has got the right and also the duty to see that next friends act properly and bona fide in the interests of minors, and that no suits are instituted or carried on by next friends for their own benefit only irrespective of the benefit of the minors. The Court would have jurisdiction in every case in which a minor is a litigant to see that proceedings are all carried on properly, and any suit instituted by a next friend which is proved to be not in the interests of the plaintiff could be stayed by order of the Court. Having regard to the importance of partition suits to co-parceners of joint Hindu families, Courts take particular care when such suits for partition are instituted on behalf of minors. By staying such suits or dismissing them on the ground that they are not for the minor's benefit the Court is only exercising a part of its general jurisdiction with reference to minors generally. It seems to me that the exercise by the Court of its general jurisdiction over minors should not be taken to affect in any way the substantive rights of minors. It is a maxim of law that "acts of Courts injure nobody." In this view also, if

32. 3 P W 150.

33. (1839) 1 Beau 583.

34. (1839) 1 Beau 586.

35. (1904) 27 Mad 377.

36. (1889) 13 Bom 137.

the suit for partition on behalf of the minor is proved to have been for his benefit when instituted, the same should not be rendered ineffective simply because the minor should happen to die before the Court could satisfy itself of the beneficial nature of the action and that the action was properly instituted. Substantial rights of minors should not be prejudicially affected by the exercise by Courts of a jurisdiction which they possess in the interests of the minor and with a view to see that the rights of minors are not prejudiced.

When we consider what is happening outside Court when partition arrangements amongst co-parceners of a joint Hindu family, some of whom are minors, are carried out as a matter of course, and when we consider the real nature of the jurisdiction exercised by Courts in suits in which minors are plaintiffs, the conclusion is irresistible that the accidental death of a minor plaintiff in a suit for partition should not have the result of abatement of the suit, if otherwise, the suit would be decreed in favour of the minor had he been alive at the date of the decree.

There are no Hindu law texts to which our attention was drawn which would govern the decision of the exact question now before us. Our attention was not drawn to any case directly deciding this question, excepting the case reported as *Chelimi Chetty v. Subbamma* (2) already referred to, and a decision of the Patna High Court in the case reported as *Krishna Lal Jha v. Nundeshwar* (14), in which—however—a view contrary to the decision in *Chelimi Chetty v. Subbamma* (2), was taken. On general principles by which we should in such cases be guided, I think the correct view to take is that the suit does not abate in such cases but that the Court should proceed with the trial of the suit, and if it should come to the conclusion on the evidence that the suit as instituted was for the benefit of the minor, it should pass a decree the benefit of which will go to the legal heirs of the deceased minor. The above line of reasoning has led me to answer the first question referred to us in the negative and the second question in the affirmative.

Cornish, J.—Except for *Chelimi Chetty v. Subbamma* (2), no case covering the

question referred to us has been brought to our notice. In that case it was held that on the death of the minor plaintiff in a partition suit before decree a legal representative was not entitled to be brought on record to continue the suit. But there is no discussion of the topic in the judgment. The judgment merely accepts the respondent's contention that as there was no partition, whatever rights the minor had in the co-parcenary property survived to his co-parceners. I think the explanation suggested by Venkatasubba Rao, J., in the referring order must be correct, that the contention put forward by the appellant in that case was that, without anything more, a minor became divided in status from his co-parceners at the moment of instituting his suit for partition. The judgment must be taken as proceeding upon and refuting that proposition. There can be no doubt upon the authorities that in the case of a minor suing for partition through his next friend severance of status is only accomplished if the suit is decreed, but the severance will be deemed to have taken place from the date of the plaint. The effect of the Court's decree is to affirm the minor's right to separate from his co-parceners. This seems to me to be the implication from what is said in *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (11) that

"when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition, the imprimatur of the Court must be deemed to have been placed on the allegations in the plaint justifying the effecting of a partition."

The question is, what is the position when the minor plaintiff dies pending suit? If the suit is discontinued the minor's undivided interest in the joint property will, of course, survive to his remaining co-parceners. But the suit will only abate if the cause of action does not survive. A right of a co-parcener to have his share defined and divided from the joint property is incidental to co-parcenership. In the case of an adult co-parcener the institution of a suit by him is regarded as such an unequivocal expression of an intention to separate that he is deemed to have become thereby divided in status and should he thereafter die while the suit is pending, his share is severed from the co-parcenary property. If he

is solely entitled to that share it will form part of his separate estate. In the case of a minor the assertion by suit of his right to separate is, as we have seen, an inchoate right until perfected by a decree of the Court. But whether the plaintiff be an adult or a minor there is no distinction as regards the date from which divided status begins: *Krishnaswami Thevan v. Pulu Karuppa Thevan* (9). Now, the minor's right to enforce a partition being solely dependent upon the approval by the Court of the circumstances alleged in the plaint for justifying a partition, I can see no reason why the justification should be treated as ceasing to exist with the subsequent death of the minor. Why should his death debar the Court from confirming his right to a partition? The interest or benefit of the minor which is said to be the guiding consideration with the Court in decreeing the suit is not simply an interest or benefit personal to the minor. It involves the existence of special rights to property. In my judgment the accident of the minor's death pending suit ought not to prevent the pursuit of those rights for the benefit of the minor's estate by his legal representative.

P.R.S./R.K. *Reference answered.*

A. I. R. 1933 Madras 913

MADHAVAN NAIR AND JACKSON, JJ.

(*Kalasipudi*) Subba Rao and others—
Plaintiffs—Appellants.

v.

Palakurthi Bhimalingam and others—
Defendants—Respondents.

Appeal No. 305 of 1927, Decided on 29th March 1933, against decree of Addl. Sub-Judge, Vizagapatam, D/- 7th March 1927.

(a) Land Tenure—Grant of patta—Effect.

The grant of patta constitutes a fresh grant: *A I R 1922 P C 95, Holl.* [P 914 C 1]

(b) Civil P. C. (1908), S. 11—For application of *res judicata*, Court which tried previous suit must be competent to try subsequent suit—Decision by former Court on point which it was not competent to try may be disregarded and is not *res judicata*.

For the application of the principle of *res judicata*, it is necessary, amongst other things, that the Court which tried the previous suit must be competent to try the subsequent suit. Where the former Court gives decision both on points which fall within its competency and which does not so fall, the decision on points which it had competence to try would be *res judicata*; but the decision on points which it

was not competent to try may be disregarded and does not operate as *res judicata* in subsequent suit: *Case law referred.* [P 915 C 1]

V. Govindarajachari and B. V. Ramanasu—for Appellants.

Y. Suryanarayana and P. Somasundaram—for Respondents.

Madhavan Nair, J.—Plaintiff is the appellant. The plaintiff's suit was for the redemption of the mortgage over the lands in Schs. A and B of the plaint and for possession of the same. Sch. A lands are Muzumdari service inam and Sch. B lands are quit rent inam. These lands were originally held by the members of Kasiraja family. In 1885 the holders executed a usufructuary mortgage over both Sch. A and Sch. B lands in favour of the predecessor-in-title of defendants 1 to 5 for Rs. 6,000. In 1886 a simple mortgage of these lands was executed in favour of one Putta Audenna for Rs. 1,500. In the same year a third mortgage which was also a simple mortgage was executed in favour of two persons, K. Latchayya and M. Venkata Rao, Latchayya having a 2/3rds share in the mortgage and Venkata Rao a one third share. This mortgage was for Rupees 1,200. The second mortgagee transferred his mortgage to the first mortgagee. In execution of the decree in O. S. No. 27 of 1887 the plaintiff's father who had obtained a money decree against the mortgagors purchased the equity of redemption over these lands and obtained symbolical delivery on 14th October 1892. In 1893 defendants 1 to 5 brought O. S. No. 34 of 1893 on the second mortgage and obtained a decree. This decree amount was paid off by the plaintiff's father. On 17th July 1894, the plaintiff got an assignment of the 2/3rds share of the third mortgage owned by K. Latchayya. In O. S. No. 303 of 1896, Venkata Rao the mortgagee of one-third share of the third mortgage obtained a decree which was transferred to defendant 6 who got the lands sold at Court auction and purchased them. The plaintiff's father was a party to the suit. It may here be observed that the sale and purchase of Sch. A lands was invalid as the lands are Muzumdari service inam and hence inalienable; but the sale of Sch. B lands was not open to this objection.

However, the plaintiff being bound by the decree must be deemed to have lost

his rights over both the properties ; but in 1902 he was given a patta for Sch. A lands by the Government. In *Venkata Jaganatha v. Veerabhadrayya* (1) it was held that the grant of patta constitutes a fresh grant. The plaintiff must therefore be deemed in consequence of the grant to have obtained an absolute title to the property for which he was given a patta. On the strength of the title thus obtained the plaintiff instituted O. S. No. 280 of 1903 for possession of Sch. A properties against the present defendants 1 to 5 and defendant 6 who was defendant 19 in that suit. Issue 1 in the suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of defendant 19. On this issue the District Munsif found against the plaintiff and dismissed the suit (see Ex. 4). On appeal the District Judge confirmed the District Munsif's decision holding that to get possession the plaintiff must first pay off the mortgage of defendants 1 to 4 and that the grant of the patta in his favour did not affect the rights of defendant 19, (i. e., defendant 6) in the suit lands (see Ex. 5). As a result of this decision the plaintiff instituted the suit out of which this appeal arises for redemption and for possession of the suit lands. The suit is admittedly confined to the lands for which the plaintiff has obtained a patta from the Government as already mentioned in 1902.

Besides raising the contentions relating to the merits of the case, the contesting defendants raised, at the very outset, various legal objections to the suit, as preliminary points for decision. These points were that the plaintiff's rights in the lands have been extinguished in consequence of some of the previous proceedings, that his rights, if any, were barred by limitation, that the suit was barred under O. 2, R. 2, Civil P. C., and that it was also barred by res judicata by reason of the decision in O. S. No. 280 of 1903. On these preliminary points, the learned Subordinate Judge upheld the contentions of the defendants and in consequence the plaintiff's suit was dismissed without any inquiry into its merits.

In appeal Mr. Govindarajachari on be-

half of the plaintiff-appellant contended before us that the decision on all these points is wrong and that the case should be sent down for a decision on the merits. Mr. Somasundaram on behalf of defendant 6 attempted to support before us the lower Court's decision only on the point of res judicata. The only point, therefore for us to decide is "is the plaintiff's suit barred by res judicata by reason of the decision in O. S. No. 280 of 1903."

It may here be mentioned that the plaintiff is willing to redeem defendants 1 to 5, but they support defendant 6's plea which, if successful, would entail dismissal of the plaintiff's suit. The lower Court's decision on the question of res judicata is contained in para. 13 of the judgment which is as follows :

"Defendant 6 was defendant 19 in the previous suit. There was a specific issue raised therein as to whether the patta to plaintiff had the effect of cancelling the sale in favour of defendant 19. This issue was found against the plaintiff. This finding was confirmed in appeal. This decision is conclusive there being no second appeal by the plaintiff."

Mr. Govindarajachari contends that assuming that a previous decision on a question of law, though erroneous, can be treated as res judicata in a subsequent suit—a proposition which he is not willing to concede though, we think, decisions are against him—the decision of the appellate Court in the previous suit should not be accepted as res judicata in the present suit inasmuch as the District Munsif in whose Court the previous suit was instituted is not competent to try the present suit which has been instituted in the Sub-Court. According to S. 11, Civil P. C., to constitute a previous decision res judicata in a subsequent suit it is necessary amongst other things that the Court which tried the previous suit must have been a Court "competent to try the subsequent suit." In the case before us the Court of the District Munsif was competent to try the previous suit, that suit being one for possession ; but admittedly the present suit being one for redemption of a mortgage of Rs. 6,000 it was not competent for the District Munsif's Court to try it. It must therefore follow according to S. 11, Civil P. C., that the previous decision cannot operate as res judicata in the present suit. But Mr. Somasundaram for the respondent argues

1. A I R 1922 P C 96=61 I C 667=48 I A 244=44 M d 643 (P C).

that the nature of the previous and the present suits remains the same and that the plaintiff should not be allowed by merely tacking on to the prayer for possession a prayer for redemption to get rid of the effect of the decree in the previous suit. In support of his contention he strongly relies on the decision in *Pathumma v. Salimamma* (2), followed and explained in *T. Raman v. P. M. Karnaran* (3) and *Pattachariar v. Alamelu Mangai Ammal* (4), but on examination it will be found that that decision does not support him.

In that case it was held that the decision of a District Munsif with regard to the validity of a gift of a shop and a warehouse which was only one of the items in a deed of gift which comprised various other properties also was res judicata in a subsequent suit as it was within his competency to decide it; but his decision as to the validity of the deed of gift which was a larger question was not res judicata in a subsequent suit as his Court was not competent to decide this larger issue which involved title to the rest of the properties comprised in the gift. Applying this principle to the present case the position will be this. If the District Munsif had held in the previous suit that the plaintiff could not recover possession from defendant 19 (that is, the present defendant 6), then that decision which fell within the competency of his Court to decide would be res judicata in the present suit and the plaintiff will be precluded from raising the same question again; and if the District Munsif gave any decision with regard to the redemption of the mortgage, that decision would not be res judicata as his Court could not try a suit for redemption and may therefore be disregarded. In the previous case it was not decided that the plaintiff was not entitled to possession as against defendant 19. As between defendant 19 and the plaintiff the only issue raised in that suit was whether the patta granted to the plaintiff had the effect of cancelling the sale of the lands in favour of defendant 19. On this point the decision was against the plaintiff. That decision not only did not say that the plaintiff is not entitled to possession

against defendant 19, but it did not involve any finding that defendants 1 to 4 were entitled to remain in possession, for the final decision was the decision of the District Judge and he held that the plaintiff is entitled to redeem defendants 1 to 4 and that a suit should be brought for that purpose if he wanted to recover possession.

The present suit has been instituted in consequence of that decision. The nature of the decision in the prior suit being as described above, I do not think the contentions of the appellant's learned counsel in the present case in any way goes against the decision in *Pathuma v. Salimamma* (2). Various decisions such as *Misir Ragobardial v. Sheo Baksh Singh* (5), *Run Bahadur Singh v. Lucho Koer* (6) and *Sheoparsan Singh v. Ramandan Singh* (7), etc., were brought to our notice, but as they have only a general bearing on the question under discussion I do not think it is necessary to deal with them. The case relied on by the lower Court in support of its decision *Bhagwan Butti v. Forbes* (8), has no application to the present case. In that case the previous suit was brought in the Munsif's Court where, it was held that the plaintiff is not entitled to road and public work cesses. In the subsequent suit instituted by him against the same defendant in the Sub-Court he claimed to recover the road and public work cesses and also embankment and dak cesses. It was rightly held that the plaintiff cannot be allowed to enlarge the scope of the suit by adding reliefs to it to get rid of the effect of the decree in the previous suit. The present case is clearly not one of that class. The plaintiff now seeks to redeem the suit mortgage. Such a suit cannot be tried in a District Munsif's Court. If in the suit before him the District Munsif expressed any opinion about redemption such opinion may be disregarded; but his decision about possession which he was competent to decide would be binding: see *Pathuma v. Salimamma* (2).

In the present case, as already pointed out, the District Munsif did not decide in the previous suit that the plaintiff

2. (1885) 8 Mad 83.

3. (1915) 27 I C 989.

4. I R 1927 Mad 273=100 I C 40.

5. (1885) 9 Cal 439=12 C L R 520=9 I A 197=4 Sar 395 (PC).

6. (1885) 11 Cal 301=12 I A 23=4 Sar 602 (PC).

7. A I R 1916 P C 78=33 I C 914=43 I A 91=43 Cal 694 (PC).

8. (1901) 28 Cal 78=5 C W N 483.

was not entitled to possession as against defendant 19 nor was it decided that defendants 1 to 4 are entitled to remain in possession against the plaintiff. What was finally decided was that the plaintiff may redeem. In no way does the present suit therefore go against the decisions of this Court in *Pathuma v. Salimamma* (2) and *T. Raman v. P. M. Karnavan* (3) and other cases of a similar nature. For the above reasons I would hold that this suit is not barred by res judicata by virtue of the decision in O. S. No. 280 of 1903. In the result we set aside the decision of the lower Court and remand the case for disposal according to law after hearing the case on the remaining issues on which we express no opinion. The appellant is entitled to the costs of this appeal. We may say that there is no liability in respect of the court-fee as the appeal was allowed to be filed in forma pauperis.

Jackson, J.—A mass of authority has been cited upon the question of res judicata, but the case is very simple and runs on all fours with *Pathuma v. Salimamma* (2). In both cases plaintiff was suing a defendant in ejection and a third party intervened claiming paramount title. In *Pathuma v. Salimamma* (2) "an issue as to the title derived under the gift was framed" and it might run in this fashion. Whether the title set up by plaintiff had the effect of cancelling the gift in favour of Salimamma, the third party. In our case we have the issue whether the patta granted to plaintiff had the effect of cancelling the sale in favour of defendant 19 (the third party). In *Pathuma v. Salimamma* (2) the Munsif's Court found in favour of the plaintiff, and in our case against him. That makes no difference. The point is that when a larger question was agitated in the superior Court, the opinion of the Munsif who was not competent to deal with this larger question, was not treated as res judicata. Salimamma sued for all the property under her alleged deed of gift, and the gift was upheld. In the same way when plaintiff sues in our case for his right to redeem as mortgagor—a matter beyond the competence of the Munsif—his right can be upheld regardless of the Munsif's opinion that he had no right.

But what cannot be disregarded, and

this is the main import of *Pathuma v. Salimamma* (2), although it is mere common-sense which hardly requires a ruling, is the competent decision of the Munsif within the bounds of his jurisdiction. The Munsif decreed that plaintiff must have the shop and warehouse for which he sued, and that decree cannot be upset on any theory of its not being res judicata. S. 11, Civil P. C., contemplates "matter in issue" which no one except out of sheer perversity could suppose to mean "matter already decreed." And so too in our case if the Munsif within his competence had decreed that plaintiff could not eject defendant 19, it would be idle for plaintiff to re-open the matter. He might get a decree in redemption against defendants 1 to 4, but defendant 19 would be irremovable under the prior decree.

But defendant 19 never claimed possession in O. S. No. 280 of 1903. He claimed: see para. 5 of the judgment, Ex. 4, as was set forth in the issue, that his title by sale was superior to plaintiff's title by patta just as Salimamma had claimed that her title by gift was superior. The Munsif found in favour of defendant 19, and if in consequence of that finding it had been held that plaintiff could not eject defendants 1 to 4, defendants 1 to 4 could retain their possession just as in *Pathuma v. Salimamma* (2) plaintiff retained his shop and warehouse. But that was not the final finding; for the District Judge held that to get possession plaintiff must first pay off defendant 1's mortgage (Ex. 5), in conformity with which finding the present suit is brought. An attempt to shake the authority of *Pathuma v. Salimamma* (2) by reference to an obiter dictum of the Privy Council in *Gokul Mander v. Padmanund Singh* (9) was repelled by a Bench of this Court in *T. Raman v. P. M. Karnavan* (3). But in the present suit the question there is academic. If the dictum of the Privy Council is given the literal interpretation which was attempted to be applied to it—not even the decree of the Munsif's Court would be res judicata in the superior Court—the whole proceeding of the Court not competent to try such subsequent suit would be a nullity. But for the appellant, Mr. Govinda-

rajachari does not carry his argument so far, and is content to rest it upon *Pathuma v. Salimamma* (2), leaving the respondents entitled to whatever they got by the decree in the Munsif's Court. Of course if the decree also is ruled out, respondents are worse off than they were before. It seems hardly necessary to add that in my opinion the dictum does not carry this meaning and has been correctly interpreted in *T. Raman v. P. M. Karnavan* (3).

P.R.S./K.S.

Suit remanded.

A. I. R. 1933 Madras 917

BARDSWELL, J.

Nidamanuri Satyamma — Plaintiff—Appellant.

v.

Official Receiver, Masulipatam and another—Defendants—Respondents.

Second Appeal No. 826 of 1929, Decided on 15th September 1933, against decree of Sub-Judge, Bezwada, in A. S. No. 100 of 1928.

(a) Transfer of Property Act (1882), S. 100—Deposit of money with another—Purchase of property by latter with money deposited and his own money—Depositor is not entitled to charge on property purchased unless deposit was made specifically for such purchase.

Where a person deposits money with another and the latter purchases property with the money so deposited and also his own money, the depositor is not entitled to a charge on the property purchased by the mere fact of deposit unless such deposit was made specifically for the purchase of the property : *A I R 1933 P C 148; Hallett's Estate Knatchbull v. Hallett*, 13 Ch. Dn 656. Ref. [P 918 C 2, P 919 C 1]

(b) Provincial Insolvency Act (1920), S. 28 (2)—Objection that suit has been brought without leave under S. 28 (2) not taken in Court of first instance should be deemed to have been waived and cannot be raised in appeal.

Where an objection that the suit has been brought without obtaining leave under S. 28 (2) is not taken in the Court of first instance, it should be deemed to have been waived and cannot be raised in appeal : *A I R 1927 Mad 201, Rel on; A I R 1927 Mad 925, A I R 1929 Mad 480 and A I R 1929 Mad 323; Ref.* [P 919 C 2]

(c) Civil P. C. (1908), S. 80—Objection as to want of notice can be waived,

An objection as to want of notice under S. 80 can be waived and when not raised in the Court of first instance should be deemed to have been waived : 24 Cal 257 and 40 Cal 503, *Rel on.* [P 919 C 2]

V. Govindarajachari — for Appellant.

K. Ramamurthi—for Respondents.

Judgment.—The appeal is by the plaintiff. She sued for a declaration of her title to one-eighteenth share in a

rice and oil-mill at Bezwada. Her case is that she contributed money towards the share, that the money was first credited in the name of defendant 2 and afterwards in the name of defendant 1. Defendant 3 is the husband of her sister and defendant 1 is his brother and she says, that as these two defendants are her relations her share was nominally standing in their names, but that on 26th April 1924 she got a release deed from them in respect of her share. Defendants 3 and 4 who are creditors of defendant 2 brought I. P. No. 2 of 1924 of the Sub-Court, Bezwada, to have defendants 1 and 2 adjudicated insolvents. In the end only defendant 2 was declared insolvent and it was held that the release deed, Ex. A was invalid and that defendant 2's estate vested in defendant 5 who is the Official Receiver, Kistna District. The District Munsif decreed the suit in favour of the plaintiff, but on the appeal by the Official Receiver the decree was reversed and the suit was dismissed. The matter is now only one between the plaintiff and the Official Receiver as the suit was given up at an early stage as against the creditors, defendants 3 and 4.

On the evidence I think it perfectly clear that the plaintiff did not entrust money either to defendant 1 or defendant 2, or to both of them, in order to the purchasing of a share in the mill. The evidence on the subject is discrepant and, such as it is, is not borne out by the accounts. The accounts clearly show that some money was deposited by the plaintiff with the defendants, but they do not show for what purpose it was deposited and the indications are that it was not deposited, as the plaintiff contends, for the definite purpose of buying a share in the mill. Ex. B, the rough day book of defendant 2, shows that on 9th November 1921 Rs. 331 were credited to the plaintiff as the proceeds of the sale of her jewels; and on the same day Rs. 400 are shown as having been spent "towards our share in the mill." The amount thus spent on the share is not noted as having been spent on behalf of the plaintiff while it is considerably more than the amount received on that date on the plaintiff's account. No further sum is shown as having been held for the plaintiff on that date. It is of course impossible to

say that an amount of Rs. 400 could have been paid out of an amount of Rs. 331. Another payment of Rs. 200 for the share, which again is not shown in the accounts as having been paid by or for the plaintiff, was made on 3rd September 1922. On 14th November 1921 according to the accounts, Ex. B, the plaintiff had been credited with Rs. 221-12-9 as the sale proceeds of another jewel but there is nothing to connect this credit with the debit over nine months later of Rs. 200 towards the purchase of the share which purchase is entered as being in the name of defendant. 1. A third credit to the plaintiff of Rs. 124 odd was made on 1st July 1922. This too can in no way be connected with the payment of Rs. 200. All then that the account can be relied upon to show is that a total amount of Rs. 676 odd was held to the plaintiff's credit but there is nothing in the accounts by which it is shown or from which it could be inferred that the money was deposited by the plaintiff in order to the buying of a share in the mill. Further the recital in the release deed, Ex. A, differs from what appears in the accounts. According to it the plaintiff gave to defendant 2 Rs. 400 on 10th November 1921 and Rs. 200 on 3rd September 1922 towards her share. These statements are incompatible with the entries in the accounts to which I have referred above.

It is the version given by defendant 2 as P.W. 2 that these amounts of Rs. 400 and Rs. 200 were received from the sale proceeds of jewels though from the judgment of the District Munsif he appears to have said that the credit was in his own name. Any way his evidence cannot be accepted as it does not square with the accounts. The plaintiff has said that she gave about Rs. 1,250 to defendant 2 for her share. This story is not supported by the accounts or by Ex. A which refers only to Rs. 600. She says that defendants 1 and 2 executed a promissory note in her favour but no such promissory note has been produced. The whole story then as to the purchase of this share on behalf of the plaintiff is not supported by any evidence to which credit can be given and therefore cannot be accepted. It is hardly necessary to refer to circumstances of suspicion in a case where evidence

has failed but it cannot be overlooked that the plaintiff is closely connected with the defendants and that one of them has been adjudged an insolvent on a petition put in not long after the execution of Ex. A. It has also to be remembered that Ex. A was executed to the plaintiff not only by defendant 1 but also by defendant 2. The case for the plaintiff is that the share which the plaintiff claimed was first credited in the name of defendant 2 but that it was afterwards transferred to the name of defendant 1 owing to some rule of the factory. This must have been some time before the entry of the resolution dated 18th April 1923 in Ex. 1, the resolution book. But in spite of this transfer in the name of defendant 1 we find both defendants 1 and 2 executing the release deed, Ex. A. It is represented that defendant 2 was a party to this document as a matter of greater precaution; but still, if he had parted with his interest in the share, there should have been no need for him to have been a party to it and indeed there was no reason why this share should not have been in the name of the plaintiff all along.

It has been urged that the Official Receiver has not taken steps to have Ex. A avoided; but this is not a case in which Ex. A can be taken as a valid document in the absence of avoidance. The plaintiff is setting up a definite case that the suit share actually belonged to her and had been purchased with her money and Ex. A came in by way of a formality, putting into her own name what in fact was already hers, in virtue of a consideration that had passed long before. I must hold in agreement with the learned Subordinate Judge in the light of what has been discussed above that her whole story has to be disbelieved. Then it has been argued, for the first time in this second appeal, that the plaintiff is entitled in any case to a charge, on the share in that it has been bought with money of her own which had been mixed up with the assets of defendant 2 and which money she had entrusted to the defendants for the definite purpose of buying a share. Reference is made in this connexion to the Privy Council decision in *Official Assignee, Madras v. Krishnaji*

Bhat (1), I find that that decision has no application to this case. It was one in which money had been deposited for a specific purpose. Nor has the decision in *In re Hallett's Estate*, *Knatchbull v. Hallett* (2), any bearing on the facts of the case. In the case now under consideration I find no evidence that the plaintiff had deposited her money with either defendant for any specific purpose. It was a mere deposit and nothing more.

Two legal points have been taken on behalf of the respondent. These it is unnecessary for me to discuss at any length as I hold that the appeal fails on the facts; but I will just refer to them. One is that the suit should be dismissed as leave to the plaintiff for filing it had not been granted under S. 28 (2), Prov. Ins. Act. This point was not taken in the Court of first instance though it was taken on appeal and the learned Additional Subordinate Judge held that it must be taken as having been waived. No definite authority has been shown as to whether there could be a waiver in such a case while it has been held in *C. Ghouse Khan v. Bala Subba Rowther*, AIR 1927 Mad 925, and *Ponnuswami v. Kaliaperumal*, AIR 1929 Mad 480, that, if a suit, to bring which permission under S. 28 (2) is required, is brought without such permission, the defect cannot afterwards be cured. This however does not deal with the point of waiver in a case such as this. In both cases the objection that no leave had been given was taken at an early stage of the proceedings. With reference to S. 16 (2) of the former Prov. Ins. Act, corresponding to S. 28 (2) of the present Act the question has been considered at length in *Subramanyam v. Narasimham* (3) though in a different connexion. In that decision it was held that the fact that no leave under the section had been obtained did not render a decree passed in such a suit a nullity. It was pointed out that the suit was one which the Court in which it was instituted was competent to try and that the Court had jurisdiction over the parties and that the question whether the suit could be main-

tained without the leave of the Insolvency Court did not affect the competency of the Court to try the suit but was only a question which might have been raised for determination in the suit. These remarks set out a principle with reference to which the question of waiver can be decided. The point whether leave should have been given ought to have been raised for determination in the suit. It was not raised and a decree was passed which decree was not a nullity. This decision was on appeal from a decision by Phillips, J., which is reported in *Narasimham v. Subramaniam* (4) and in which he held that the objection as to want of leave was a ground of objection to the suit and that as it was not taken it must be deemed to have been waived. I think that this principle must equally apply to a case such as this. It was perfectly open to the respondent Official Receiver to raise the point in the first Court, but he did not choose to do so; and as it was not a question of the original Court having acted entirely without jurisdiction so that its proceedings could in no circumstances be valid, I do not see how it is open to the Official Receiver to raise the point on the appeal and contend that, because of the failure to obtain leave, the suit ought to have been dismissed on that ground alone. As this point is not one on which the decision of this appeal depends, I do not discuss whether the suit was of such a kind as required permission under S. 28 (2) for its being brought.

The other objection taken is that notice should have been given to the Official Receiver under S. 80, Civil P. C. The learned Subordinate Judge held as to this objection also that it was waived and could be waived; and this view appears to be correct having regard to the decisions in *Manindra Chandra Nandi v. Secy. of State* (5) and *Bhola Nath Roy v. Secy. of State* (6). The second appeal fails and is dismissed with costs.

P.R.S./K.S.

Appeal dismissed.

4. AIR 1927 Mad 201=98 IC 446.

5. (1907) 34 Cal 257=5 CLJ 148.

6. (1913) 40 Cal 503=16 I C 849.

1. AIR 1933 PC 148=143 IC 162=60 I A 203=56 Mad 570 (PC).

2. (1880) 13 Ch D 696=49 LJ Ch 415=28 W R 732=42 L T 421.

3. AIR 1929 Mad 323=119 I C 46.

* A. I. R. 1933 Madras 920

REILLY AND BURN, JJ.

Official Assignee, Madras—Appellant.

v.

Neelambal Ammal—Respondent.

O. S. Appeal No. 99 of 1931, Decided on 26th July 1933, from order of Stone, J., D/- 7th October 1931.

*** (a) Hindu Law—Joint family—Partnership business—Joint family business cannot be business of some group of members of joint family or members of branch of family less than the whole joint family.**

A Hindu joint family firm is a special form of partnership, the members of which must be either the whole of a joint family or the whole of a branch of a joint family. The members concerned in such a joint family firm, including the minor members, have certain rights and liabilities by virtue of their membership of the joint family or of the branch. Those rights cannot be conferred nor liabilities imposed by contract, subject to the possible exception that, if a joint family consists of adult members only or a branch consists of adult members only, then a joint family firm may be started by the members of that joint family or branch with the consent, express or implied, of all of them. Hence a joint family business need necessarily be the business of a whole joint family or a whole branch of a joint family, and it cannot be the business of some group of members of a joint family or members of a branch of a joint family less than the whole joint family or the whole branch: 25 *Mad* 678 and 27 *Mad* 382, *Rel on*; 20 *W R* 197, *Diss from*. [P 922 C 1,2]

(b) Hindu Law—Joint family—Partnership business—Held on evidence that though a joint family consisted of father and his four sons yet the business was ordinary partnership business of three brothers only.

A joint Hindu family consisted of the father and his four sons. But the evidence showed (i) that a document set out that it related to a business jointly conducted by only three brothers while the father and the fourth brother were still alive, (ii) that the firm was referred to, not as a family firm, but as a company; (iii) that the firm used letter paper with a heading showing three brothers as partners of the firm; (iv) that the fourth brother never claimed any part of the profits of this business

Held: that the business was not a joint family business but was an ordinary partnership business of the three brothers only. [P 924 C 1]

(c) Practice—High Court—Case involving difficult questions should not be dealt with on motion.

A case involving elaborate and difficult questions should not be dealt with on motion.

[P 921 C 2]

(d) Practice — High Court — Application under R. 5 can be treated as one under R. 4—Civil P. C. (1908), O. 22, Rr. 4 and 5.

A Court is at liberty to treat an application under O. 22, R. 5 as one under R. 4, [P 925 C 1]

S. Varadachariar, O. T. G. Nambiar and *T. N. C. Srinivasa Varadachariar*—for Appellant.

K. S. Krishnaiwami Iyengar, K. Krishnaswami Iyengar and A. R. Krishna-swami Iyer—for Respondent.

Reilly, J.—This is an appeal against the decision of Stone, J., in an insolvency matter. On the application of some creditors three brothers, Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, were adjudged insolvents by this Court in February 1929. They were described in the order as "of C. K. Narayana Ayyar & Sons." The petitioning creditors did not mention, and the learned Judge who made the adjudication order was obviously unaware, that Ramanatha Ayyar had died five years earlier. There is no suggestion that any application was made to the Court for the administration of his estate under S. 108, Presidency Towns Insolvency Act. Ramanatha Ayyar had left a minor son, Subramanya Ayyar. In May 1929 the minor's mother, Meenakshi Ammal, sent a notice to the Official Assignee that Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar had carried on business, not as members of a joint family, but as partners under a partnership deed of 26th May 1913, that the minor was entitled to a third share of the immovable property which the partners had bought out of the profits of their business and that the Official Assignee had no right to claim that third share of the property. Apparently in consequence of that notice the Official Assignee in August 1929 gave notice of a motion for a declaration

"that the business carried on by C. K. Sundaresa Ayyar and C. K. Viswanatha Ayyar under the name and style of C. K. Narayana Ayyar & Sons was a joint family business carried on for the benefit of the joint family consisting of themselves and C. K. R. Subramanya Ayyar, son of C. K. Ramanatha Ayyar, a deceased son of the said C. K. Narayana Ayyar, and that the assets of the said family, including the shares therein of the said Subramanya Ayyar, are liable for the payment of the debts incurred in the said business."

And in support of that motion the Official Assignee put in a report to the effect that the business was started by Narayana Ayyar, the father of Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, that Narayana Ayyar retired from active business in 1911 or 1912, leaving Ramanatha Ayyar, Sunda-

resa Ayyar and Viswanatha Ayyar to manage the business on behalf of their family, that after Ramanatha Ayyar's death Sundaresa Ayyar and Viswanatha Ayyar, who were the only adult members of the family, carried on the business as before, that the business was a joint family business and all the assets of the family were liable for the firm's debts, and that there had been no partition amongst the sons of Narayana Ayyar, who had always continued as a joint undivided family.

In answer to that report a clerk of Meenakshi Ammal put in an affidavit to the following effect; Narayana Ayyar had not only three sons, namely Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, but also another son, his eldest son, Krishnaswami Ayyar; Narayana Ayyar started business in 1895 as his own separate and exclusive business; about 1909 he took his three younger sons, Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, as partners and carried on the business under the style of "C. K. Narayana Ayyar & Sons"; Narayana Ayyar retired in 1912, and that partnership was then dissolved; Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar carried on business as partners under the same style and executed a deed of partnership on 26th May 1913; Krishnaswami Ayyar never had any interest in the business of his father nor in the business of his father and his brothers nor in the business of his brothers: on the death of Ramanatha Ayyar in 1924 the partnership of the three brothers was dissolved; Ramanatha Ayyar as co owner with his brothers Sundaresa Ayyar and Viswanatha Ayyar had a third share in the property bought by the three partner-brothers out of the profits of their business; on his death Subramanya Ayyar, his minor son, succeeded to that share as co-owner and also had a third share in the property afterwards bought by Sundaresa Ayyar and Viswanatha Ayyar out of the profits of their business, the accounts of Ramanatha Ayyar's share never having been made up. Before this motion came on for hearing before Stone, J., in September 1931, the minor Subramanya Ayyar had died, and first his mother, Meenakshi Ammal, and on her death his sister,

Neelambal Ammal, had been brought on record as his legal representative.

It is an odd feature of this case that the existence of Narayana Ayyar's eldest son, Krishnaswami Ayyar, was never mentioned in the Official Assignee's report to the Court, which represented Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar as the only sons of Narayana Ayyar. That Krishnaswami Ayyar was the eldest son of Narayana Ayyar and was alive at the date of the Official Assignee's report and is now alive is not disputed. Stone, J., was naturally very surprised at the defective and misleading character of the Official Assignee's report in this respect, and I must say I share his surprise.

The omission of the Official Assignee to mention Krishnaswami Ayyar by amending his report or bringing Krishnaswami Ayyar's existence to the notice of the Court in some other way is the more remarkable when we are told that the Official Assignee's solicitors took a proof of Krishnaswami Ayyar's evidence a year and a half before the motion came on for hearing. If I may say so with respect, there are one or two passages in Stone J's judgment which I find a little difficult to follow; but I think the learned Judge was obviously embarrassed by the way the case was put before him, and I agree with him that this case, involving some elaborate and rather difficult questions, was one which should not have been dealt with on motion. The learned Judge says he himself would not have dealt with it on motion if he had had the facts properly stated to him by Official Assignee in the first instance. However, when the case came on for hearing, what appears to have been contended for the Official Assignee before the learned Judge was that Krishnaswami Ayyar was indeed a son of Narayana Ayyar and his eldest son and had been a member of an undivided family with his father and his three younger brothers, but that Krishnaswami Ayyar had divided from his brothers in 1915, after the death of Narayana Ayyar in 1914, and that from the date of that partition Ramanatha Ayyar, Sundaresa Ayyar and Viswantha Ayyar and their sons formed a complete joint family; and it was in respect of that complete joint family, cut short, as alleged, by the separation of Krishna-

swami Ayyar from it, that the Official Assignee pressed for the declaration he had prayed for. Stone, J., found as a fact that Krishnaswami Ayyar was never divided from his brothers but that at the time when the motion was heard he was still an undivided member of the joint family with his surviving brothers, Sundaresa Ayyar, Viswanatha Ayyar and Ramanatha Ayyar's minor son, Subaramanya Ayyar, and further and consequently that there never had been a joint family consisting only of Sundaresa Ayyar, Viswanatha Ayyar and Ramanatha Ayyar's minor son, Subaramanya Ayyar, as alleged by the Official Assignee, and therefore the declaration for which the Official Assignee prayed could not be made. The learned Judge therefore dismissed the application of the Official Assignee, and against that dismissal this appeal has been preferred.

It has been contended before us by Mr. Varadachari for the Official Assignee that even if as found, Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar by themselves never formed a complete undivided family without their brother Krishnaswami Ayyar, nevertheless they could form among themselves, to the exclusion of Krishnaswami Ayyar, a joint family firm and that therefore assuming that Stone, J.'s finding that the complete joint family, which still existed at the time of the hearing, included Krishnaswami Ayyar, is correct, yet the business conducted by his three younger brothers under the style of "C. K. Narayana Ayyar & Sons" may have been a joint family business as alleged by the Official Assignee. The theory put forward is that a joint family business need not necessarily be the business of a whole joint family or a whole branch of a joint family, but it may be the business of some group of members of a joint family or members of a branch of a joint family less than the whole joint family or the whole branch. I am unable to agree with that contention. As I understand the matter, a Hindu joint family firm is a special form of partnership, the members of which must be either the whole of a joint family or the whole of a branch of a joint family. The members concerned in such a joint family firm, including the minor members, have certain rights and liabilities by virtue of their mem-

bership of the joint family or of the branch. Those rights cannot be conferred nor liabilities imposed by contract, subject to the possible exception that, if a joint family consists of adult members only or a branch consists of adult members only, then a joint family firm may be started by the members of that joint family or branch with the consent, express or implied, of all of them. But how could some only of the members of a joint family or a branch of a joint family create, for themselves and their sons and grandsons and great-grand sons alone to the exclusion of other members of their joint family or branch, a joint family firm in which their future sons and grandsons and great-grand sons would have an interest by birth and that interest would always be liable for the debts of the firm? If we examine the matter, I think it will be seen that the characteristics of a Hindu joint family firm are the effects of a joint family with its peculiar constitution trading as a unit, a joint body of a particular kind, and, as every one knows, such a joint family cannot be created by contract.

There are plenty of cases to show that all the members of a joint family or some of the members of a joint family may trade together and put the profits of their trade or property acquired with those profits into the common stock of their joint family so as to make it joint family property. *Ram Pershad Tewari v. Sheocharan Doss* (1) which has been referred to, appears to me to be one of those cases. But that is very different from what is suggested by Mr. Varadachari here. He has been able to show what is indeed unquestionable now, that some only of the members of a joint family may hold property in joint tenancy with rights of survivorship. That was decided in the case of daughter's sons, who are members of a joint family, succeeding to their maternal grandfather's property in *Venkayamma Garu v. Venkataramanayamma Bahadur Garu* (2) and this Court has held in *Vaithinatha Ayyar v. Narayana Ayyar* (3) that daughter's sons in those circumstances would hold such property not

1. (1863-66) 10 M I A 490=2 Sar 177 (P C).

2. (1902) 25 Mad 678=29 I A 156=8 Sar 286 (P C).

3. (1904) 27 Mad 382.

only in joint tenancy but with the incident of joint family property, that their sons would acquire an interest in it by birth. But to show that some members of a joint family can succeed to property which has the characteristics of joint family property to the exclusion of other undivided members of their own family is very different from showing that some members of a joint family can create among themselves a joint family firm with all its legal incidents. Mr. Varadachari has also referred to *Sham Narain v. Court of Wards* (4), a decision of the Calcutta High Court in 1873. In that case some property had been given by a Raja to two out of three undivided brothers for services rendered.

The learned Judges found that those two brothers had so held the property as to make it their joint property with right of survivorship, but not the joint property of all their brothers. That was not, it will be seen, a case of inheritance; but the learned Judges held that those incidents were impressed upon the property by the way the two brothers dealt with it. With great respect I find it difficult to follow the reasoning of the learned Judges in that case. They appear to proceed on the ground that the three brothers might legally have divided among themselves and so have no longer been a joint family: then two of them might have reunited and so formed among themselves a joint family: and into the common stock of that smaller joint family so formed they might have thrown this property acquired by gift from the Raja. With great respect I cannot see how these possibilities lead to the conclusion at which the learned Judges arrived in the case. In *Sudarsanam Maistri v. Narasimhalu Maistri* (5), Bhashyam Ayyangar, J., expressed dissent from that case; and, if it were necessary for the purposes of the present case, I may say that I should with great respect follow that learned Judge in his dissent. But that Calcutta case again is not sufficient for Mr. Varadachari's purpose. Even if it were possible for two members of an undivided family themselves to deal with property so acquired in such a way as to impress

upon it the incidents of joint family property for themselves and their descendants alone to the exclusion of other members of the undivided family, that would not show that some members of a joint family or some of the members of a branch of a family for themselves and their descendants alone could create a joint family firm. There is no case, it is admitted, in which it has been so decided; and in my opinion we must reject the contention that Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar could have created a joint family business to the exclusion of Krishnaswami Ayyar while they were members of a joint, undivided family with Krishnaswami Ayyar.

But, as I have mentioned, what was contended for the Official Assignee before Stone, J., was that the business of "C. K. Narayana Ayyar & Sons" after the death of Narayana Ayyar was the joint family business of the whole undivided family of his four sons, including Krishnaswami Ayyar, but that in 1915 Krishnaswami Ayyar separated himself by division from that family and the remaining brothers remained a complete joint family among themselves enjoying without legal obstacle a joint family business. Now there is no question that until 1915 Krishnaswami Ayyar was a member of an undivided family with his brothers. (After examining the evidence oral and documentary, his Lordship concluded.) In my opinion there is no sufficient reason to differ from Stone J.'s finding that Krishnaswami Ayyar at the time of the hearing was still an undivided member of the family of himself and his brothers. And that is sufficient to support the learned Judge's disposal of the case. But the respondent here contends, as she contended before Stone, J., that she can go further and show that the business conducted by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar was not on behalf of any joint family, either a joint family consisting of them alone or a joint family including them and their brother, Krishnaswami Ayyar. Stone, J., having found it necessary to dismiss the Official Assignee's application because he could not make the declaration required in respect of a non-existent joint family, did not think it necessary to arrive at any definite finding on this

(1873) 20 W R 197.

(1902) 25 Mad 149=11 M L J 353.

contention of the respondent. But he did remark that the partnership-deed produced, Ex. B dated 26th May 1913, was in his opinion inconsistent with the theory that the business conducted by three younger brothers was the business of a joint family including others besides themselves and their descendants. It is contended before us for the Official Assignee that that document is not an ordinary deed of partnership but is merely a document recording some arrangement to regulate the conduct of a joint family business. It is perhaps a meagre document to take the place of a regular deed of partnership among ordinary partners. But I think Stone, J., is right in regarding it as a deed of partnership, not as a document merely regulating the proceedings of a joint family firm including other adult members besides the executants. That document sets out at first that it relates to a business to be jointly conducted by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar. It was executed in May 1913, while Narayana Ayyar was still alive and while the members of the joint family to which those three brothers belonged included, as has been found, Narayana Ayyar and Krishnaswamy Ayyar. There is no mention of either of them in the document, no indication that the document relates to any business in which they were interested. Then it is described as a "kuttiviyabaram chittu," there is no mention of "kudumba viyabaram." The firm is referred to, not as a family firm, but as a "company." And without going into details I may say that paras. 1, 2, 7 and 8 appear to me to include language quite inappropriate to the proceedings of a joint family firm. Ex. B therefore is a strong piece of evidence in support of the respondent's case that the business conducted by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar was not a joint family business at all but was an ordinary partnership business, in which the three younger brothers were the partners. There are accounts in this case in the possession of the Official Assignee; but neither side has produced them, and therefore we may infer that those accounts give no indication whether the business was a joint family business or an ordinary partnership business.

But there is evidence that in the three years 1921, 1922 and 1923 the firm used letter paper with a heading showing Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar as the partners of the firm, which would be a very odd thing for a joint family firm to do. Then it is to be noticed that, after Ramanatha Ayyar died, when the two remaining business brothers, Sundaresa Ayyar and Viswanatha Ayyar, bought property out of the profits of the business, they bought it, not in their own names alone, but also in the name of Ramanatha Ayyar's son, Subramanya Ayyar, quite an unnecessary and inappropriate thing to do if those were the profits of a joint family business. On the other hand there are the documents already mentioned, in which Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar or some of them referred to their business as a joint family business, and in particular Exs. D and D-1. Now it may be that in so referring to their business being members of an undivided family, they were under some misapprehension and wrongly described it. Perhaps it is more probable, as has been suggested for the respondent, that they found it profitable in some way to represent their business as a joint family business, though it was not so. It is stated by Viswanatha Ayyar in his evidence that, after they had made very large profits in 1917 and 1918, they were taxed by the Income-tax Officer as if theirs was an ordinary partnership business: they appealed, urging that it was a joint family-business and so not liable to so much tax as super tax; they succeeded in persuading the Income-tax Officer that their business was a joint family business. Having once made that representation, whether it was true or false, they would have to continue to do so; and it may very well have been profitable to do so in subsequent years. That may be the explanation of Exs. D and D-1. And it is to be noticed that Krishnaswamy Ayyar's conduct in never claiming any part of the profits of this business even in the height of its success, which might appear rather strange if it was a joint family business, in which he had an interest, becomes very simple and intelligible, if the business was never a joint family business at all but an ordinary partnership business of his younger bro-

thers. In my opinion on the whole evidence the proper finding is that this business was not a joint family business but was an ordinary partnership business of Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar.

At the conclusion of his argument Mr. Krishnaswami Ayyangar for the respondent urged that the Official Assignee's application should have been dismissed by Stone, J., as having abated because no proper legal representative of Subramanya Ayyar was brought on record within the time allowed after Subramanya Ayyar's death. It appears that within the proper time an application was made by the Official Assignee, apparently under R. 5, O. 22 of the Code, that a decision might be made who was the proper legal representative. There was no explicit application under R. 4, O. 22 of the Code that any particular person should be brought on record as Subramanya Ayyar's legal representative. But Waller, J., before whom the matter, came, decided to treat the application put in under R. 5, O. 22 as one in substance under R. 4 of the order, though it had a defect in form. Treating the application as one under R. 4 of the Order—and I think Waller, J., was quite at liberty so to treat it—it was in time, and there was no abatement of the Official Assignee's application. In my opinion this appeal should be dismissed with costs.

Burn, J.—I agree.

P.R.S./v.S.

Appeal dismissed.

A. I. R. 1933 Madras 925

MADHAVAN NAIR AND JACKSON, JJ.

Sri Sri Sri Ramachandra Deo and others—Plaintiffs—Appellants.

v.

Sutapalli Ramamurty and others—Defendants—Respondents.

Appeal No. 260 of 1926, Decided on 9th January 1933, against decree of Addl. Dist. Judge, Waltair, in O. S. No. 11 of 1924.

(a) Civil P. C. (1908), S. 11—Principle of res judicata cannot be ignored on ground that reasoning in previous decision can be attacked on particular point.

Where the matter directly and substantially in issue in the former suit has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning whether in law or otherwise, of a previous decision can be attacked on a particular point: 37 I.C. 857; A I R 1928

Cal 777 (F B) and A I R 1931 Bom 570, *Rel on*; 30 Mad 461, *not Foll.* [P 927 C 2]

(b) Civil P. C. (1908), S. 11—Suit to recover arrears of kattubadi—Argument that previous decision was given with respect to previous years has no bearing whether or not decision therein acts as res judicata.

In a suit by a landlord to recover arrears of kattubadi from the mokasadar and the usufructuary mortgagee from him, a prior decision decreeing the landlord's claim for arrears in respect of previous years against the same parties is res judicata. And because the landlord claims kattubadi in the present suit for different years, it cannot be alleged that the liability to pay it in different years depends upon consideration which varies from year to year. Moreover the argument that the previous decision was given with respect to previous years has no bearing on the question whether that decision does or does not operate as res judicata: A I R 1930 Mad 209 and A I R 1926 Pat 288, *Rel on*. [P 928 C 1, 2]

Advocate-General and B. Satyanarayana—for Appellants.

B. Jagannadha Das—for Respondents.

Madhavan Nair, J.—The plaintiff is the appellant. This appeal arises out of a suit instituted by the plaintiff, the Maharaja of Jeypore, in the Court of the Agency Additional District Judge of Waltair for kattubadi for the years ending 30th June 1918, 30th June 1919 and 30th June 1920. The suit is directed against the mokasadars of the Pachipenta estate and the usufructuary mortgagees from the mokasadars of a portion of the suit mokasa. These usufructuary mortgagees are defendants 12 to 21. These defendants contended that as being mortgagees from the mokasadars there was no privity of contract between them and the plaintiff and that therefore they were not liable for rent payable by the mortgagors. Plaintiff pleaded that these defendants are estopped by the decrees in O. S. No. 18 of 1913 on the file of the Special Assistant Agent, Koraput, and in A. S. No. 3 of 1916 on the file of the Agent to the Governor, Vizagapatam, from questioning the plaintiff's right to obtain kattubadi from them (issue 5). The other contentions raised by the parties were not pressed before us. The learned Additional District Judge held that the decisions referred to did not debar the defendants from raising the contention that they are not liable to pay the kattubadi claimed, and he also held that they were not in law liable for the same.

In O. S. No. 18 of 1918 the Maharaja of Jeypore claimed arrears of kattubadi for certain previous faslis. The main issue fought was the right of the Maharaja to kattubadi. There was no specific issue regarding the liability of the mortgagees to pay the kattubadi. The Assistant Agent decided against the Maharaja. On appeal after remand, in A. S. No. 3 of 1916 the agent decided in favour of the Maharaja and gave him a decree for the kattubadi claimed. Suta-palli Appanna the predecessor of the respondents was respondent 4 in that appeal. The learned Advocate-General on behalf of the appellant argues that these decisions constitute res judicata in the present case and the respondents are precluded from raising their plea of non-liability on the strength of these decisions. Having regard to explanation 4 of S. 11, Civil P. C., which says :

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit,"

the fact that the plea of their non-liability was not expressly raised by the respondents' predecessor may be ignored in deciding the question of res judicata and the appeal has been rightly argued by Mr. Jagannodha Das on behalf of the respondents as if the point was raised specifically and decided against their predecessor. His argument is that the decision in O. S. No. 18 of 1913 and in A. S. No. 3 of 1916 holding that the mortgagee is liable to pay the rent is an erroneous decision on a question of law and as such cannot operate as res judicata when the same question is raised between the same parties or their representatives in a subsequent suit. The question for us to decide is whether this argument can be upheld. In support of his contention, the respondent relies on a decision of this Court in *Mangalathammal v. Narayanaswami Ayyar* (1). In that case it was held that:

"Where a purchaser of property at a court-sale purchases it subject to a charge for maintenance, such purchaser cannot, under S. 69, Contract Act, recover from the owner in whose hands it was so liable, payments made by him (the purchaser) towards maintenance to prevent the sale of the property."

It was objected that the question was res judicata in the plaintiff's i. e., the

purchaser's favour, because in a previous suit she recovered from the defendants money which she had paid in satisfaction of the maintenance charge. There was no dispute that in giving the judgment for the plaintiff in the previous suit the Court had arrived at an erroneous conclusion on a point of law. The learned Judges overruled the contention as to res judicata in these words:

"It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal on a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law."

provided the decision in the latter case does not in any way question the correctness of the former decree. If this decision lays down the correct law, then there can be no doubt that the respondent's objection should be upheld, but it has been pointed out in *Bommaderava Venkata Narasimha Naidu v. Andavolu Venkataratnam* (2) that this decision does not accurately express the law. In that case Napier, J. who wrote the leading judgment after an elaborate discussion of the question in the light of the Privy Council decision in *Badar Bee Habib Maricar Noordin* (3) and also the English law came to the conclusion that: "where a decision on a point of law whether it be on the construction of a document or of a statute or on Common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties it is res judicata."

Sadasiva Ayyar, J. concurred with Napier, J. and pointed out that Wallis, C. J. in *Secy. of State v. Maharaja of Venkatagiri* (4), has clearly changed the view to which he was a party in *Mangalanathammal v. Narayanaswami Ayyar* (1). Shortly stated, in that case the learned Judges pointed out that if the question of law to be decided was a matter directly and substantially in issue in both suits within the meaning of S. 11, Civil P. C., then the previous decision on the question will be res judicata in the subsequent suit, provided of course the other conditions relating to res judicata are fulfilled. In *Badar Bee v. Habib Maricar Noordin* (3), the question was whether the point of law, viz., the true construction of a will as to the

2. (1917) 37 I C 857.

3. (1909) A C 615=78 L J C P 161=101 L T 161.

4. (1916) 35 I C 266.

1. (1907) 30 Mad 461=17 M L J 250.

destination of released funds was res judicata by reason of a previous decision on the construction of the testator's will. The previous decision clearly was a pure question of law and their Lordships of the Privy Council held that the question was res judicata in these words:

"The decree of 1872 was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared under Cl 6 of the will The result is that it appears that the point raised by this appeal has already been adjudicated on and it is not open to the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal."

Regarding this decision Napier, J. observed that it is to be noted that the Board drew no distinction between questions of law and mixed questions of fact and law. The decision *Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam* (2), was followed in *Doorvas Seshadri Ayyas v. Govindaswami Pillai* (5), by the same Judges when a similar question arose for decision. In this connexion attention may also be drawn to the observations of their Lordships of the Privy Council in *Hoystead v. Commissioner of Taxation* (6) at p. 165. Their Lordships observe thus:

"It is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle"

The question was considered recently somewhat elaborately by a Full Bench of the Calcutta High Court in *Tarini Charan Bhattacharya v. Kedarnath Hal-dar* (7) see pp. 735 and 736 of 56 Cal. In the course of his observation, Ren-kin, C. J., pointed out that the correct-

5. AIR 1921 Mad 315=63 I C 189

6 (1926) A C 155=95 L J P C 79=134 L T 354=42 T L R 207.

7 AIR 1928 Cal 777=115 I C 593=56 Cal 723 (F B).

ness or otherwise of a judicial decision has no bearing on the question whether it does or does not operate as res judicata. It was also pointed out by him that if it is found:

"that the matter directly and substantially in issue in the former suit has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning whether in law or otherwise, of a previous decision can be attacked on a particular point."

This view follows from the language of S. 11, Civil P. C., and is substantially the view adopted by our own Court in *Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam* (2). The latest decision of the Bombay High Court in *Keshav Jagannath v. Gangadhar Yadneshwar*, A. I. R. 1931 Bom. 510 is also to the same effect.

The next argument of Mr. Madha Das was that as the preser for the recovery of kattubadi from the mortgagees for the years 1918, 1919, and 1920, the decision that they were not liable to pay the kattubadi in the previous faslis cannot be treated as res judicata, as the causes of action in the two suits are different. In support of this argument reference was made to the decision of the Privy Council in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (8). The question in that case related to the valuation under the Local Government Act, 1919 of New South Wales. There was an adjudication for valuation in a previous year and the question was as to the valuation for the subsequent year. It was argued that the adjudication of the Court for the previous year would be res judicata as regards the adjudication for the subsequent years. Lord Carson rejected the argument with the following observations:

"The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadem questio*," and therefore the principle of res judicata cannot apply."

It was argued that these observations might well be applied to the present case also. The true significance of these observations was pointed out by this Court in *Sankaralinga Nadar & Brothers v. Commissioner of Income-tax, Madras* (9) in which case the learned

8. (1926) A C 94.

9. A I R 1930 Mad 209=126 I C 273=53 Mad 420 (F B).

Judges dealt with both the decisions in *Hoystead v. Commissioner of Taxation* (6), (already referred to) and the decision in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (8). Referring to the latter decision the learned Judges stated the following as the principle deducible from it :

"But if the question is decided by a Court on a reference which depends upon consideration which may vary from year to year, e.g., the case in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* (8) in which the average valuation had to be taken there can be no question of res judicata."

The observations of Lord Carson in *Broken Hill Proprietary, Co. v. Broken Hill Municipal Council* (8) cannot therefore help the respondent inasmuch as it is not and it cannot be alleged that the liability to pay kattubadi in different years is based upon consideration which varies from year to year. It has been

"it is settled law that even in the cause of action for a suit be a recurring one every matter decided in the suit may be res judicata which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous. *Debi Prasad v. Jaldhar Mahton* (10)."

Section 11, Civil P. C. makes no reference to question of law or to cause of action. Under that section if an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and if the issue has been heard and finally decided the decision on that issue is res judicata in the subsequent suit provided the other conditions are fulfilled. Both the principle and on authority it follows that the arguments that the previous decision was erroneous in law and that it was given with respect to previous facts have no bearing on the question whether that decision does or does not operate as res judicata. We must therefore accept the contention of the learned Advocate-General that the decision A. S. No. 3 of 1918 by the Agent to the Governor, Vizagapatam, is res judicata in the present case and that the respondents mortgagees are also liable for the kattubadi claimed by the appellants. The decree of the lower Court in so far as it exempts the respondents from such liability is set aside with costs here and in the Court below.

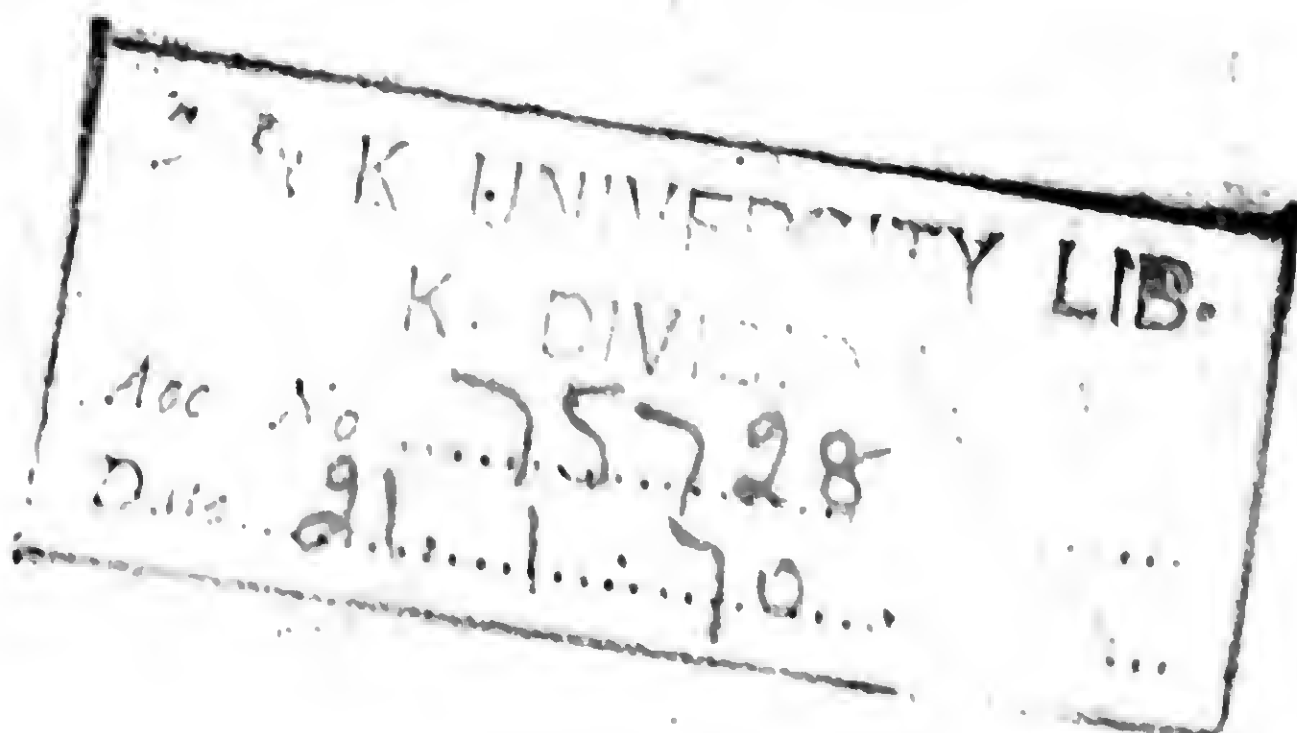
10. A I R 1926 Pat 288=94 I C 553.

P.R.S./V.S.

Appeal allowed.

END

J. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.



G. N. Dair
Advocate in Court
Jammu & Kashmir
Srinagar

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